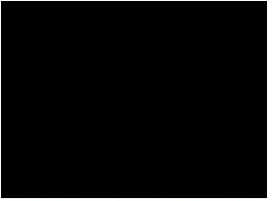




Ms. Oonagh Buckley
Deputy Secretary General
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Re: Family Justice Oversight Group - Phase 1 Consultation

26 February 2021

By Email: FamilyJusticeConsultation@justice.ie

Dear Ms. Buckley

I refer to your letter of 18th December 2020 inviting the Council of The Bar of Ireland to make submissions at the invitation of the Family Justice Oversight Group in relation to the development of a national family justice system. The Council is pleased to make observations and welcomes the opportunity to engage with the Oversight Group on this very important topic.

The Council's response deals with the list of questions/topics enclosed with your correspondence of 18th December at Appendix 1 'Family Justice Oversight Group Consultation Topics - Phase 1 Consultation', and provides some preliminary high-level commentary under each heading.

We understand that the Family Justice Oversight Group will review the submissions received from a wide range of stakeholders and thereafter, begin the process of formulating the policy options for further consideration, research and consultation, as may be appropriate.

It is our expectation that we will have the opportunity to make further submissions and participate in detailed discussions in relation to the policy options that may emerge in due course.

Until such time arises, the Council remains at your disposal should any queries arise in relation to the enclosed submission.

Yours sincerely,

Ciara Murphy

CHIEF EXECUTIVE



THE BAR
OF IRELAND

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Submission by Council of The Bar of Ireland to the Family Justice Oversight Group

Consultation on the development of a national family justice system Phase 1

26 February 2021

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Introduction

The Council of The Bar of Ireland (“the Council”) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

The Council has prepared these submissions at the invitation of the Family Justice Oversight Group which was established by the Department of Justice in September 2020 to agree a high-level vision and key medium and longer-term objectives for the development of a national family justice system.

Scope of Consultation

The Oversight Group has invited submissions on specific topics relevant to family justice which are the focus of the first phase of the Oversight Group’s work. They are:

1. Optimising the delivery of family justice

- The use of modern technology;
- The provision of facilities and supports in the family justice locations.

2. The place of mediation in family justice

- The desirability of using mediation to resolve family law issues;
- Maximising family court users’ understanding of the role mediation can have in settling family disputes;
- Interdisciplinary training in mediation for family justice practitioners;
- 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?

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

- 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?
- 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?
- Legal Aid in family justice - more than legal advice and representation.

4. The Family Courts

- What issues should always be prioritised for hearing?
- 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.).

5. Voice of the Child

- How best to incorporate the voice of the child?
- How can the proposed new system of family justice be made more child friendly?
- How can we keep children informed in the family court system?

The Council's response deals with each of the topics in the order that they appear above and provides some preliminary high-level commentary under each heading. We understand that the Family Justice Oversight Group will review the submissions received from a wide range of stakeholders and thereafter, begin the process of formulating the policy options for further consideration, research and consultation, as may be appropriate.

It is our expectation that we will have the opportunity to make further submissions and participate in detailed discussions in relation to the policy options that may emerge in due course.

1. Optimising the delivery of family justice

The use of modern technology

The [Courts Service Strategic Plan 2021-2023](#), together with its [long-term strategic vision](#) for the digitalisation of justice, aims to fundamentally transform how the Courts Service delivers services by improving access to justice in a modern, digital Ireland. The Council supports the Courts Service in its endeavours to bring new technology and modern ways of working to the administration of justice so that it operates to the highest standard for everyone, from vulnerable court users, witnesses and litigants to judges and legal professionals. In this regard the recent paper by Dr. Rónán Kennedy of NUI Galway entitled "*Algorithms, Big Data and Artificial Intelligence in the Irish Legal Services Market*" offers useful commentary on the role of technology.¹

The Council is particularly cognisant of the needs of vulnerable users and supports greater investment in the use of video link facilities and supports such as induction loop systems. Acoustics generally should be central to any courtroom adaptation or re-design to ensure all parties to proceedings can be adequately heard.

The provision of facilities and supports in family justice locations

Those seeking to resolve family law proceedings are currently faced with wholly unsuitable and inconsistent court facilities, where in some instances, even basic needs are not met. The existing system does not adequately protect the rights of individuals or children participating in family law proceedings, and is inhibiting access to justice for some of the most vulnerable members of our society.

