LAW SOCIETY SUBMISSION

FAMILY JUSTICE OVERSIGHT GROUP

SUBMISSION TO THE DEPARTMENT OF JUSTICE

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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Introduction

Thank you for the invitation to make submissions to the Family Justice Oversight Group ('the Group'). The Society is glad to provide the below responses to each of the fourteen issues raised at Appendix 1 of your letter of 18 December 2020.

1. Optimising the delivery of family justice via:

1.1 The use of modern technology

The Society believes that Head 5 of the General Scheme of the Family Court Bill 2020 ('the General Scheme') should make specific reference to the promotion and use of technology to assist in remote hearings and the e-filing of papers.

There should also be a specific objective to reduce, where possible, the requirement for parties to attend in-person, particularly in respect of procedural and similar applications.

The new legislation provides a unique opportunity to modernise the Family Court system from an IT perspective and to consider whether a Family Court Cloud might be developed for filing papers and guiding individuals (lawyers or lay litigants) through the process in tandem with offering appropriate other services.

The Society believes that such an approach would ultimately save time and money and would assist in the transfer of cases to the most appropriate venue (be that the Regional or District Court) and may also reduce the necessity for case management hearings.

Recent developments at EU level provide further impetus for change. Two new EU Regulations will become binding in July of next year which will make e-filing, e-communication and e-transmission the norm (rather than the exception) in cross-border child and family law cases.[1]

The last year has produced unexpected but welcome momentum in enhancing the use of technology in the work of legal practitioners and experiencing its transformational benefits to the running of legal practices. Arguably, technology could be utilised to a greater degree in the family courts, at the very least in relation to administrative type hearings such as case progressions. The Society welcomes the fact that it is envisaged that the new court system will incorporate the use of technology in a fundamental and comprehensive way, both in relation to administrative type hearings but also in terms of how the new family court offices operate, making particular provision for the electronic filing of certain documents. Many types of applications can take place on a remote basis. For example, Consent Rulings, Procedural Applications, Consent Non-procedural Applications, Case Progression, Case Management and List to Fix Dates. This could also apply to the ruling of routine Pension Adjustment Orders although in Dublin at present they are being ruled by the Judge in Chambers which is working well.

Remote hearings are not suitable for contentious cases and contested interim applications. That said, during the pandemic, virtual court call-overs have been successful as have court attendances via video link for litigants in custody. Facilities such as video links can be used more often in certain circumstances beyond criminal law. In recent months, the District

[1] Regulation 2020/1783 deals with taking evidence and Regulation 2020/1784 deals with the service of documents.

Court has also allowed practitioners to have matters adjourned on foot of an email to the office (subject to written consent from all parties). The foregoing innovations can save time and reduce costs for the parties. In the intended new Family Court rollout, the limited number of Family Court buildings may require technology-based outreach for certain purposes.

Technology could be used to issue applications and for the service of proceedings. The necessity of a document such as a Family Law Civil Bill needs to be re-evaluated in the context of facilitating online application forms which can be completed easily and then filed electronically with the court. This could significantly reduce solicitor time, court time and costs. Head 10(2)(a) of the General Scheme provides the opportunity, perhaps, for new forms/processes for issuing proceedings. A more streamlined and simpler procedural process could reduce the amount of practitioner, Courts Service and judicial time required in proceedings.

It may be prudent to examine the process used in the jurisdiction of England and Wales and elsewhere to see whether access to the Family Court system can be simplified for each Court user, whether it is a solicitor instructed in a matter, or a lay litigant, acting on his or her own behalf. At present, there are a number of documents to be filed in the context of any given family law matter. These documents tend to be less complex for the District Court, with layers of complexity added depending on whether the matter is being litigated in the Circuit Court or in the High Court. The position is even more complex for the non-marital family parties, many of whom may find themselves issuing a number of different types of proceedings under various statutes, in order to seek relief in respect of their children, property and finances. It is submitted that many lawyers find family litigation cumbersome to navigate and the task is even more arduous and complex for lay litigants.

A simple question and answer form could be completed by each new applicant (or solicitor) in order to commence a family law matter. Alternative dispute resolution (ADR) could be built into this model such that the individual user would be given information about personal counselling, relationship counselling, addiction services, parenting advice, mediation and collaborative law while navigating the first phase of the Family Court portal. It may be that a small financial payment would be required in order to actually issue proceedings to avoid multiple applications or abuse of process. The Family Court portal could be a means of ensuring that the totality of a dispute between any given set of parties is dealt with by the same forum, rather than having a situation whereby the same parties can litigate separate issues in three different courts simultaneously – which can occur at present in highly litigious cases. This portal could be developed to enable the parties to upload essential documents such as the marriage certificate and birth certificates of their children. Declarations as to the truth of an affidavit of means and/or affidavit of welfare could also be provided for together with a function enabling the uploading of financial documentation, vouching and other proofs. Where a child expert is required this could be considered by inserting relevant questions. Likewise, the form could contain a list of the various reliefs sought and indeed each party could tick a box indicating the precise grounds for an application. Moreover, the respondent could complete his/her form online.

The service of documents could be examined but it would likely involve giving the respondent notice of the private log-on details to access the forms that have been served on him/her through the portal. It is submitted that a well-designed set of questions would ensure that cases are managed appropriately at every stage of the process. Unless waived by the parties, an order for discovery of 12 months vouching documentation should issue in every case. A fast-track system could be considered for parties who reach agreement. Early dates should be considered for a round table assessment of progress made in negotiations

together with early case management/progression. The ratio contained in the Supreme Court decision of G v G[2] needs to be applied at all levels in the family court system to ensure that family proceedings are not unnecessarily protracted and that, wherever possible, a genuine effort is made, both by lawyers and clients, to resolve matters by agreement.

