



**Submission to the Department of Justice
Family Justice Oversight Group
Family Law Reform**

**EPIC – Empowering People In Care
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“We need to think bigger and more strategically about how to keep children safe in a modern fit-for-purpose family law system.”

1. Introduction:

EPIC is the only independent organisation in Ireland which works with, and on behalf of, children and young people in care or with care experience. A core part of the work of EPIC is the provision of an individual advocacy and support service for children and young people in care and with care experience. The policy development undertaken by EPIC seeks to make positive change for children and young people in care and with care experience at a systemic level.¹

EPIC hopes that this submission will contribute to the conversation taking place within the Department of Justice around the reform of the Family Courts, and from EPIC's perspective, specifically how children and young people in care or with care experience interact with the courts. EPIC welcomes the opportunity to make this written submission to the Family Justice Oversight Group on the reform of the family justice system. We have limited the submission to the issues that are within the remit and expertise of EPIC and we recognise that this submission is being made at a specific point in time and that we will continue to evolve the details of our proposals over the coming months through discussions with colleagues, professionals and academics. This submission is based on EPIC's experience of working directly with children and young people who have experience of the courts, as well as working alongside Guardian *ad litem*s, solicitors, barristers, social workers and other experts. The central tenet of this aspect of EPIC's work is around advocating for children and young people in care or with care experience. This includes listening to children, and in relation to court, helping them to better understand the court process, participate in the process where possible, and to understand the outcomes of decisions. EPIC has invaluable experience and understanding of how some aspects of the family court system could be improved. EPIC has also partnered with the Community Law and Mediation Centre to provide a monthly free legal advice clinic for children and young people in care or with care experience. This is the basis of our expertise.

It is welcome that Heads of Bill were published in 2020 for the new family law system and that the Family Justice Oversight group was established to oversee this process. Reform of the family justice system and the establishment of new family law courts are long overdue. Unfortunately, children are often not recognised as central to proceedings within the family justice system, despite being key stakeholders. The current slow and adversarial system is not conducive to involving children and young people in the process, despite the outcomes from decisions shaping their future so fundamentally. This opportunity to review, and fundamentally modernise the family justice system must be optimised. The reform of the family justice system must have children front and centre. As an organisation that recognises the value and importance of hearing directly from children and involving them in decision making EPIC welcomes the commitment of the Family Justice Oversight Group to hold consultations involving children, to hear and learn directly from them.

¹ For more information see www.epiconline.ie

2. Recommendations

- i. The reform of the family justice system must have children front and centre.
- ii. Consultations involving children must take place, to hear and learn directly from them.
- iii. Explore, within the Guidance, some creative and innovative practices to include hearing from very young children, as well as those with disabilities, in court cases and alternative dispute resolutions. Flexibility is crucial when ascertaining the views of the child, since every child and every case is different.
- iv. Guidance on the best interests principles for public child law must be developed – consideration could be given to creating a reference in the Bill to relevant statutory guidance, which would then cover new legislation, such as the current review of the Child Care Act.
- v. The Department of Justice must examine international best practice to establish the most appropriate method of supporting children to communicate, by providing, for example a safe space, time and support, as a well as a protective figure to support them.
- vi. A modern transparent family court should ensure the role of Advocates for children and young people.
- vii. The Lundy Model of Participation should be adopted as the template for inclusion of children and young people.
- viii. Improvement in the administration of cases must be a priority to ensure that children and parents alike do not have to wait indefinitely for cases to come to court, as well as days in court awaiting the case to be called. Cases with children should be prioritised.
- ix. Any professional supports offered should be regularised, and ideally centrally located to the courts.
- x. Assessors must be regulated, and paid for by the state, to ensure consistency.
- xi. Separate written judgements, expressed in language appropriate for the individual child concerned, should also be provided.
- xii. Require the parties to attend ancillary court services such as information sessions, specialist sessions, counselling, etc as appropriate to the case.
- xiii. Alternative dispute resolutions, arbitration, mediation, etc should be considered as a first resort.
- xiv. The development of an appropriate and fit for purpose system of regional courts.
- xv. The physical environment of the courts infrastructure must provide families with the necessary space and privacy to deal with the very personal and sensitive matters often discussed.
- xvi. Legislative reform must include appropriate structures are put in place to ensure a child involved in proceedings can be adequately and appropriately supported before and after hearings with an appropriate expert such as an independent advocate and/or guardian *ad litem*. This would be a child centred approach and ensure that children are appropriately enabled to participate and understand the proceedings and the outcomes.