A lack of adequate consultation rooms, separate waiting areas and family-friendly spaces in court venues directly impacts on the manner in which family law proceedings are conducted. These archaic conditions significantly increase stress and anxiety in what are typically very sensitive cases, and this can result in volatility and on occasion violence in the course of family law litigation. A modern,

¹ [Oireachtas Library & Research Service, 2021, L&RS Spotlight: Algorithms, Big Data and Artificial Intelligence in the Irish Legal Services Market](#)

efficient and family-friendly courts infrastructure will undoubtedly improve the experience of family court users and the management of family law applications.

The Government should prioritise the construction of bespoke, regional family law court complexes that are used exclusively for family law hearings and are architecturally tailored to the needs of litigants and the families that are at the centre of the cases.

It is submitted that any proposed division of districts and circuits ought to be carried out by the Courts Service in consultation with Courts Service user groups, including the legal professions (The Bar of Ireland and the Law Society) to ensure a fair, equitable, and logical geographic spread. Many litigants will be impacted by any planned reconfiguration of districts and circuits and practical factors such as travel distances and public transport infrastructure will need to be considered.

Access to local courts must be facilitated in a manner which can meet the reasonable needs of all citizens. Increased travel times and associated transport costs due to a reconfiguration of districts/circuits may affect those who can least afford it as well as those who are already in great distress. It must be remembered that often the most vulnerable members of our society are involved in family and child care proceedings, particularly at District Court level.

A reconfiguration of districts/circuits could effectively frustrate and distance community justice, and thereby restrict the right of access to justice. A broad economic and societal perspective would therefore be necessary, rather than solely an organisational one. An evaluation of catchment areas which takes account of the socio-economic profile of an area, including access to transport infrastructure, would be deemed necessary in that regard.

Reconfiguring districts/circuits could also have a knock-on impact on other key stakeholders, including State Agencies, and thus a 'whole of Government' perspective which preserves access to all of the necessary front line services when it comes to the family justice system is essential.

Until such time that bespoke regional complexes are built, adaptations should be made to existing courthouses as a matter of urgency. To the extent that it is possible, each courthouse should be adapted to create environments that are less austere and intimidating; provide child and family friendly spaces with free tea and coffee making facilities; and suitable spaces where judges can appropriately meet with children in a comfortable environment. For example, there should be comfortable seating that reflects a living room type environment.

The Department of Justice and the Courts Service should adopt a policy that, going forward, every courthouse that is constructed is child and family friendly and will provide warm, secure and relatively private facilities for people to use, with access to a vending machine, water and free tea and coffee making facilities. There should also be a canteen where light meals can be purchased. When constructing new courthouses, the Department of Justice and the Courts Service should furthermore prioritise the inclusion of a larger number of consultations rooms where clients may engage with their legal practitioners in private, particularly cognisant of the need to facilitate safe spaces for women and families who are experiencing domestic violence and abuse situations.

Provision of supports and facilities must extend to all users of the court, including those with a disability. All court venues should include wheelchair ramps, induction loop systems, video link facilities for vulnerable users, and appropriate supports for people with intellectual disabilities. The Public Sector Equality and Human Rights Duty contained within section 42 of the Irish Human Rights and Equality Commission Act 2014, requires public bodies to have regard to the need to promote equality, eliminate discrimination and protect the human rights of staff and service users. This ought to guide the development of any reforms of the court structure and family law system.

The lack of adequate facilities generally for the conduct of family law proceedings has given rise to significant safety issues for members of the public, legal practitioners and the judiciary. A series of very serious security incidents have occurred in recent years. On one occasion, a litigant produced an imitation firearm and a suspect device during a family law hearing in Phoenix House, Dublin, and held a member of the judiciary, a legal practitioner and a litigant hostage. A full security review of all family law court buildings should be undertaken by the Courts Service, and professional advice should be obtained. The Courts Service should comply with that advice and fund suitable arrangements that ensure the security of every courthouse across the country.

2. The place of mediation in family justice

The desirability of using mediation to resolve family law issues

Mediation can present an efficient and cost-effective means of resolving family law matters in particular situations. It can empower parties to contribute to the resolution of disputes and help them arrive at decisions in an amicable fashion. Notwithstanding the many benefits that are said to be attached to mediation, in relative terms the process is still in its infancy and some commentators have detailed difficulties that have arisen.