Recommendation

Development of a cloud-based document management system should be considered for family law at District Court, Circuit Court and High Court level.

Some of the Superior Courts have dealt with cases on the basis of pleadings being available online, with great success and this is a matter that the Courts Service should be asked to invest in.

Separately, there should be a similar cloud-based document management system for the Appellate Courts. While this submission focuses on family law at first instance, it does not intend to diminish the importance of decisions of precedent value which emanate from the Court of Appeal, the Supreme Court and indeed, the High Court, on appeal.

1.2 The provision of facilities and supports in the family justice locations?

The 2019 Joint Committee on Justice and Equality Report on Reform of the Family Law System ('the 2019 Report') highlighted the fact that many of the Court buildings and resources are "not fit for purpose with major issues of overcrowding and environments that are unsuitable for children and the sensitivity of family law proceedings". Currently, both the District Court and the Circuit Court have burdensome caseloads. Covid-19 is clearly creating even greater difficulties. It is submitted that these difficulties are exacerbated by the poor state of the physical infrastructure.

The 2019 Report found that: "Key ancillary services and agencies, such as legal aid and mediation services, as well as the courts and courts offices, should all be housed under one roof. Accommodation should incorporate appropriate areas for private consultation, child and welfare assessment services, ADR facilities, child-friendly spaces, crèche facilities, disability access and supports and guides for navigation through the process for lay-litigants. Translators should be readily available to courts to avoid lengthy delays when there are language problems."

Conducting proceedings in a family-friendly way to reduce conflict and minimise costs is dependent on the availability and input of agencies and professionals who can provide accompanying services and assessments. How these essential components can be included as part of a new system needs to be very clearly identified and planned for.

One of the significant obstacles which the Society envisages with the proposed reforms is resource issues including the physical infrastructure requirements of a new Family Law system. For example, the space to consult with vulnerable clients, especially in domestic violence or child care cases, is very important and many existing court buildings do not lend themselves to an acceptable level of privacy or respect.

[2] [2011] IESC 40.

All lawyers bar rooms should be equipped with appropriate facilities for remote working such as printers, scanners and photocopiers, so that settlement terms can be typed and provided to the parties and to the Judge in that form.

There needs to be sufficient space and designated consultation rooms for settlement negotiations as the current practice is simply outmoded, unacceptable and rife with potential for breaches of the Data Protection Act 2018 and the *in camera* rule. For instance, in Phoenix House, Dublin adequate rooms for the number of parties involved in proceedings are rarely, if ever, available. Consideration needs to be given to how best to provide some form of privacy to the parties. The General Scheme highlights the importance of mediation/non-adversarial options. In this regard, every Court house should have dedicated mediation/collaborative rooms to facilitate such meetings.

A Public Announcement system should be installed in every courthouse in the country to call family law cases or to announce when the Judge is doing a call-over.

It is imperative that supports are available for families when attending family courts. A holistic programme which could provide information, mediation, court and other services such as counselling, a contact centre to support access and parenting support to children and families would work best. Some courthouses have mediation services and frequently the Judge refers parties to that service to mediate and to revert when they have reached a settlement for a ruling. It should be possible to provide a service within the court setting to arrange to meet with parents and children outside court and, if necessary, provide a short report to the court recommending arrangements to try to resolve issues between the parties. Referrals from such a service could be made to psychologists (if required) and domestic violence services. Having specialist Child Court Liaison Officers, a support service such as Cafcass, domestic violence services, and a team of experts readily available to the court for parenting capacity assessments, attachment assessments and child welfare reports, would be incredibly helpful. If possible, all agencies and services should be housed under one roof (or, at a minimum, signposting should be available to assist the public to access all these services in the family justice locations). The prior involvement of The Probation Service proved to be a great asset for the District Court.

Recommendation

Appropriate facilities are required to facilitate family law proceedings and a holistic approach to proceedings must be adopted. This may include the availability of domestic violence services and waiting rooms which avoid situations where victims of domestic abuse often have to wait, sometimes for hours, in proximity to their abusers.

Advocacy services for child care clients or clients with impaired capacity should also be available in the court setting.

Other practical considerations which are necessary to ensure that child and family law matters proceed smoothly include: having translators and sign language interpreters within easy reach to avoid lengthy delays or adjournments and providing sufficient private space for parties to consult with their legal representatives.

2. The place of mediation in family justice

2.1 The desirability of using mediation to resolve family law issues;

ADR is a prominent guiding principle in Head 5 of the General Scheme. It is a means to reduce conflict and hopefully somewhat diminish the adversarial nature of family law proceedings. Mediation, for example, is an area where there is potential for greater flexibility in family law, particularly since the enactment of the Mediation Act in 2017. It has been recommended as an area for greater attention having regard to international practice and what would be possible in Ireland.[3]

Mediation and other ADR approaches appear to result in more amicable and enduring arrangements, with the attention of parents more likely to be on children's needs.[4] It may empower and facilitate families to better explore options and solutions themselves. There are significant questions around encouraging more mediation if it is conceptualised as an alternative to legal aid.[5] In England and Wales, separating couples frequently do not want to engage in mediation, opting instead to self-represent in court.[6]

There are issues relating to power dynamics in relationships and children are often excluded from ADR. Therefore, it should be viewed as a useful alternative mechanism for resolving family law disputes, not as a cost-saving measure.

The Society believes that ADR should be actively promoted and facilitated, wherever possible, having regard to the facts and circumstances of every case and the needs of particular clients.