3. Voice - How best to incorporate the voice of the child in proceedings

Every child has the right to have their views heard in any judicial proceedings that affect them. The views of the child should be given due weight in accordance with the age of the child and the child's

maturity.² The Council of Europe's *Guidelines on Child-Friendly Justice* provide that judges should respect the right of children to be heard in matters that affect them, including the manner in which they would like to be heard. The *Guidelines* also provide that children should not be precluded from being heard on the basis of age.³ The UN Convention on the Rights of the Child makes specific reference to the child being heard in court proceedings either directly or indirectly through a representative body. This is an opportunity to include, within the Guidance, some creative and innovative practices to include hearing from very young children, as well as those with disabilities. Holding consultations with specialists, here and abroad, as well as consulting directly with children and young people who have experienced the court process would be beneficial. The Covid-19 Pandemic has shed a light on the possibilities of virtual court rooms, which may in some instances, provide a less onerous method for ensuring children can participate virtually in court cases. Courts could, in some situations, adopt a hybrid or more creative approach to interacting with some children and young people.

United Nations Convention on the Rights of the Child (UNCRC) - All children under the age of 18 have a right to be heard and their views taken seriously. The UNCRC clearly asserts that all "[S]tate Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."⁴

The inconsistent and adhoc nature of hearing the voice of the child currently in family court proceedings must change. Dr Conor O'Mahony has highlighted that flexibility is crucial when ascertaining the views of the child, since every child and every case is different. Dr Carol Coulter has outlined that while children are not always the best judges of their own welfare, their views need to be represented before the courts in an unfiltered manner. Dr Coulter expressed concern that the current system leaves room for the views of the child to be silenced while prioritising the guardian *ad litem's* opinion regarding the welfare of the child. There is always a social worker and a solicitor representing Tusla's side in public cases, and it is important to note that the social worker is not impartial in proceedings and that they are in court seeking a specific outcome. This is where additional independent professionals should be considered, such as Advocates, as discussed below.

4. Best interest

Article 3(1) of the UNCRC states that the best interests of the child should be a primary consideration in all actions concerning a child. This best interests principle must be assessed for each case. Guidance on the best interests principles in private family law exist in the Child and Family Relationship Act 2015, section 63, and in adoption proceedings in the Adoption Amendment Act 2017, section 9, but guidance

² UN Convention on the Rights of the Child (UNCRC,1989) Art 12.

³ Council of Europe; Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice; 29.

⁴ United Nations Convention on the Rights of the Child.

in relation to public child law does not currently exist.⁵ The Family Court Bill will need to rectify this situation. Consideration could be given to creating a reference in the Bill to relevant statutory guidance, which would then cover new legislation, such as the current review of the Child Care Act by the Department of Children Equality Integration and Youth.

5. Article 42A of the Constitution – sends a clear message that Ireland values children

The inclusion of the stand-alone Article 42A dedicated to children in the Constitution, both the rights it contains and the presence of the Article itself, sends a clear message that Ireland values children and wishes this to be reflected in our laws and court decisions. Article 42A gives explicit expression to the rights of children as individuals. The amendment brought about a significant rebalancing of the text of the Constitution with a more extensive reference to, and recognition of, children's rights. This greater focus on children's constitutional rights is now beginning to be reflected in more child-centred judicial decisions and legislation, and this review of the family law courts will hopefully continue to embed this fundamental shift in the way we address issues that impact on children's lives.

The constitutional obligation to ascertain the views of children in child care proceedings is primarily set out in Article 42A.4 of the Constitution, with additional obligations arising from Article 40.3. This amendment to Article 42A echoes Article 12 of the UNCRC and states that provision shall be made by law for the best interests of the child to be the 'paramount consideration' in child protection and care, adoption and family law proceedings and for "any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."⁶ However, the requirement under the constitutional amendment to give primary weight to the best interests of the child can only be achieved when children are given the possibility to express their views in matters that concern them and that those views are properly taken into account when decisions are made. Children are fully respected members of society who can bring insight and credible views to decisions on issues that impact their lives, but many require support, a safe space and time to be able to formulate their views and have their voice heard.

6. Advocacy – the missing step

Article 12 of the UNCRC and Article 42A.4 of the Constitution are hugely significant for all children, and apply to all public and private law proceedings, but for children in care another step or support must be implemented to ensure that their voices are heard, namely Advocacy.