Hazel Genn, Dean of Law and Professor of Socio-Legal Studies at University College London, described the growth in mediation and the reduction in the number of disputes being decided by the courts as “the privatisation of civil justice”, which raises many rule of law concerns including the loss of valuable judicial precedent. Genn argues that supporters of mediation have promoted mediation as a “central element” of civil justice and have consequently ensured that civil disputes involving legal rights and entitlements are trivialised. Judicial determination, she argues, has been redefined as a failure of the justice system, as opposed to “its heart and essential purpose”. The central tenor of her argument appears to be that if an increasing number of disputes are diverted into private forms of dispute resolution, the law may become stale, and important issues may be untested for longer than is positive for society. This is of particular concern in Ireland where much of family justice is rooted in our Constitution.

The family has a constitutional status in Irish law. In the event of marital breakdown, prior to granting a decree of divorce, one of the pre-conditions that the court must be satisfied of is that proper provision exists or will be made for the spouses and any dependent members of the family. The courts have a constitutional duty to adjudicate on and apply the concept of proper provision having regard to the individual circumstances of a family.

Given the particular dynamics at play in family law proceedings, there will be some cases that may not be suitable for the application of alternative dispute resolution processes, for example situations involving child protection or domestic violence.

As was highlighted by Dr Carol Coulter of the Child Care Law Reporting Project, before the Joint Oireachtas Committee on Justice and Equality in March 2019, *“There is a difference between a dispute involving two private individuals and a situation where the State intervenes in a family to remove parents’ constitutional rights to raise their children, and a child’s constitutional right to be brought up by his or her parents, as happens in child care proceedings. There is a clear imbalance in power between the State and individual parents, and mediation or other forms of alternative dispute resolution may not uphold the individual’s right to fair procedures. When a constitutional right is at stake it is*

particularly important that an individual's right to fair procedures is upheld, including the right to adequate legal representation and to have a hearing before a court".

Public child care cases should be deemed, in general, unsuitable for mediation. However, mediation should be left open as an option (with the benefit of properly resourced legal advice) in areas around voluntary care, access, decisions in respect of children's education or holidays, or medical assessments and treatment.

A further unique challenge that arises both in family and childcare proceedings, which may not often arise in other areas of law, is the constitutional obligation to hear the voice of the child in any decision-making process that might impact upon them. Where there are mechanisms for facilitating this in litigation, the mechanisms by which children can be heard in family and child care proceedings are yet to be fully worked out in the context of mediation. The Mediation Act 2017 provides no such guidance on the issue.

It is important to highlight that the Domestic Violence Act 2018 specifically precludes mediation as a proposed solution. The policy consideration underpinning this is clear – the potential for subversion of the mediation process, leading to further victimisation of the victim and/or dependent children is always present where there is evidence that one partner has already perpetrated abuse. In that instance, clearly the protection of a court order is necessary so that it may be enforced against the perpetrator by An Garda Síochána if necessary.

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

The Mediation Act 2017 places stringent obligations on legal practitioners to make statutory declarations confirming that they have advised separating clients, and divorcing clients, about reconciliation, engaging in mediation, effecting a separation by means of deed or agreement and also, that they have furnished clients with appropriate contact details. Such obligations already existed under the Judicial Separation and Family Law Reform Act, 1989 and the Family Law (Divorce) Act, 1996 but were strengthened by the 2017 Act.

The Legal Aid Board is making significant efforts in promoting family mediation services through its policy of co-locating its law centres and family mediation offices where possible. A joint initiative between the Board and the Courts Service also makes family mediation freely available on site at the District Family Court in Dolphin House in Dublin. There is no requirement for an applicant to meet financial eligibility criteria and there is no charge for the service. Further opportunities to maximise the accessibility of mediation services and information through co-location with Law Centres and courthouses should be encouraged and supported by adequate funding and resources.

Interdisciplinary training in mediation for family justice practitioners

A much more structured and stringent framework of training, accreditation and regulation of mediators and others engaged in alternative dispute resolution should be introduced as a matter of urgency.

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?

It is submitted that where mediation or another alternative dispute resolution process is proposed, this should not be so extensive as to make alternative dispute resolution mandatory. Parties to the

proceedings should be entitled to indicate their agreement/consent with the proposal. Litigants have a constitutional right of access to the courts, thus their consent to engage in an alternative dispute resolution process is imperative, as is their entitlement to object. Where mediation or another alternative dispute resolution process is proposed, there ought to be clearly defined parameters in which to consider its feasibility in each case i.e. cost; party consent; waiting times etc.