The Society appreciated that ADR is to be explored "'only where appropriate" which is important, especially in cases of domestic violence where the power differential must be taken into account.

A common problem which arises is that of lay litigants bringing or defending cases which may be suitable for mediation, especially in the District Court. If mediation is to be raised as a real alternative for families in conflict, this needs to be promoted at an early stage, even before proceedings are issued. Moreover, the Mediation Service needs to be available and visible for people who are accessing the Courts and while this may be the case in some locations where there are on-site mediation services, such as Dolphin House, it simply is not in other areas which means that mediation is not really initially seen as a viable alternative to resolving conflict. Even if it is not a pre-requisite to issuing proceedings, some early information or understanding of mediation should form part of the system but it has to be a realistic, viable and available option.

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[3] Law Society of Ireland, *Submission to the Department of Justice, Equality and Defence: Family Law – The Future* (Dublin: Law Society of Ireland, 2014).

[4] Joan Kelly, "Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research" 46 *Family Processes* 35 (2007), at 40.

[5] Rachel Treloar, "The Neoliberal Context of Family Law Reform in British Columbia, Canada: Implications for Access to (Family) Justice" in Mavis Maclean, John Eekelaar and Benoit Bastard, eds., *Delivering Family Justice in the 21st Century* (Hart Publishing, 2015).

[6] Rosemary Hunter, "Inducing Demand for Family Mediation: Before and After LASPO" 39 *Journal of Social Welfare and Family Law* 189 (2017).

Accessibility to mediation is therefore very important if the principle in Head 5 is to have a meaningful impact. Logistics are an important consideration in deciding on areas for investment. For example, the closest Family Mediation Offices and Services to Cavan/Monaghan are in either Dundalk or Blanchardstown. Poor public transport makes accessing services very difficult/costly. If the mediation principle is to become embedded, it has to be readily available. Currently, mediation is under resourced. The Society is concerned by the lengthy waiting times for mediation in some areas: Laois (six months), Donegal (six months), Carlow (7 months) and Sligo (9 months).

There may be merit in fast-tracking mediated cases which could make engaging in mediation more attractive to parties and thereby becomes part of the culture of family law.

Mediation ultimately saves time, costs and protects relationships but it is not a panacea in all cases.

2.2 Maximising family court users' understanding of the role mediation can have in settling family disputes;

It is important that the benefits of mediation and ADR are articulated at an early stage. There is no doubt about the desirability of using mediation to resolve family law issues. Mediation and counselling services should be the first options that the court user encounters on entering either the family court portal online or on entering a family court office. The mediation and counselling services on offer should be extensive and should involve the possibility of entry into a mediation and/or counselling service in addition to attendance at an information meeting.

Mediation allows parties remain in control of their proceedings and the outcome in relation to them. It can add to cordiality in relationships between the parties for the future which is very important in order to avoid ongoing litigation over every issue that may arise, particularly where children are involved. It also saves costs, court time and the nature of family law proceedings are such that mediation or ADR processes should always be considered before adversarial litigation.

Often while parties are engaging in mediation (usually in cases where there are assets, property or pensions) legal advice will be required and this should be readily available in order to assist progress. Mediation is important and could be used more extensively, in particular in routine private law access and maintenance matters. Where there are no child protection issues and where it is merely a parenting/access plan that is required or assistance given to parents to work out a co-parenting schedule, these cases could all be managed through mediation.

The District Court pilot scheme which was initiated a number of years ago to promote mediation has been very successful. The fact that the mediation services are housed in the same building is of great assistance. If all Court buildings had a mediation service available on hand, Judges could adjourn cases before them to allow mediation to take place. The model used in Dolphin House provides an excellent template which is already being extended to other districts. It is a great example of staff, judiciary and practitioners all working collaboratively to improve outcomes and, in turn, to ease the pressure on the parties (and ultimately, the lists).

2.3 Interdisciplinary training in mediation for family justice practitioners;

Any new Family Court structure must recognise and actively promote an interdisciplinary system to ensure effective communication between all the disciplines involved in family law e.g. medical, legal, education, guardians *ad litem* and social services.

Restructuring of the family law court without the involvement and promotion of a system of mediation training for family justice practitioners would not achieve the objective of meeting the particular needs of the users of the family court structure.

This interdisciplinary approach involves an acceptance that simply making a court order is not sufficient and that further work needs to be undertaken by specialists with a range of non-legal skills to ensure that the needs of clients are met. It would require a problem-solving court where, for example, judges would be in a position to order a mental health assessment. Without this type of addition, any new system remains as flawed as the current one.

2.4 Should mediation be a requisite to initiating or progressing family law proceedings with the court only being required in irresolvable cases or as the last step?

In conjunction with mediation, all forms of non-court based resolution should be promoted but should not be a prerequisite to initiating or progressing family law proceedings. Indeed, we have been provided with considerable insight during the last year, when the courts have been closed or sitting in more limited ways, about the capacity for non-court based resolution of cases.

Settlement hubs were used to good effect for the settlement of Circuit and High Court cases in the past year, and this model could be promoted. In fact, this is what happens in many cases but is often left to the day of the hearing with a last-minute rush to secure valuations and vouching of documents to settle matters before a court adjudication. This could be scheduled as part of a Case Management/Case Progression system so that parties are given the opportunity to have settlement talks in a more calm, measured environment than that which almost always prevails on the day of a hearing. A significant number of issues in contention can, and should be, narrowed between the parties in advance. Negotiation is, or should be, a mainstay of the family justice system. Case management has to be more than just the exchange of vouching followed by the issuing of a notice of trial.

