LAW SOCIETY SUBMISSION

GENERAL SCHEME OF THE FAMILY COURT BILL

SUBMISSION TO THE JOINT OIREACHTAS COMMITTEE ON 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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1. Introduction

The Law Society would like to thank the Committee for the invitation to furnish a written submission on the General Scheme of the Family Court Bill.

Ireland does not yet have a specialised family or children's court system. While such systems are commonplace across Europe and in common law jurisdictions, most cases in Ireland concerning children which require a court adjudication are heard in the general courts system by judges who generally do not specialise in laws concerning children or families. In addition, cases may be heard in buildings which are also used for proceedings concerning minor crime and road traffic offences.[1]

The establishment of a specialised family and children's court system is a recommendation in the Council of Europe guidelines.[2] The publication of the General Scheme is welcomed, but the necessary detail, resources, infrastructure and implementation are now needed in order to make those plans a reality.

Promises of reform in this area date back to the 1970s where the issue of a Family Court was on the agenda of the Law Reform Commission. In the intervening period, we have seen several reports published but little progress made in achieving meaningful change. Very significant progress has been made in introducing legislation to reflect the changing reality of contemporary family life. Unfortunately, this progress has not been matched with the infrastructure which is necessary to support the new legislation. This has left Ireland with first world legislation and third world infrastructure.

In terms of infrastructure, services should be provided in a "one-stop" family hub that would include counselling, mediation, arbitration, services from non-governmental organisations such as One Family, Treoir, Women's Aid, Men's Aid, Rape Crisis Network Ireland, Barnardos, as well as housing dedicated courtrooms to hear family law cases.

In the 1980s, the Probation Service sat in every family law case - but that changed late in the decade as the Probation Service moved to concentrate on criminal law cases. Unfortunately, the HSE was not in a position to fill the void as its staff was not forensically trained. Moreover, the HSE did not have sufficient social workers to undertake the work that had been carried out by the Probation Service in such cases. This left a significant gap in the provision of support services to vulnerable family law clients which has never been filled. This void takes on added significance when one considers the fact that most family law cases involve lay litigants - and that legal aid is not always provided to them. This is of increased concern given the introduction of complex legislation such as the Children and Family Relationships Act 2015 and the Domestic Violence Act 2018.

There needs to be considerable urgency in progressing the Family Court Bill to ensure citizens have access to justice in a uniform manner across the State.

Recommendation

The Law Society believes that a timeline for the commencement of the new reform is highly desirable given that drift has occurred in this area over the last number of decades.

[1] In Dublin, Cork and Limerick District and Circuit Courts, they are heard in separate buildings. The Children Court in the Dublin Metropolitan District is located in Smithfield.
[2] Council of Europe, *Guidelines on Child-Friendly Justice* (2010), at 10.

2. Background, Comparative Overview and Resources

2.1 Law Reform Commission Proposal

The proposal set out by the Law Reform Commission Family Courts Working Group in 1996 recommended the establishment of a two-tier court system: the District Court and the Regional Family Court.

Under this proposal, the lower tier would have some of the jurisdiction the District Court currently has, but that court would not make final orders, as is stated at page 128-129 of the Law Reform Commission's Working Group's Report.

Under the Law Reform Commission's proposal, the jurisdiction of the District Court in family law matters would be limited to the making of emergency orders and interim orders especially in situations of emergency. In all of these matters the jurisdiction of the District Court would be parallel with the jurisdiction of the Regional Family Court. What is envisaged is a system whereby all substantive decisions having long-term effect would be reserved to the Regional Family Court. Any extension of an interim order would be determined in the Regional Family Court.

The proposal was that rather than having the current volume of sittings of the Family District Court (where there are "family law days" in each District, sometimes as infrequently as once per month), there would be more specialised sittings of the Family District Court, which would sit in fewer locations than the current District Court does, but with more frequency. This would have the advantage of being frequent and, even if somewhat more logistically distant than at present, these courts would have a dedicated court, staff, and would have other services available and a specialised judge to hear the case.