Furthermore, having heard several witnesses, the Joint Oireachtas Committee on Justice and Equality concluded in its 2019 report on the reform of the family law system that structures for mediation and resolution of family conflict remain significantly under-resourced, and often people must wait 12-26 weeks for an appointment. Such delays and lengthy waiting times ought to be addressed as a matter of urgency if mediation is to be made a requisite to initiating or progressing family law proceedings.

Information meetings should be funded by the Legal Aid Board where parties meet a certain criteria (but, similarly to the UK, only one party should have to satisfy that criteria in order for both to avail of such meetings). Should parties wish to avail of an alternative dispute resolution process, funding should also be made available to extend the legal aid scheme to ensure that litigants have an appropriate level of advice and/or representation in any alternative dispute resolution process that they may enter into.

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

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 Council shares the view of Dr. Geoffrey Shannon, Special Rapporteur on Child Protection, who highlighted to the Joint Oireachtas Committee on Justice and Equality during its engagement with stakeholders on family law reform in March 2019, that alternative dispute resolution should never be seen as an alternative to legal aid, rather it should *“be seen as a useful alternative mechanism for resolving family law disputes”*.

Non-court based solutions may be suitable in particular situations, and information meetings about alternative dispute resolution processes, which are funded by the Legal Aid Board, should be widely promoted. However, the availability of legal aid has long been recognised as an essential component of ensuring that a person’s constitutional rights of access to the courts and to a fair hearing are given effect to, and that right of access must continue to be upheld. Alternative non-court resolution processes may not uphold an individual’s right to fair procedures, therefore access to adequate legal representation through the provision of legal aid and the right to have a hearing before a court must be equally available.

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?

The Council is considering the possible future use of arbitration as part of the FLAS initiative (Family Law Arbitration Scheme). This is a collaboration between the Chartered Institute of Arbitrators, the Family Lawyers Association, The Bar of Ireland and the Law Society. Its scope would necessarily be addressed within the existing constitutional framework and to areas where its use may be suitable.

It is important to acknowledge that introducing a system of arbitration in the family law context in Ireland may be challenging. For example, unlike our nearest neighbours, the Constitution of Ireland

stipulates that proper provision must be made in the event of a marriage breakdown – the role of adjudicating upon whether this has been achieved is exclusively exercised by the courts. In addition, there can be little doubt that arbitration in family law may have challenges.

Legal Aid in family justice - more than legal advice and representation.

The availability of legal aid to those who cannot afford legal representation is an essential element in the administration of justice in a democratic society. Legal aid has long been recognised as a vital component to ensuring that a person’s constitutional rights of access to the courts and to a fair hearing are given effect to, and that litigation can and (can be seen to) operate on an equality-of-arms basis.

It is clear that the Legal Aid Board requires significant additional resources if a properly functioning civil legal aid system is to be provided. Whilst the Civil Legal Aid Scheme does, in general terms, provide a very good service to its clients in very challenging circumstances, practitioners have, over the years, observed and experienced a number of difficulties across the operation of the Scheme which, in the opinion of the Council are hindering its capacity to provide meaningful legal aid to the most vulnerable sectors of society on a long term and sustainable basis. Many recipients of legal aid are among some of the most vulnerable cohorts of society and their access to the legal system must be supported and protected in the highest possible way.

There is manifest desirability for improvements to the civil legal aid system in Ireland in terms of eligibility and the areas of law to which legal aid applies. In the event that civil legal aid was to be made more widely available this would help, not only to achieve equal access to justice and to secure effective legal representation for all, but also to address the increasing incidence of litigants in person in the Courts. The Courts have increasingly had to determine cases that have (at least) one litigant in person participating. There are a number of reasons behind self-representation but the inability to afford legal representation and non-qualification for legal aid are predominant factors.

As set out under Section 4 of this submission, there should be an urgent move towards an interdisciplinary approach to family law and this should be reflected in the facilities provided in courthouses, including Legal Aid Board Law Centres. A joined up approach is necessary in the delivery of family justice, and the Council would advocate for the coordination and/or co-location of legal aid services and ancillary services such as counselling, parenting supports, and domestic violence supports where possible.

4. The Family Courts

What issues should always be prioritised for hearing?

Every family law case by definition is urgent but below is an indicative list of what, on an objective basis, might require a more immediate hearing:

- Child protection
- Domestic Violence
- Breaches of domestic violence, maintenance, custody and/or access orders
- Child Abduction
- Time sensitive applications

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.)?