Family law practitioners are required to discuss mediation with clients. The Mediation Act 2017 has raised awareness among the profession generally. Unfortunately, the delays in the family mediation service act as a deterrent and many clients feel that private mediation is too expensive. The optimum solution would be to invest resources in mediation and reduce the waiting lists. Filtering appropriate cases through mediation, supported by child experts, with court as the last option would be very helpful. The possibility of judicial guidance could arise if certain issues became problematic. However, mediation should not be the only mechanism used to try to resolve disputes. Disputes are often resolved very effectively by the lawyers acting for both parties. The difficulty is that the vast majority of cases are settled very close to the hearing date.

There is very little regulation of mediators and their minimum standards of qualifications which is an area that should be addressed. We note, in this regard, that the Mediation Act 2017 makes provision for a Code of Practice.

In many cases mediation can be assisted by the use of therapists and a panel of qualified trained therapists should be available to assist in issues relating to the children.

Recommendation

ADR should be defined in the Family Court Bill to include other forms of ADR, in addition to mediation - i.e. collaborative law, lawyer assisted settlements and arbitration. Moreover, a system of regulation for mediators should be introduced to ensure a uniform standard in the provision of mediation services.

There are issues relating to power dynamics in relationships and children are often excluded from ADR. Therefore, it should be seen as a useful alternative mechanism for resolving family law disputes, not as a cost-saving measure.

The Society believes that ADR should be actively promoted and facilitated, wherever possible, having regard to the facts and circumstances of every case and the needs of particular clients.

Information sessions could be held *in situ* in the District Court, Circuit Court and High Court nationwide. ADR specialists such as accredited mediators, conciliators and lawyers could provide such information sessions and adhere to a code of conduct.

3. Reimagining the structure of civil legal aid in family justice

3.1 Should a greater focus of the system of civil legal aid be on the promotion and use of non-court based solutions to family issues where these are possible?

The Civil Legal Aid system can and should promote non-court based solutions but this is only meaningful if private family law practitioners follow a similar approach. Otherwise, we create a two-tier system where Legal Aid Board clients will have cases treated differently to other cases. Some Legal Aid Board clients commence proceedings with a view to settling matters but when the other party retains a practitioner who takes a different approach, the legal aid client feels that he/she needs to "match" that approach and to "fight" his/her case. If non-court based solutions are to work, they will have to be integrated across the family justice system.

There has been much consultation within the Legal Aid Board in relation to ADR and facilitation of non-court based resolution given the significant benefits associated with same. Since November 2011, the State-funded Family Mediation Service has come under the umbrella of the Legal Aid Board and a number of projects have been piloted, such as the Kilkenny project (a co-location pilot) and the Co-location Blueprint to ascertain better ways of working within the Legal Aid Board to facilitate non-court based resolutions. A further pilot scheme took place in Cork wherein a legal aid certificate would not issue unless clients had attended a mandatory mediation information session. Clients could still attend for an advice consultation but a certificate for court proceedings would not issue unless the parties had attended the mediation session.

The statutory basis for operating the aforementioned pilot scheme is an interpretation of section 28(2)(d) of the Civil Legal Aid Act 1995. That provision states that, in order to grant a legal aid certificate, the Board must be satisfied that the proceedings which are the subject matter of the application are the most satisfactory means by which either the result sought by the applicant or a more satisfactory one, may be achieved (having regard to all the circumstances of the case, including the probable cost to the applicant). Therefore, it is the practice of Legal Aid Board solicitors in granting a certificate that the Board cannot be deemed to be satisfied without the applicant being properly informed as to all available options which, of course, includes mediation and other forms of ADR. When applying for a legal aid certificate, a submission must be made which confirms that the solicitor has meaningfully discussed mediation and/or other forms of ADR with the client. Furthermore, the State has court based legislative 'safeguards' which attempt to ensure that non-court options have also been discussed.

3.2 In addition to mediation, is there scope within a civil legal aid system for utilising other ADR mechanisms including but not exclusively arbitration and collaborative law as a means of achieving family justice?

As stated above, all forms of ADR should be explored. Achieving family justice is possible by using collaborative law. One of the key aspects of the collaborative model is the commitment by the parties and their lawyers that they will not go to court, or threaten to go to court, unless it is to have an agreement ruled by the court and that the lawyers will cease to act for the parties if contentious court proceedings are instituted. Another key aspect is face-to-face meetings involving the parties and the lawyers. While the theory of collaborative law is innovative, accompanying social supports are necessary to make it effective in practice.

The option of family counselling or a parenting programme as envisaged by the Children and Family Relationships Act 2015 could also be considered a form of ADR. It is an interesting concept which is not being utilised.

3.3 Legal Aid in family justice – more than legal advice and representation!

The UK introduced the Children and Families Act in 2014 which provides that *"Before making a relevant family application, a person must attend a family mediation information and assessment meeting."* They are already colloquially known as MIAMs. You must attend a MIAM before issuing an application to the family court, although there is still some discussion as to how strictly this is enforced by the courts in the UK.[7]

Since the pandemic began, the Legal Aid Board has also put in place regional Settlement Hubs providing venues for parties to attend and negotiate settlements as the ability to negotiate was reduced due to the closure of the Law Library. While available (during Level 3 restrictions or below) these were very successful in alleviating much of the stress for clients who were outside the court environment. In addition, the Legal Aid Board has run a Legal and Mediation Helpline since the beginning of the pandemic to answer queries in relation to legal/mediation issues which has been very successful, with very positive feedback.