This independent voice of the child has already been recognised previously in Ireland, most notable in the Report into the Commission into Child Abuse (The Ryan Report). When it was published in 2009, it stated that: "The HSE and IYJS will ensure that all young people in care and detention are made aware of the work of IAYPIC⁷ [now EPIC] and will support children should they wish to contact or become involved with the service."⁸ Importantly, The Ryan Report valued the strength and idea of an independent organisation to help amplify the voice of the child, and ensure the child or young person was adequately guided, prepared, and debriefed in all matters relating to his/her care experience.

⁵ A proposed amendment was published in 2019 but fell with the change of Government in 2020.

⁶ *Bunreacht na hEireann* Article 42A (2).

⁷ IAYPIC (Irish Association of Young People In Care) the former name of EPIC.

⁸ Office of the Minister for Children and Youth Affairs; *Report of the Commission to Inquire into Child Abuse, 2009; Implementation Plan; 2009; p463.*

The Report backed up its reasoning for the need for advocacy by declaring that, “[C]hildren in care are often isolated with their concerns, without an adult to whom they can talk. Children communicate best when they feel they have a protective figure in whom they can confide. The Department of Health and Children must examine international best practice to establish the most appropriate method of giving effect to this recommendation.”⁹

Definition of Advocacy

Finding a definition of advocacy in the Irish context is very difficult as very little is written about it in relation to the care of children in Ireland. However, if we look to Northern Ireland, they have defined it as, “[A]dvocacy seeks to support individuals to express and have their views heard. It aims to redress any imbalance of power between the individual and professional. It is concerned with empowerment, autonomy and self-determination, the safeguarding of citizenship rights and the inclusion of otherwise marginalised people.”¹⁰ Scotland follows similarly in its definition, which also encourages communicating on behalf of another, and endorses the concept of restoring the power balance. They have defined it as “the process of standing alongside another, speaking on behalf of another and encouraging the person to speak up for themselves. Advocacy can help address the imbalance of power in society and stand up to injustice.”¹¹

The role of an advocate on behalf of a young person must be based on the principles of the UNCRC. By doing so advocacy can work in the day to day lives of young people, in a meaningful participatory and inclusive way; helping the child or young person maximise their outcome and thereby positively influencing their lives. “Advocacy has a role in dealing with obstacles to children and young people’s participation. They can be supported by advocates to take part in a variety of processes such as formal meetings, etc.”¹² A modern transparent family court should ensure the role of Advocates for children and young people.

7. The Lundy model for participation – template for including children

The Lundy Model of Participation has been adopted by Tusla as the template for inclusion of children and young people. This is a positive step to ensure that young people in the care system are participating fully in their care and being fully heard. This model provides a new way of conceptualising Article 12 of the UNCRC, which is intended to focus decision makers on four elements of the provision:

- Space: Children must be given the opportunity to express a view
- Voice: Children must be facilitated to express their views
- Audience: The view must be listened to.

⁹ *Commission to Inquire into Child Abuse Report*, Vol. IV; Dublin; 2009; p463.

¹⁰ The Bamford Review of Mental Health and Learning Disability (Northern Ireland), *Human Rights and Equality of Opportunity*, October 2006, p. 41.

https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/human_rights_and_equality_report.pdf

¹¹ The Scottish Independent Advocacy Alliance, *Principles and Standards for Independent Advocacy*, Edinburgh, 2008, p.38. https://www.siaa.org.uk/wp-content/uploads/2013/11/siaa_principles_and_standards_2010.pdf

¹² Elsley, S., “*Advocacy makes you feel brave*”: *Advocacy support for children and young people in Scotland*.” 2009, p. 12. <https://www.nls.uk/scotgov/2010/9780755992065.pdf>

- Influence: The view must be acted upon, as appropriate.¹³

This is a positive model from which the family courts system could base the development of their service.

8. Training of professionals – from the outset and ongoing

In order for all professionals to recognise and accept the value of involving children in appropriate court processes it must be integrated into the initial training of solicitors, barristers, and all relevant professionals to ensure a shift in mindset. All professionals involved within the family courts services must be appropriately trained and must be required to regularly carry out continued personal development. Family courts deal with particularly sensitive and painful disputes that require a panoply of specific and unique skills that need to be developed. In some countries, notably Canada, continuous professional training on an annual basis is an obligation for Judges to undertake. Similar requirements would be welcomed here. Scandinavia’s jurisdiction is tailored towards the child for example.

9. The Family Courts

i. What issues should be prioritised for hearing?