There should be an urgent move towards an interdisciplinary approach to family law and this should be reflected in the facilities provided in courthouses. At each family law sitting, domestic violence charities and/or support groups should be available to provide counselling/advice to parties in proceedings (as is the case at Dolphin House). Key services should also be available so that judges can refer parents to skilled personnel to, for example, carry out parenting capacity assessments, draw up parenting plans, assist to restore access orders when they break down, and/or provide anger management programmes to litigants. Access to assessors, such as child psychologists/psychiatrists for the purposes of providing court reports is also an essential requirement. Onsite Legal Aid Board and mediation services should also be provided for, including assistance for lay litigants. Such developments are a vital aspect of ensuring the family law system is fit for purpose, and these facilities should be available as a “one stop shop” under the same roof.

5. Voice of the Child

How best to incorporate the voice of the child?

The Council supports the recommendation of the 2019 Report of the Joint Committee on Justice and Equality that a more structured framework for hearing the voice of the child be put in place to ensure the views of the child are adequately and fairly ascertained.

Notwithstanding the insertion of Article 42A into the Constitution and a number legislative reforms that followed, the right of the child to be heard is not being adequately fulfilled and in many circumstances, not adhered to at all. While this is a problem predominantly in private family law proceedings, as outlined in statistics provided by the Child Care Law Reporting Project, there is a significant geographical disparity in respect of the appointment of guardians ad litem in public childcare proceedings across the country. The current guardian ad litem system, whose role it is to inform the court of any views which the child wishes to express and to advise the court on what, in the Guardian ad litem’s professional opinion, is in the child’s best interests, operates in the absence of regulation.

In the absence of specialist training, judges are not necessarily best placed to determine if the views and wishes expressed by the child are genuinely held. It is imperative that judges assigned to deal with family and child care matters should be given comprehensive training in this regard.

In circumstances where the services of a suitably qualified professional are obtained or court ordered, it is the parties involved in the proceedings who must cover the cost, and the fee for such expertise is often prohibitive for many. The Legal Aid Board will often pay a contribution on behalf of a legally aided person. However often the balance can still prove onerous on the limited financial means of low income families. A dangerous hierarchy of rights thus emerges in terms of access to justice where only those children whose families can afford the expert fee will have their constitutional right to be heard realised.

The recent Guardianship of Infants Act 1964 (Child’s Views Expert) Regulations attempted to address the cost of procuring an expert report under section 32 of the Child and Family Relationships Act 2015 by introducing a maximum fee level. Concerns have been raised however that the maximum level may be too low in certain circumstances and fail to appeal to suitably qualified experts. It is the view of the Council that an urgent review of an increase in the level of fees available to child views experts

engaged in family law proceedings through the Legal Aid Board should be undertaken, with such fees sufficiently covered by the Board for those that need it.

The current framework for ascertaining the views of the child does not comply with the spirit or wording of Article 42A. It is imperative that the constitutional right of the child to be heard in court proceedings is supported by adequate funding, expertise and resources so that no child's right is compromised owing to a lack of means, or indeed a lack of suitably qualified experts willing to carry out the work needed. This must be addressed as a matter of urgency.

The establishment of a guardian ad litem service which would see guardians used in both public and private law proceedings is one potential solution put forward by the Joint Committee in its 2019 Report and is perhaps something that ought to be considered.

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

Until such time that bespoke regional complexes are built that are used exclusively for family law hearings and are architecturally tailored to the needs of the families and children that are at the centre of such cases, each courthouse should be adapted to create environments that are less austere and intimidating; with suitable spaces where judges can appropriately meet with children in a comfortable environment. For example, there should be comfortable seating that reflects a living room type environment. The courtroom itself should also be a child-friendly environment.

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

Judges dealing with family and child care law proceedings should be assisted and supported by liaison officers, as recommended in the Oireachtas Joint Committee on Justice and Equality, Report on Reform of the Family Law System and in the Submission of the Children's Rights Alliance to the said committee. To ensure independence, it is recommended that the Courts Service employ such officers, whose responsibility it would be to provide procedural information and support to children and families during the course of family law proceedings. The liaison officer should be suitably qualified and trained professionals (for example, social workers) and should travel to courthouses wherever the assigned Judge is sitting. They should be provided with the resources needed to carry out their role effectively. Liaison officers should have responsibility for providing adults and children engaged in the family law system with advice and insights in relation to practical and non-legal issues. This service will be particularly useful for lay litigants who do not have the benefit of a legal representative to explain how the courts system operates. A pilot scheme should be introduced at District Court level as a matter of urgency.



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