The civil legal aid threshold should be raised. This would reduce the number of lay litigants in the system which would result in savings to the family justice system. At one stage, lay litigants appeared in over 50% of cases before the Supreme Court! Increasing the threshold to qualify for civil legal aid might give litigants a greater understanding of the process and it

[7] Section 10(1).

would expedite cases and minimise conflict. Due importance needs to be given to family law and the negative impact an acrimonious separation can have on children. Even if one party was privately represented and the other was in receipt of legal aid, both would benefit by each having legal representation.

It is submitted that, where eligible, parties should be afforded legal aid to facilitate attendance at mediation and other negotiations, in the first instance. At present, legal aid seems to be limited to the court process rather than the non-court based resolution of family matters. This may have the effect of turning every legal aid client into a litigating client, if that is the only option available to secure legal support.

It will be essential to reimagine the Legal Aid Board if the new system is to be effective.

There is definitely scope for a greater emphasis within the Legal Aid Board for more targeted ADR, and for opening up other methods of ADR but these would need to be used by all family law practitioners in order to be effective. Undoubtedly the focus on the Legal Aid System should be, in tandem with the private system, on the promotion of non-court based solutions.

The Society welcomes the commitment by the Minister for Justice in the Justice 2021 Plan to review the Civil Legal Aid Scheme. We believe the scope of the review should include:

- the functions of the Legal Aid Board;
- resources;
- the criteria for legal aid;
- financial thresholds/means test; and
- current delays in accessing legal aid.

4. The Family Courts

4.1 What issues should always be prioritised for hearing?

All family matters deserve priority given the profound implications they can have on citizens, particularly where children are involved.

The General Scheme seeks to establish a separate Family Court, to include the establishment of a District Family Court, a Circuit Family Court and a Family High Court. The General Scheme also provides for the establishment of the Family Law Rules Committee. A principal Judge together with other specialist judges are to be appointed at each level. A District Court Judge can transfer proceedings to the Circuit Family Court, depending on the number of issues which remain outstanding, the complexity of the matter, the value of assets and the likely duration of proceedings. Family Law proceedings are defined as proceedings before a court of competent jurisdiction under the:

- Guardianship of Infants Act, 1964;
- Family Home Protection Act, 1976;
- Family Law (Maintenance of Spouses and Children) Act,1976;
- Family Law Act, 1981;
- Status of Children Act, 1987;
- Judicial Separation and Family Law Reform Act, 1989;
- Child Abduction and Enforcement of Custody Orders Act, 1991;

- Child Care Act, 1991;
- Maintenance Act, 1994;
- Family Law Act, 1995;
- Family Law (Divorce) Act, 1996;
- Protection of Children (Hague Convention) Act, 2000;
- Civil Registration Act, 2004 (other than section 56);
- Adoption Act, 2010;
- Civil Rights and Certain Rights and Obligations of Cohabitants Act, 2010;
- Children and Family Relationships Act, 2015;
- Gender Recognition Act, 2015; and
- Domestic Violence Act, 2018.

It is anticipated that the foregoing matters will be heard in either the District Family Court or the Circuit Family Court (not the High Court, in the first instance) with the exception of special care cases, adoption cases and child abduction matters, which are to be dealt with in the High Court in the first instance.

The Society is of the view that the success of the new Family Courts will depend on allocating the correct cases to the appropriate Court, with the required additional resources concentrated on the relevant Courts. The General Scheme seeks to create an overall structure and leaves the allocation of actual cases between Courts as a matter to be addressed in subsequent court rules and regulation.

The fact that a party cannot originate certain private family law cases in the High Court under this provision is a matter of profound concern to the Society.

It essentially relegates family law to an inferior status when compared to every other area of the law. There are certain cases which, due to their complexity and value, require special consideration and the allocation of significant volumes of time which is simply not possible in the Circuit Court due to the volume of cases being heard. There appears to be no rationale for this decision which may, if it proceeds as is, significantly hamper the operation of the Circuit Court due to the volume of court time needed to hear these cases.

In addition, the loss of jurisprudence from High Court decisions will prejudice the practice of family law. Practitioners regularly rely on High Court decisions in order to advise clients appropriately. If the jurisdiction of the High Court is limited to points of law or appeals only, this will have a profound impact on jurisprudence and the practice of family law.

Moreover, altering the jurisdiction of the High Court may have constitutional implications. In this regard, Article 34.3.1° of the Constitution provides that the High Court enjoys ‘‘full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal’’.[8]

[8] See para 1.04 - 1.14 of the LRC Consultation Paper on the Family Court in 1994.

4.2 What are the professional supports both privately funded and in the case of eligible persons, publicly funded that most benefit the participants in the process or the court in dealing with family cases (examples include psychologists, social workers, family support services, anger management training etc.);

Where decisions in relation to children need to be made, the court needs to have professionals available to undertake assessments, therapies and training for the children. There is limited benefit in making orders if the services or assessments are unavailable, expensive, or the waiting period is too lengthy. This is a significant issue in both public and private family law cases. There should be trained family therapists/psychologists. Children in care are especially vulnerable and these cases are characterised by delays in assessments, therapies and supports. This affects the whole life of a child as they remain in care waiting for assessments to be completed or waiting for therapy or support to be put in place. The whole trajectory of their life is formed by those delays and this needs to be a priority for any family justice system.

In private family law matters, key services should be available to permit family law judges to refer couples or parties to skilled personnel to:

- draw up parenting plans;
- carry out parenting capacity assessments;
- deal with anger management programmes in domestic violence cases;
- monitor custody and access orders when they break down and facilitate their restoration;
- engage in family therapy; and
- implement supervised access orders.