The proposed second tier involved the establishment of Regional Family Courts with information centres attached. These were to be the same tier of jurisdiction as the current Circuit Court and were to use specially trained members of the judiciary. It was also recommended that there would be other services which would assist with family breakdown, either on site or close by, which would be connected with the family law courts in a real and meaningful manner.

The Regional Family Court would have jurisdiction on all other issues: separation, divorce, dissolution of civil partnership, cohabitation, cases involving children, Hague and Luxembourg cases, adoption, surrogacy, succession cases, and perhaps cases for children requiring secure care. It was proposed that there would be approximately 15 centres nationwide, and that their location would be proportionate to populations across the country. The judges assigned would be specialised Family Law Judges, provided with training.

The right of appeal from the "Regional Family Court" could be to the High Court, though in some instances it could be to the Court of Appeal.

2.2 Other Jurisdictions

Some states do well in ensuring a specialised judiciary for cases concerning children. In France, judges in child protection cases hold the title of "Judge for Family Affairs" and they are highly specialised and trained in child welfare.[3] This specialist judiciary work closely with

[3] Andy Bilson and Sue White, "Representing Children's Views and Best Interests in Court: An International Comparison" 14 *Child Abuse Review* 220 (2005), at 231-3.

social workers to provide support and advice throughout the legal process and to secure the agreement of all parties.[4] In Belgium, there is a high level of training and specialisation for lawyers in this area. Members of the Flemish Bar Association and its Youth Lawyer Commission must undertake a two-year course to train as a "youth lawyer".[5] The course has training on children's rights and trainee lawyers study child psychology as well as methods of communicating with children. In England and Wales, the Bar Standards Board published a list of competencies in February 2017 which every barrister is expected to have from the outset in order to act in Youth Court proceedings and they must now be registered with the Board as part of the practicing application in order to act as a barrister in the Youth Court. Tunisia has also invested heavily in training child protection representatives in children's rights, collaborating with Belgium and UNICEF and initiating various projects to raise awareness of the 1989 United Nations Convention on the Rights of the Child (CRC).[6]

An analysis of the Family Law Court system in England and Wales and Australia suggests a model which is not overly interwoven with the rest of the Courts System. Managing the "type" of case which goes before each tier of the Court also emerges as a key issue of importance.

2.3 Resources

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.

Systems must be adequately resourced in order to be fit for purpose. A better system will require significant resources, especially at the outset. Systems will require more support professionals and specially trained judges. Good systems and necessary modifications are not cost neutral. Legal aid cuts have had a disproportionate impact on women and children, who are in greatest need of legal aid.[7]

The discourse of a 'cost/benefit' analysis; that is, attempting to ensure that expenditure is perceived to have sufficient (economic) benefits; pervades all discussions of children's services.[8] Although there are already moral and international human rights law obligations to ensure access to good systems and legal aid, there are - in fact - economic benefits to ensuring adequate support in legal proceedings. Cuts to legal aid budgets have led to proceedings which are more drawn-out and more difficult to resolve; where adequate support is lacking. The time constraints faced by professionals actually cost more money in

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[4] *Ibid*.
[5] In 2010, 400 graduated as youth lawyers. Cited in *Listening to Children about Justice*: *Report of the Council of Europe's Consultation with Children on Child-Friendly Justice (*Council of Europe, 2010), at 26.
[6] Representing Children Worldwide, *How Children's Voices are Heard in Protective Proceedings, Tunisia: Summary Analysis*. Available at: http://www.law.yale.edu, Tunisia.
[7] Felicity Kaganas, "Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy" *Journal of Social Welfare and Family Law* (2018), and Mavis Maclean, John Eekelaar and Benoit Bastard, eds., *Delivering Family Justice in the 21st Century* (Hart Publishing, 2015), at 1.
[8] See the many references to cost/benefit analysis in Family Justice Review, *Final Report* (Published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Government, November 2011).

the long run. Kirkman and Melrose outline the challenges faced by social workers when making decisions about children (including time and workload pressures) and receiving information of relatively low quality (which further affects the time and workload issue as much follow-up is needed).[9]

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."