Decisions made in family court hearings have a profound and often life altering affect on participants, particularly children, whose entire future will be impacted as a result of decisions made. The current delays in hearing family law cases is unacceptable, particularly for children, whose sense of time is different to that of adults, and the duration of cases coupled with delays, are disproportionate to their age. The United Nations Committee on the Rights of the Child expressed concern over the delays in hearing family law cases in 2016, and recommended that cases with children should be prioritised.¹⁴ Similar recommendations are echoed in the Council of Europe’s *Guidelines on Child-Friendly Justice* which recommend that all proceedings involving children should be heard quickly, with the principle of urgency applied, adapted to the child’s pace with regular breaks and are limited in duration.¹⁵ In the United Kingdom for example, there is both a human and a legal requirement on the Family Court to consider and determine children cases in the course of a matter of weeks or months, with an upper statutory limit on public law care proceedings of 26 weeks.¹⁶ General improvements in the way the courts are administered must be a priority to ensure that children and parents alike do not have to wait indefinitely for cases to come to court, as well as days in court awaiting the case to be called. The UNCRC best interest principal must be applied.

ii. Professional Supports that most benefit the participants in the process or the court?

Any professional supports offered should be regularised, and ideally centrally located to the courts. Assessors must be regulated, and paid for by the state, to ensure consistency. Separate written

¹³ Lundy, L., “Voice in not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child. *British Educational Research Journal*, Vol. 33, No. 6, p927-942, at 933.

¹⁴ UN Committee on the Rights of the Child; Concluding observations on the combined third and fourth periodic reports of Ireland; 2016; para 48.

¹⁵ Council of Europe; Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice; p28-29.

¹⁶ The Rt. Hon. Sir Andrew McFarlane President of the Family Division and Head of Family Justice; Children Cases in the Family Court: Consultation on Interim Proposals for Reform; Note from President; 2019.

judgements, expressed in language appropriate for the individual child concerned, should also be provided. A requirement could be made for all parties to attend ancillary court services such as information sessions, specialist sessions, counselling, etc as appropriate to the case.

iii. Alternative dispute resolutions – the place for mediation: Should mediation be a requisite to initiating or progressing family law proceedings with the courts only being required in irresolvable cases or as the last resort?

The current adversarial nature of the family courts system is not child friendly or child centric. The recommendation for alternative dispute resolutions, arbitration, mediation, etc should be explored and embraced where it is appropriate. Such an approach has been encouraged by the Council of Europe in its *Guidelines on Child Friendly Justice*.¹⁷ Where it is considered a possibility alternative dispute resolutions should be explored and discussed with every family in question, as it offers a less adversarial and costly approach, which can be more child focused, with better buy-in and adherence to outcomes from all sides due to the involvement and necessary commitment of all parties.

iv. Other – infrastructure, administration, gaps,

Dr Geoffrey Shannon in 2019 in the Houses of the Oireachtas Joint Committee on Justice and Equality Report on Reform of the Family Law System stated that that though Ireland has been progressive in terms of its legislation, it is behind in terms of its infrastructure which is very adult centric.¹⁸ The development of an appropriate and fit for purpose system of regional courts to ensure that families do not have to travel to Dublin to have their case heard must be prioritised. General improvement in the way the courts are administered would help ensure that children and parents do not have to wait indefinitely for cases to come to court and do not waste days in court awaiting the case to be called. The physical court space must be family friendly, with full disability access, baby changing facilities, consultation rooms, comfortable seating, and access to subsidised snacks and water. The family courts must not be intimidating or overwhelming environment for fraught families and children, but must seek to support and ease a stressful experience. The current physical environment of the courts infrastructure does not provide families with the necessary space and privacy to deal with the very personal and sensitive matters often discussed. The design of courtrooms has ‘a direct impact on the way in which family law proceedings are conducted’ and this design forces parties into an inappropriate proximity with other people leading to increased ‘anxiety, tension and has given rise to significant safety issues’.¹⁹ Judges are making decisions in Courts around the country about intimate family issues often in the same room as they are dealing with other matters such as criminal law.²⁰

In 2019 the Houses of the Oireachtas Joint Committee on Justice and Equality Report on Reform of the family Law System stated that the general view amongst stakeholders was that any family law

¹⁷ Council of Europe; *Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice*; p25.

¹⁸ Houses of the Oireachtas Joint Committee on Justice and Equality; Report on Reform of the Family Law System; October 2019;

¹⁹ The Bar of Ireland; ‘Submission by Council of The Bar of Ireland to the Joint Oireachtas Committee on Justice and Equality on the Reform of the Family Law System’;2019; p7.