The key ancillary services referred to above are an essential part of any new family law court system and the success of this approach, evident when it was introduced at District Court level as part of the Dolphin House initiative, demonstrates the value of having a variety of agencies (such as legal aid, mediation services and the courts and courts offices) under one roof.

The new family courts should be located separately from existing courts with sufficient rooms for private consultations and a welfare assessment service to support public and private family law proceedings. ADR facilities should be located in the new family law courthouses.

Experts in the area of attachment, child development and the impact of abuse ranging from neglect to sexual abuse should be provided to judges who are allocated to deal with child care matters in light of the fact that decisions made by these judges have lifelong consequences for children and families.

5. Voice of the Child[9]

5.1 How best to incorporate the voice of the child?

The 2019 Report made a number of recommendations relevant to hearing the voice of the child and the necessity to establish a panel of suitably qualified child experts. The General Scheme is silent on these issues other than insofar as it anticipates that a Judge will ascertain the views of a child (see 3(d)(ii) "in respect of any child who is capable of forming his or her own views, ensuring as far as practicable that the views of the child are ascertained and given due weight having regard to the age and maturity of the child").

Further, the 2019 Report states that "there is a Constitutional requirement to ascertain the views of the child, in reality this is undermined by the fact that the funding of the necessary expert reports to give effect to this can fall on the shoulders of parents, who will often not have such resources. If the constitutional aspiration that the voice of the child be heard is to be made a reality, there is a need to establish a State panel of experts who would be available to the courts to produce a report within a reasonable timeframe. An alternative solution would be to establish a national body such as the guardian *ad litem* service in Northern Ireland, with a view to the service being utilised in both public and private family law proceedings".

This issue is not provided for in the General Scheme and requires urgent attention in order to ensure that the Irish Family Court system meets international standards in terms of protecting children's rights. We need to ensure that the voice of the child is heard, in cases concerning their interests and welfare.

The General Scheme is also silent on the issue of providing regulations in respect of section 32/47 reports, similar to the recent Child's View Expert Regulations. Such regulations would ensure that those who prepare the reports are properly qualified and given specific terms of reference for engagement. Perhaps this work will form part of the focus of the Family Law Rules Committee? In any event, it is preferable that there is a positive articulation of this requirement in the legislation.

A crucial element of an adequate courts system for children and families is the participation of children in proceedings. Apart from the physical environment of the courts, a family law system must be equipped to not only have children present, but also to facilitate their meaningful involvement in proceedings where appropriate and necessary.

Courts in Ireland have a duty to hear children and to give due weight to their wishes under Article 12 of the United Nations Convention on the Rights of the Child (CRC) and also under domestic law. Section 24 of the Child Care Act 1991 requires a Court to give due consideration to the wishes of the child having regard to the age and understanding of the child. The enactment of the Children and Family Relationships Act 2015 (referenced previously) incorporated the right of children to be heard in private law proceedings, though it is not yet clear how, or if, this is being fully implemented.

Article 42A of the Constitution provides a more heavily entrenched right for children to be listened to in private family law cases.

[9] It is planned that a future strand in the work of the Group will involve a targeted consultation involving children themselves.

There is a distinct lack of provision in Ireland for accommodating the voice of the child.[10] Guardians *ad litem* are often the most effective mechanism through which children can present their views to the courts, yet they may or may not be appointed in a given case.

Another issue in Ireland is that of the judicial interview. CRC Article 12 stipulates that children may be heard by the decision-maker directly, and the UN Committee on the Rights of the Child emphasises that children should have a choice in this matter.[11] Though judges may meet occasionally with children in Ireland, data is not collected on the extent to which that happens. Furthermore, there are no guidelines for meetings between judges and children apart from some points set out in 2008 in *O'D v O'D* where Abbott J. opined that judges should not seek to act as a child expert; the terms of reference should be agreed with the parties beforehand; the judge should explain the nature and purpose of the interview to the child, including the fact that children will not have a determinative say; the judge should assess "whether the age and maturity of the child are such as to necessitate considering his or her views"; and only speak to children in confidence if the parents agree.[12] Though these points are useful, they are not comprehensive. They also fail to acknowledge that CRC Article 12 requires that the process should begin with an assumption in favour of hearing children (instead of focusing on adult-centric concerns about securing the agreement of parents rather than on ensuring children's comfort and consent).[13]

The best way to incorporate the voice of the child may be via an holistic court support service which incorporates professionals such as GALs or other professionals of similar qualifications.

There are many challenging questions when considering how to hear the voice of the child. These questions are particularly difficult during a harsh economic climate, with society barely recovering from austerity and now plunged into a pandemic. In this context:

- How are the interests of children to be protected when their parents' relationship runs into difficulty leading to separation and divorce?
- How should children be supported through this time of family crisis?
- Where will children find supports for their needs?

5.2 How can the proposed new system of family justice be made more child friendly?

The proposed system should be made more child friendly with a guardian *ad litem* being appointed or someone with the skills necessary to discuss matters with children involved in proceedings in an independent, child-focused manner.

The Society believes that a guardian *ad litem* is a very useful means of keeping children not only visible in the family court system but also part of the decision-making process. While it is, of course, necessary for children to feel empowered in family breakdown situations and

[10] See, for example, Aoife Daly, "The Judicial Interview in Cases on Children's Best Interests: Lessons for Ireland" 20 *Irish Journal of Family Law* 3 (2017); Aoife *Daly, "Limited Guidance: The Provision of Guardian ad litem Services in Irish Family Law"* (2010) 13(1) *Irish Journal of Family Law* 8.
[11] General Comment No. 12, (2010).
[12] See further Aoife Daly, "The Judicial Interview in Cases on Children's Best Interests: Lessons for Ireland" 20 *Irish Journal of Family Law* 3 (2017).
[13] *Ibid.*

for their voices to be heard, we need to proceed carefully in this area and not overburden children with too much responsibility in very emotional and often fraught family situations.