None of these facilities are currently available in any of our Family Courts nor are they provided for in the Bill, although it is acknowledged that these aspects can be developed as part of the work of the Oversight Committee. It would be helpful if the Bill set out some of these key objectives.

Recommendation

Funding should be allocated as a matter of priority and construction commenced on the promised purpose-built family law complex at Hammond Lane.

3. General Scheme of the Family Court Bill

The General Scheme of the Family Court Bill ('the 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 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;

[9] Elspeth Kirkman and Karen Melrose, "Clinical Judgement and Decision-Making in Children's Social Work: An Analysis of the 'Front Door' System" (Department of Education [England and Wales], 2014), at 4-5.

- 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 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.

3.1 Head 5

Head 5 sets out the guiding principles for the establishment of a Family Court. In general, the Society welcomes the principles. It is imperative, where possible, that family law matters are settled by consent or by alternative dispute resolution. That said, mediation is not always possible and does not suit every case. There is, perhaps, an over emphasis on the benefits of mediation. Where one of the parties cannot advocate effectively for whatever reason, mediation simply does not work. Furthermore mediation is not suitable for a domestic violence application because of the risk of a power imbalance.

3.1.1 Alternative dispute resolution (ADR)

ADR is a prominent guiding principle in Head 5. It is a means of reducing the conflict and adversarial nature of family law proceedings. Mediation, for example, is one arena in which 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.[10]

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.[11] It may 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.[12] In England and Wales, separating couples frequently do not want to engage in mediation, opting instead to self-represent in court.[13]

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[10] Law Society of Ireland, *Submission to the Department of Justice, Equality and Defence: Family Law – The Future* (Dublin: Law Society of Ireland, 2014).
[11] Joan Kelly, "Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research" 46 *Family Processes* 35 (2007), at 40.
[12] 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).
[13] Rosemary Hunter, "Inducing Demand for Family Mediation: Before and After LASPO" 39 *Journal of Social Welfare and Family Law* 189 (2017).

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.

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. While they would not furnish legal advice in any specific case, they could usefully provide information on ADR generally.

The Society notes that ADR is to be explored "'only where appropriate" which is important, as stated above, 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 and even before the 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 considered initially as a viable alternative to resolving conflict. Even if it is not a pre-requisite to issuing proceedings, some information or understanding of mediation should be available as part of the system but it has to be a realistic, viable and available option.

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).

Even if mediation is not fully successful, it could be used as a mechanism to narrow the remaining issues outstanding thereby enabling parties to file a "Statement of outstanding issues".

There may be merit in fast tracking mediated cases which would make it more desirable for parties to engage in mediation so that it becomes part of the culture of family law.

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

A balance needs to be struck between providing a more informal/less intimidating process for litigants and ensuring that respect for the court is maintained.[14] In this regard, the litigation umbrella under which our family law system currently operates is unsuitable and

[14] This is captured at subpara 3 of Head 10.

enhances the potential for conflict. A move away from that model is vital and that appears to be reflected in this principle.

It has often been emphasised that the common law adversarial system is highly unsuited for family law cases, as parents are focused on 'winning' and their disputes can be psychologically damaging for themselves and their children.[15] The binary nature of family law processes is also problematic for complex family situations. Children state that it is very important to them to have flexibility built-in to arrangements so that children themselves can seek to change them if they wish.[16] However, children are frequently unable to secure changes to private law arrangements,[17] or to timelines imposed by the courts.

It is unclear whether inquisitorial systems are better for family law and for proceedings concerning children in particular. Those in favour of a more inquisitorial system (for example, the Lord Chief Justice of England and Wales appeared to advocate such a change in 2014) point to decreased bitterness and the potential for economic savings as compelling factors.[18] Those against it say it will not, in fact, save money as more judges will be necessary and that judgments will be delivered less considerately.[19]

Research is needed into whether inquisitorial systems are better for family law and, if so, whether the model could be adopted in Ireland.