²⁰ Prof. G Shannon; DCYA; Eleventh Report of the Special Rapporteur on Child Protection; 2018; 72.

system must be equipped to have children involved in proceedings in a meaningful way. The current situation of inadequate facilities, the adversarial nature of proceedings, the legislative gaps, as well as inadequate training for staff, is proving to be a major barrier to the realisation and upholding of the Constitutional Amendment of 2012. Dr Conor O'Mahony has pointed out that the gaps and lack of clarity in the current legislation are problematic:

*"This lack of clarity has potential to pose difficulties. The obligation to facilitate the free expression of the child's views remains, but the absence of clear provisions stipulating how this should happen leaves the door open to nothing happening at all. This is particularly so since the current default in private family law proceedings is that the views of the child are not ascertained. Many judges may not feel qualified to speak to children in chambers, and direct testimony from the witness box will often be inappropriate, given the nature of the proceedings. Rather than granting the court the discretion to appoint an expert and leaving silence on the fall-back position, the better approach would have been for the Act to make the appointment of an expert the default position, with clear stipulations as to the exceptions where this need not occur, and what should happen instead."*²¹

The Child Care Law Reporting Project under Dr. Carol Coulter, as well as work undertaken by Dr Kenneth Burns, Dr Conor O'Mahony and others in University College Cork, has been a great asset in providing much needed insight into the working and decision making process in some of the child care cases before our courts. They have helped catalogue the challenges facing the courts in relation to child care proceedings for example, and have helped create an awareness of the inconsistencies around the country, the adversarial nature of such proceedings, and have repeatedly highlighted the lack of appropriate child friendly physical space for such hearings.

In the example of care proceedings, there is a significant period of time before and after these proceedings, which involves much 'pre-care order' and 'post-care order' work for children to understand the process and the outcome. Any legislative reform must include some mention of these crucial periods of time so that appropriate structures can be put in place to ensure a child involved in proceedings can be adequately and appropriately supported before and after hearings with an appropriate expert such as an independent advocate and/or guardian *ad litem*. This would be a child centred approach and ensure that children are appropriately enabled to participate and understand the proceedings and the outcomes.

EPIC has seen the positive impact of having an Advocate appointed to support children who are involved in court proceedings. As a result, EPIC believes that all children and young people involved in court proceedings should have an independent Advocate appointed to them, even alongside a Guardian *ad Litem*, in order to provide preparatory and post court assistance. This would ensure that the child or young person is better able to articulate their views, wishes and feelings in a supported manner, and has a better understanding of the process. EPIC currently provides such support and often works independently or alongside Guardian *ad litem*s.

Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction is an interesting example to consider, as this article gives a discretion to a court to refuse to return a child to the place of his or her habitual residence if the child objects to being returned and if the child has reached an appropriate age and maturity to take this into account. Article 11(2) of Regulation

²¹ Houses of the Oireachtas Joint Committee on Justice and Equality; Report on Reform of the Family Law System; October 2019; p34/35.

2201/2003 (the Brussels II A Regulation) provides that when applying Articles 12 and 13 of the Hague Convention, a child must be given an opportunity to be heard, unless this is inappropriate having regard to his or her age or degree of maturity. Interestingly, recent guidelines issued by the UK Court of Appeal for Judges hearing children in this context recommend that the role of the judge is to be the passive recipient of the child's views.²² This shows to what extent the voice of the child must be given priority.

Conclusion

The voice of the child should be listened to from the beginning of any process. Children are able to provide valuable insight and articulate their views on matters affecting them. Children have a right to say what they think, have an opinion about decisions that affect them, and have their views taken into account. The role of the independent advocate supports this and this role should be formalised in legislation. Children must be involved in decision making, in line with the UNCRC, and as enshrined in the Constitution. In order for children to have a better understanding of the court case, and to be better able to articulate their views, their voice must be heard in court cases where the decision will impact their future. More resources should be put into enabling and listening to all children, including the use of technology and creative solutions, in court processes. The voice of the child and their wishes must be balanced alongside independent assessments of the child's best interest. The importance and positive effect of direct advocacy support is evidenced through the work of EPIC, for example. All children who require support should be encouraged to access an Advocate. Policies around advocacy and supporting children and young people to participate fully in all decisions affecting them should be standard practice. Any court must also take on board the State's own vision in terms of the children of this State; notably *Better Outcomes, Brighter Future; the national policy framework for children and young people*. This opportunity to reconfigure the infrastructure and values of our family court system are long overdue.

²² Lord Justice Thorpe's Working Party of the Family Justice Council; *Guidelines in relation to Children giving evidence in Family Proceedings*; Available at: www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Children+Giving+Evidence+Guidelines+--+Final+Version.pdf (03/18).