The Guardianship of Infants Act, 1964 (Child's Views Expert) Regulations 2018 which came into force on 1 January 2019 stipulate qualifications and fees for experts which have proven to be problematic. In practice, Child's Views Experts quote fees which render their services outside the reach of many parents. The Society believes it may therefore be prudent to introduce a panel of suitably qualified experts. Under this system, experts would apply to be placed on the panel, in a manner similar to the Private Practitioner Panel of Solicitors or Counsel.

The State no longer provides a comprehensive welfare report type service which means that the most vulnerable children in our society do not have access to a child expert, in the context of a private family court case concerning their welfare. It is submitted that we could examine both the Cafcass service in the United Kingdom and the guardian *ad litem* service to see whether we could design an appropriate family court panel of child experts and/or guardians in private family law matters. Such a child expert or guardian would be in a position to identify the other supports required by the individual family such as counselling services, addiction services, housing, medical needs and educational needs. A guardian could also keep a child informed about the litigation progress and next steps, in a child-friendly manner, and could equip him/her with some of the necessary coping skills for dealing with their parents' separation, in addition to ensuring that he/she has access to appropriate services. A guardian/child expert would also be in a position to conduct a targeted consultation with the children themselves (perhaps at commencement or at an early phase of the family court process). There is a concern that the present system results in a focus on the exchange of financial documentation rather than prioritising the needs and interests, and indeed, the voice of the child.

5.3 How can we keep children informed in the family court system?

Divorce and judicial separation are not one-off events. Children will have many questions before, during and after proceedings have concluded. We could therefore consider those various stages and what supports could be provided. The following are some suggestions:

1. Written information should be provided about parental separation in all its forms:

    - In schools;
    - Libraries;
    - GP surgeries;
    - Mediation centres;
    - Citizens Information Centres; and
    - Child and Adult Mental Health Services.

    Such information could provide children with neutral and informative advice from a trusted source. Parents themselves can be overwhelmed by the emotional turmoil of a separation. For the children, it leads, at least temporarily, to a major disruption in their daily lives which can impact their education; friendships and even their mental health; so having information readily available is key.

2. We need to review the impact of technology and the internet in relation to the provision of information about separation and divorce and consider setting up safe 'hubs' to be accessed by children. This needs to be undertaken by a trusted source, for example with pro bono support from law firms and/or the Legal Aid Board. There can be a

confusing mass of information. Therefore, the setting up of a trusted source/resource for children could prove very effective.

3. Parents should be provided with access to interdisciplinary resources in the Court venue itself. This could take the form of a one-off consultation with legal advisors, mediators and/or guardians *ad litem*.

4. Guardians *ad litem* have a very significant role in hearing the voice of the child. Their capacity to assess what is happening for children can provide judges with invaluable information to assist the court in its decision-making process.

   At the moment, as stated earlier, the GAL system is unregulated. When regulated, all children should have a GAL appointed so that the principle, that all children should be heard in cases which impact them, is put into practice. Currently, in private law proceedings, the burden of financing a report falls on individual parents. If they cannot pay, as previous stated, the child's voice is not heard which is in breach of international treaties, domestic legislation and our Constitution. All children who are the subject of proceedings should be given the choice to be heard. In public law cases, GALs should be appointed in all cases where children are the subject of care proceedings. Those proceedings will affect one of the most important issues for a child i.e. whether they live with, or are removed from, their family.

5. The legal system could benefit from information from other systems of thought, for example, educators; mental health specialists; GPs and GALs. This could ensure that we develop, in practice, an interdisciplinary approach so that the legal system does not remain the dominant force. This could, in turn, benefit those children impacted by court proceedings.

6. It would be helpful to review over time what works and what does not. Therefore, pilot studies should be conducted by academic institutions to look at what methods and strategies are most effective. This could be achieved by interviewing all the participants in the family justice system, including children, as to their experiences and what might have improved matters for them.

A panel of appropriately qualified professionals should be available to the court so that a report can be procured in every case similar to Cafcass in the UK and equivalent legislation needs to be introduced in Ireland to cater for this. There seems to be little uniformity in relation to the approach taken by assessors. This merits the creation of a list of accredited child assessors who would be obliged to carry out annual training so that they fully understand how to question and engage with children of a separated family. If an expert is appointed to prepare such a report, he/she should be able to feed back to the child, in a child-friendly way, what is happening in the process ensuring he/she is informed and aware of developments. The child needs to be given an opportunity to express a view/wish. This may need to be undertaken at a number of points in an ongoing process. Some children, even with this support, would like to meet and engage with the judge and this could be facilitated, but the exercise is more for the child to witness the decision-making process rather than the court gathering information or evidence from the child. Such professional services will satisfy the obligation to hear the views/wishes of the child. The child's active participation in the court process, subject to their age and maturity, is a further obligation which will require the professional to advocate effectively in the decision-making process. On much fewer occasions, children can be joined to the proceedings and allowed to participate with a legal representative. This generally only happens when the child is over the age of 16. The design and funding of these professional roles will require careful

planning and review. It also needs to allow for a reasonable fee structure in order to allow good quality assessors to be appointed.