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.

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[15] Joan Kelly, "*Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes*: *Current Research and Practice"* 10 *Virginia Journal of Social Policy and the Law* 129 (2002), at 131.

[16] John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" in Philip Alston, ed., *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994), at 42.

[17] Judith Timms, Sue Bailey and June Thoburn, "Children's Views of Decisions Made by the Court: Policy and Practice Issues Arising from the Your Shout Too! Survey" (2008) 14 *Child Care in Practice* 257, at 268.

[18] Owen Bowcott, "Inquisitorial System may be Better for Family and Civil Cases, Says Top Judge" *The Guardian Online* (4 March 2014).

[19] Lorna Borthwick, "Why an Inquisitorial System for Family Courts Won't Work" *Halsburys Law Exchange* (12 March 2014). See also Adrienne Barnett, "Family Law without Lawyers: A Systems Theory Perspective" 39 *Journal of Social Welfare and Family Law* 223 (2017).

3.2 Active case management

The concept of "active case management" as a guiding principle is worthy if it assists in streamlining the court process and, in particular, if it focuses on the needs of children to have matters progressed in a timely manner.

Timetabling and case management decisions must be child-focused and made with explicit reference to the child's needs and timescales. This recommendation should be underpinned by primary legislation as delay and drift have a profound impact on the welfare of children and families. A special case management court may be worthy of consideration.

Case management hearings should take place at the beginning of proceedings in order to set out dates for the filing of papers/documents leading to a final hearing date being assigned at the outset. The Society acknowledges that this may not always be possible but the procedure could include an option to bring an application to extend time in cases where it is reasonable and necessary to do so.

A further option worthy of consideration is that cases could be given specific time slots to avoid a large number of litigants waiting in crowded court houses for prolonged periods.

As part of the Courts Service modernisation programme, e-filing and e-court documents should be actively explored in family law matters to simplify the application/motion process and to minimise costs and time for both the Courts Service and practitioners.

This would result in discontinuing the use of call overs which would be replaced with case management hearings.

There may also be merit in introducing pre-action protocols to ensure that mediation has been attempted where appropriate. Such an innovation would make the application process more user-friendly and accessible to lay litigants.

Recommendation

In addition to each of the above recommendations in respect of case management hearings, dedicated time slots, e-filing/documents and pre-action protocols, the Society recommends inclusion of the following text at Head 5 of the Scheme:

"5(3)(e) In cases involving non-compliance with Court Orders, or concerns where non-compliance might arise, ensure active and regular case management to monitor, and take active steps to ensure, compliance with Court Orders."

The Society recommends introducing a provision for the imposition of a cost sanction for non-compliance with Court Orders.

3.3 Conducting proceedings in a family-friendly way to reduce conflict and minimise costs

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 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 a level of privacy or respect.

It is not appropriate to have family law clients, especially victims of domestic violence or child care clients, waiting in court houses for their case alongside criminal and civil litigation clients. If the State is advocating for a more child-friendly and family focused court experience then listing family law matters in the same court where criminal law matters are being dealt with is entirely inappropriate and not consistent with that aim.

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 matters 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 when there are language barriers as well as providing sufficient private space for parties to consult with their legal representatives.

3.4 Best interests of the child

As with ADR, the best interests of the child and the importance of the voice of the child have been recognised as guiding principles in our current system over the last number of years (and the amendment to best interests being a 'primary' consideration is entirely appropriate) but the extent to which the principle could be reflected in practice has been limited by how the system currently operates and the lack of resources. The current system is not equipped to allow for full implementation of this principle.

A checklist of factors similar to the 11 which are set out in the Guardianship of Infants Act 1964 ('the 1964 Act') should be introduced to provide greater clarity in the application of this principle. In particular, section 63 of the Children and Family Relationships Act 2015 deals with determination, by a court, of what is in the best interests of a child and inserts a new Part V into the 1964 Act.

The 11 factors at section 31(2) of the 1964 Act, to which the court shall have regard in assessing the best interests of a child are:

(a) the benefit to the child of having meaningful relationships with each of his or her parents and with other relatives and persons who are involved in the child's upbringing;

(b) the views of the child;

(c) the physical, physiological and emotional needs of the child;

(d) the history of the child's upbringing and care;

(e) the child's religious, spiritual, cultural and linguistic upbringing and needs;

(f) the child's social, intellectual and educational upbringing and needs;

(g) the child's age and any special characteristics;

(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of family violence and the protection of the child's safety and psychological well-being;

(i) proposals made for the child's custody, care, development and upbringing and for access and contact, having regard to the desirability for parents or guardians to agree proposals and co-operate with each other in relation to them;

(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

(k) the capacity of each person in respect of whom an application is made under the Act to care for and meet the child's needs, to communicate and co-operate on issues relating to the child and to exercise the relevant powers, responsibilities and entitlements to which the application relates.

Recommendation

A checklist of factors similar to the 11 factors set out in section 31 of the 1964 Act should be introduced to provide greater clarity in the application of this principle.

3.5 Child focused – ascertaining 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 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 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 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 Oversight 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. 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 earlier in this submission, 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.

There is a distinct lack of provision in Ireland for hearing children.[20] 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.[21] 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.[22] 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).[23]

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[20] 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.

[21] General Comment No. 12, (2010).

[22] 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).

[23] *Ibid.*

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 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 alone determine 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.

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 here. 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.

In summary, the "voice of the child" is mentioned as a guiding principle in the Scheme but much greater clarity is needed around how this voice can be heard. The Scheme is aspirational in respect of the voice of the child but how will this be resourced and operated in practice? Will we continue with the formulaic type section 32/47 assessments or will we have a hybrid of those assessments and Judges meeting with children (as appropriate)?

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 is 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 this principle.

Child's views experts need to be more accessible. There are many cases where clients simply cannot afford a report. The cost of these reports is a significant burden on the parties who may not be able to afford these costs (typically, section 47 reports can cost thousands of Euros).

The Society is of the view that consideration should be given to a service such as the Cafcass service 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 it 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.

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.

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

3.6 Use of technology

Head 5 should make specific reference to the promotion and use of technology to assist in remote hearings and the e-filing of papers, in particular in respect of centralised Circuit Courts so as to ease the issue of access to those Courts.

For such centralised Courts, there should be a specific intent to reduce, where possible, the requirement for parties to attend in-person, particularly in respect of procedural and similar applications.

It is time 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 while offering appropriate other services.

We believe that such an approach would ultimately save time and money, it 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.

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.[24]

4. Establishment of the District Family Court - Head 6 to 10

4.1 Head 6

Head 6 provides for the establishment of a District Family Court. The consistency provided under this Head (whereby a Judge of the District Family Court has to complete a three-year term of assignment) will be of significant benefit to the practice of family law. Currently in districts where there are travelling Judges, there is a lack of consistency which can regularly require the rehearing of matters. This provision will significantly assist the efficiency of the District Family Court and will reduce time spent in Court. In addition it is welcome that Judges may have to undertake such courses or training as may be required

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

by the Judicial Studies Committee. This provision will be of immense practical importance in ensuring that any Judge appointed is fully trained on the intricacies of family law.

The establishment of a District Family Court needs to be properly resourced, both in terms of infrastructure and of personnel. There are some concerns in respect of access to justice if centralised courts are established around the country. These concerns can be mitigated by giving local District Courts jurisdiction to deal with emergency applications.

The principle of access to justice is recognised as a basic human right in our legal system, our Constitution, the European Convention on Human Rights, and other international instruments. The concept has evolved over time in our justice system.

A democratic nation must provide citizens with a means by which to enforce their rights, entitlements and obligations and to have same enforced against them. However, a functioning justice system requires a reasonable method of accessing that system. Justice cannot be so far removed from the reach of citizens so as to make it prohibitive. This is so in terms of cost, physical and geographical access and access to representatives.