Resources, better qualified assessors, access to assessors nationally, parenting support and help with parenting plans, child-friendly court facilities nationwide, training for judges who speak with children and hearing the voice of the child in every matter, including consent matters, would all assist in giving a voice to children. This requires a streamlined system with in-house services being provided, as part of the family justice system, rather than such services being privately sourced.

Judges dealing with family law and child care cases will sometimes enquire if children want to meet the judge in-person in order to express their views and opinions. A suitable physical space in which to facilitate these meetings remains an issue. Some judges facilitate meetings in the courtrooms or in chambers. The Society recommends the creation of dedicated child-friendly spaces on the same site as the Court location.

In child care cases where the child is already subject to a statutory care order and has a guardian *ad litem* appointed, his/her guardian *ad litem* and/or the child's allocated social worker will usually accompany him/her to Court to meet the judge. In private family law cases however, it may or may not be appropriate for one or other of the parents to do so. In such circumstances, the Society recommends establishing a specialist, trained child court accompaniment service.

In the UK, Cafcass is a dedicated service which has an independent role in advising the Family Courts "about what is safe for children and in their best interests". Cafcass was set up in the UK on a statutory basis in 2000, independent of the Court, social services and health authorities. Its duty is to safeguard and promote the welfare of children in the family courts. Cafcass encompasses both private and public law cases and interestingly, it is the largest employer of qualified social workers in the UK. It replaced the UK GAL service and, unlike in this jurisdiction, it encompasses private family law cases. In contrast, our Child Care (Amendment) Bill 2019 seeks to amend and extend the law as it relates to guardians *ad litem* in this jurisdiction. However, it is confined to children who are subject to care proceedings, young people in special care and children detained under section 25 of the Mental Health Act 2001. At present, the plan envisaged in this 2019 Bill is to establish a National GAL service within an executive office which sits in the Department of Children. Therefore, children in Ireland who are interfacing with the Family Courts diverge along two pathways depending on whether they are before the Courts in either public or private family law proceedings, which results in a substantially more fragmented model. Regrettably, there is not an adequate infrastructure within which to standardise how Family Courts vindicate the rights of children under the 31st Amendment to the Constitution.

Recently, Cafcass introduced new "welcome and goodbye" letters for use in public and private family law cases, with different versions for older/younger children. These are the types of tools which would greatly enhance keeping children informed of decision-making which may impact on their lives. In the UK these were devised following a consultation exercise with children. The Department should consider a similar exercise.[14]

In England and Wales, the 2010 Family Justice Council Guidelines for Judges Meeting Children who are subject to Family Proceedings provides guidance for judges when meeting children. The guidance encourages judges to assure children that their wishes have been understood, to explain the nature of the judge's task and to receive advice from

[14] https://www.cafcass.gov.uk

the children's guardian (guardian *ad litem*) or lawyer about when a meeting is appropriate. Judges are advised that the age of the child is relevant but that it should not be the sole determining factor in whether a meeting is offered. Where a meeting is refused, the judge is required to provide a brief written explanation for the child. The guidelines emphasise that the meeting is for the benefit of the child, rather than for another purpose such as gathering evidence. These progressive guidelines assist in ensuring that the meeting genuinely is for the benefit of the child involved and should be considered for adaptation to an Irish context.

Change is needed, not least because the Children and Family Relationships Act 2015 implements the right of children to be heard in proceedings which affect them. Whether children can be represented by giving instructions (as opposed to a representation of their best interests) is unclear. Furthermore, the lack of clear guidance for judges meeting children in family law proceedings, outlined above, is a matter of concern. It has also been argued that children do not have sufficient visibility in proceedings in which their best interests are being determined, and that greater priority should be accorded to their autonomy, considering the extent to which autonomy is valued in other areas of the law such as medical law and the rights of those with disabilities.

In recent years, the state of Israel has successfully introduced a holistic system whereby therapeutic endeavours are used and there is a presumption that children will be involved in proceedings. This inclusive approach is of great interest in the Irish context. The Scottish children's hearings system is another unique model to consider for use in this jurisdiction. It uses a lay panel to establish the welfare needs of children in cases concerning child care and criminal behaviour and brings children and families together in relatively informal hearings.

With regard to the principle set out in 3(d)(ii) this provision will only hold sufficient weight if resources are allocated to the provision of funding for services to enable the views of the child to be ascertained. Frequently, in private family law cases where the parties do not qualify for legal aid, parties simply do not have the funds to engage assessors under section 32 of the 1964 Act. While in theory, of course, a sitting judge can hear from the child directly, generally the judiciary has been reluctant to do so except in rare situations. Therefore, in order for this provision to be effective, significant funding needs to be allocated towards resources to provide for the effective implementation of this principle.

The Society is of the view that consideration should be given to a service such as Cafcass in the UK being made available which can be accessed in every case where it is needed.

Of course, this would require state funding but if that is not put in place, the most vulnerable children will not have their voices heard. This sits uneasily with the requirement in Article 42A of the Constitution to hear the voice of the child in family law proceedings. Ultimately, this right is not always vindicated as a result of resource constraints.

Recommendation

The Society believes that consideration should be given to making a service (such as Cafcass in the UK) available which can be accessed in every case where it is needed.

Costs and/or the ability of the parties to pay for reports should not be a determinative factor as to whether or not a report is commissioned.

Hearing the voice of the child should be an automatic requirement in all proceedings where there is no consensus between the parties on access/custody arrangements for that child

and costs or the ability of the parties to pay the cost of a report should not be the determinative factor as to whether a report is commissioned.

Conclusion

The Society appreciates the invitation to furnish a written submission to the Group and hopes that our comments and recommendations will be of assistance to the Group in its vital work.

We will be glad to engage further on any aspect of that work.

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