The European Court of Human Rights, in the case of *Ashingdane v. UK*[25] stated that "...a limitation [on access to justice] will not be compatible with Article 6, Paragraph 1 (Art.6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".

Recommendation

The establishment of a District Family Court needs to be properly resourced, both in terms of infrastructure and of personnel. There are some concerns regarding access to justice if centralised courts are established around the country. These concerns can be mitigated by giving local District Courts jurisdiction to deal with emergency applications.

4.2 Head 7 – Creation and alteration of District Family Court districts (divided into "convenient geographic areas")

Although this is not ideal, if consolidating the number of smaller court districts into larger districts means that services can be provided such as mediation, voice of the child/welfare experts/family therapies in a focused, holistic setting, then it may be the best available option. Rather than having numerous court districts that do not provide the services required it would be preferable to have a more centralised court district that does. While resources must of course be considered, it is vital that sufficient regard will also be had to public transport and appropriate waiting facilities.

Currently, family court users may have to wait for 5 to 6 hours for cases to be called on. There is also a lack of private consultation rooms and often instructions are taken outside the court building in full view of the general public. This situation cannot continue. This is particularly so if we are committed to protecting citizens at the most vulnerable time of their lives.

The Society believes that we need to be more creative and ambitious in the services we provide to clients. For example, services such as family therapy or mediation sessions may

[25] 28 May 1985, at 57.

be offered online. Also, the availability of electronic filing of documents and video links for adjournments or call overs may reduce the need for frequent travel.

Mediation services could also have more localised satellite offices so they could be more accessible to court users.

This provision is necessary for the operation of a specialised Family Court subject to there being sufficient districts appointed. It is unrealistic to expect that every provincial Court would become a District Family Court if this is not feasible in terms of resources. That said, the decision surrounding the location of the geographical Districts should, of course, take account of necessary public transport links.

Recommendation

The Society believes that we need to be more creative and ambitious in the services we provide to clients. For example, services such as family therapy or mediation sessions may be offered online. Also, the availability of electronic filing of documents and video links for adjournments/call overs may reduce the need for frequent travel.

The Society believes that the new District and Circuit Court areas should be determined following a consultation process with key stakeholders.

4.3 Head 8

It is interesting to note that jurisdiction can be extended to a district in which a child whose welfare is the subject of the proceedings has, or had, a connection, or a district in which a previous order has been made in the same proceedings. From a practical point of view, this is very much to be welcomed.

Equally, the measures set out at Head 8(2) (which provide that a Judge may make an order outside his/her district where satisfied that the circumstances of the case require such an order be made as a matter of urgency) are helpful from a practical perspective. The provision for the making of Orders outside of the applicable district, or indeed outside of the court, in urgent cases is welcomed as it allows for enhanced access to justice in appropriate situations. The pandemic has very much emphasised the essential nature of the District Court in Family Law cases.

4.4 Head 9 – Sittings of the District Family Courts (i.e. in a different building)

The Society supports this provision which envisages sittings of the District Family Court not only in a different building, which would be the preferred model, but also in a different wing/part of the court building with its own entrance and separate facilities.

Head 9 provides that if not in a different building then the District Family Court would take place on a different day or in a different room. Restructuring of the current court sittings would be required as at present, and particularly during Covid-19, smaller courthouses are not being used and the court is sitting for criminal and civil matters most days of the week. Separate buildings or additions to buildings would be required with separate Judges to undertake the work.

Head 9 and Head 14 both note that family law proceedings should be held in a different building "or a different room" to other court sittings. There is a concern that this provision will facilitate the preservation of the status quo in the event of limited resources being made available to introduce much needed change. This may result in attempts to list Family Law matters separately but the reality is that unless the infrastructure and buildings are developed in some areas, families will not be given the space to deal with matters in a way that respects the sensitive nature of their situation.

It is an important consideration that sittings of the family court are held in a different building or room from that in which sittings of any other Court are held. Unfortunately, it is not unusual, particularly in provincial courts, that crime and family sittings would take place at the same time/venue which cannot continue if we are to provide a humane response to citizens at a vulnerable time in their lives.

Subhead 3 makes provision for one of the most important improvements envisaged under the new family law system; the physical separation of the family courts from all other courts and court business. Clearly, separate district family court buildings would be preferable but resources may mean that a separate day will be the reality for many districts.

4.5 Head 10

There is a concern around the capacity of the District Court to hear matrimonial proceedings and the Society believes it would be more efficient if such proceedings were retained in the Circuit and High Court.

The Society notes that the District Court is to have jurisdiction over all other family law matters with the option for the court (of its own motion or on application by either party) to transfer complex cases to the Circuit Court even if the court of origin is the District Court.

5. Heads 11 – 15: Establishment of the Circuit Family Court

Heads 11 to 15 deal with matters relevant to the establishment, jurisdiction, sittings and proceedings of the Circuit Family Court. The Society welcomes this provision subject to the below observations. In particular, clarity is needed between cases originating in the District Court and Circuit Court.

5.1 Head 12 - Creation and alteration of Circuit Family Court circuits

The same comments apply as per Head 7.

5.2 Head 13

The same comments apply as per Head 8.

5.3 Head 14

The same comments apply as per Head 9.

5.4 Head 15 - Proceedings in the Circuit Family Court

The same comments apply as per Head 10.

5.5 Heads 16 and 17

Heads 16 and 17 deal with the establishment, constitution and jurisdiction of the Family High Court.

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''.[26]

Recommendation

The current jurisdiction of the High Court in family law matters should be retained.

6. Head 18 – establishment of a new Family Law Rules Committee

The Society welcomes the establishment of a new Family Law Rules Committee ('the Committee') to assist in overhauling the court procedures and forms. This is an important provision which should assist in ensuring rules are coherently and consistently applied in all courts throughout the country. A streamlined application of the rules is long overdue.

The work of the Committee will have a profound impact on how the family court system operates day-to-day. Any jurisdictional reorganisation should complement the procedural overhaul to be undertaken by the Committee. The potential for improvement of the family law system through the work of the Committee in terms of accessibility, efficiency, potential for early resolution, minimisation of potential for conflict and reduction of costs, cannot be overstated.

[26] See para 1.04 - 1.14 of the LRC Consultation Paper on the Family Court in 1994. The Courts Act 1981 reduced the need for the High Court to deal with family law matters requiring the High Court to deal with such cases only where it is satisfied that in a particular case there is a serious danger that justice will not be done if the Court declines to exercise jurisdiction.

Recommendation

The Society believes the Family Law Rules Committee should consider, as a matter of priority, the development of e-filing infrastructure and the use of technology for remote hearings for case management matters. As mentioned previously, this recommendation takes on an added impetus in the context of the (previously mentioned) two EU Regulations which will become binding in July 2022 and will make e-filing the norm in cross-border child and family law cases.[27]

The Society is of the view that the work of the Committee will be pivotal in determining the success of the proposed family court system. In this regard, the composition of the Family Law Rules Committee should be expanded to meet the increased demands that will be imposed on the Committee.

7. Part 3 – Jurisdiction

The diminution of the jurisdiction of the High Court is a matter of profound concern. The removal of the concurrent jurisdiction of the High Court in private family law matters will have far-reaching consequences and negatively impact on the development of family law, in terms of written judgments. The Society believes that the High Court operates very efficiently and the weekly housekeeping list allows matters to progress in an efficient manner. There is consistency, in that there is a sitting Judge with a support Judge, which provides a certain predictability as to outcomes which, in turn, informs decisions and often assists in the early resolution of cases.

There must be consistency and clarity on the jurisdiction of each court in private family law matters. In this regard, under the Scheme, nullity cases are not transferred to the District Court while separation and divorce matters can originate in the District Court. It is difficult to envisage how a District Court could afford the time necessary to deal with contested hearings for separation and divorce while simultaneously dealing with the usual District Court applications concerning access, maintenance, guardianship and domestic violence. This could lead to a delay in the progress of cases which usually fall under the remit of the District Court.

The Society is concerned about expanding the jurisdiction of the District Court due to the volume of cases currently before the District Family Court in comparison with the Circuit Court and High Court. There are also more profound concerns with expanding the jurisdiction of the District Court which were set out by the Law Reform Commission in its *Report on the Family Courts* 1996 at paragraph 4.19, page 29:

> "[F]undamental issues relating to the status of persons are not appropriate for determination at District Court level. Some further explanation is required. It was not intended to suggest that District Judges lack the qualifications or capacity to make such decisions. Indeed it is important to recognise that, in the context of child protection and domestic violence, the District Court already has powers to make far-reaching decisions which may indeed have a fundamental and long-term impact on family members and their relationships. However, we remain of the view that, as long as the District Court remains a court of "summary

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

jurisdiction" with considerable limitations in its jurisdiction generally (i.e. not only in relation to family law), it would appear, to say the least anomalous to confer upon it a comprehensive family law jurisdiction. Further, given the status and the high level of protection guaranteed to the family and its members, especially under Articles 41 and 42 of the Constitution, it would be objectionable to confer a comprehensive jurisdiction in respect of family law matters on a court of summary jurisdiction. On the other hand, it should be noted that the legislature has already gone far in the extent of the family law jurisdiction which it has conferred on the District Court."

Recommendation

The current jurisdiction of the District Court in family law matters should not be extended.

7.1 Head 19

Much greater clarity is needed on the criteria for commencing proceedings in both the District Court and Circuit Court. There are many instances where cases can be transferred upwards or remitted downwards.

It is not clear from the Scheme whether, in circumstances where a case has been transferred from the Circuit Court to the District Court, there is a power to vary a previous order made by the Circuit Court? While clearly a District Court cannot vary a Circuit Court Order, under the transfer of proceedings this may have practical implications and could lead to difficulties.

While the provision includes helpful practical considerations such as the transfer of proceedings to the Circuit Court (due to the complexity of the issues and value of land), the Society believes that the District Court jurisdiction should not be extended.

Recommendation

Much greater clarity is needed on the criteria for commencing proceedings in both the District Court and Circuit Court.

Provision should be made whereby an application can be made, in exceptional cases, to transfer cases from the District Court and/or Circuit Court to the High Court.

7.2 Heads 25, 28, 29 and 32

There should not be any extension of the jurisdiction of the District Court but this is particular so in relation to Judicial Separation, Divorce, Cohabitation and Civil Partnership cases for the reasons set out above.

7.3 Head 30 – Hague Convention

The role of the High Court should be clarified in respect of cases under the Protection of Children (Hague Convention) Act 2000. Cases under the 1980 Hague Convention (i.e. child abduction) and the 1993 Hague Convention (i.e. adoption) are normally dealt with in the High Court.

8. Further Recommendations

The 2019 Report recommended the employment of specialist child court liaison officers to provide procedural information and support to children and families during the course of family law proceedings. This aspect is not covered by the Bill.

General Recommendations

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, law, education, guardians *ad litem* and social services.

Restructuring of the family law court without the involvement and promotion of a system of interdisciplinary information-sharing would not achieve the objective of meeting the particular needs of the users of the family court structure.

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.

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.

The key ancillary services referred to earlier in this submission are an essential part of any new family law court system and the success of this approach, when 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.

9. Conclusion

Ireland must invest the resources necessary to ensure that its family courts system is fit for purpose.

It should not only meet the requirements of the Convention on the Rights of the Child, the Council of Europe guidelines and other international standards, it should lead the global inclination in favour of specialised family law systems and ensure to involve children in proceedings which affect them.

We hope that the Committee finds these views and recommendations to be helpful and will be glad to further discuss any of the matters raised.

For further information please contact:

Fiona Cullen

Public and Government Affairs Manager

Law Society of Ireland

Blackhall Place

Dublin 7

Tel: 353 1 6724800

Email: f.cullen@lawsociety.ie