



*Law Society of Ireland*

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Submission to the Department of  
Justice, Equality and Defence  
**Family Law – The Future**

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## Acknowledgements

The Law Society of Ireland (hereinafter referred to as 'the Society') has prepared this submission in response to a request by the Minister for Justice, Equality and Defence, Alan Shatter TD.

The purpose of this submission is to discuss the potential effects emanating from the Department's proposed referendum in 2014 to establish a new Family Court.

The Family and Child Law Committee is a non-standing committee of the Society. The remit of the Committee encompasses establishing standards for and providing information and guidance to the profession.

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The Committee wish to acknowledge the sterling work of Dr. Geoffrey Shannon who compiled this report, having received input, feedback and the views of the Committee.

# Executive Summary

## Introduction

This submission provides an overview of the family courts in Ireland. It considers reform of the family courts and identifies the need for the establishment of a specialised family courts structure. We currently do not have a formal family court structure *per se*. Family law cases are dealt with throughout the court system although most are heard in the District and Circuit Courts.

The establishment of specialised family courts is a long standing recommendation of many reports dating back to 1996, when the Law Reform Commission<sup>1</sup> recommended reform of the courts structure and suggested unifying jurisdictions and establishing regional courts presided over by judges with appropriate expertise and experience.

Further recommendations for the establishment of a separate family courts structure can be found in the Working Group on a Courts Commission (the Denham Commission), which reported in 1998. The Family Law Reporting Project recommended, *inter alia*, the establishment of a family court division of the Circuit Court.

## Current Structure

The existing court structure is examined in this submission and the jurisdictional limitations and inconsistencies of the various family courts are identified. For example, the Civil Partnership and Certain Rights and Obligations of Co-Habitants Act, 2010 (“the 2010 Act”) provides that civil partners and qualified co-habitants can apply for a broader set of reliefs in the District Court than those that are available to a married couple.

The difficulties within the existing court structure are identified, such as excessive case-loads and consequential delay, inadequate facilities given the confidential nature of family law cases as well as the difficulties facing judges.

## The Conduct of Family Law Cases

The conduct of family law cases and the costs involved in these proceedings are examined. The fact that there are generally few costs awards against parties in a family dispute is analysed and it is suggested that this can lead to a situation where parties engage in delaying tactics and unmeritorious applications. This is, in large part, due to the fact that there is no cost orders deterrent, as would be the case in other forms of litigation.

## Children in Family Law Proceedings

The Constitutional referendum of 2012 provided for the voice of the child to be heard in certain family law proceedings. An overview of the legislative provisions under which the voice of the child is currently heard is set out in this submission and other methods of hearing the voice of the child in the judicial process are explored.

The role of the guardian *ad litem* in public law proceedings is examined, as well as the potential to make use of this service in private law proceedings.

## Alternative Dispute Resolution (ADR)

The manner in which Alternative Dispute Resolution (ADR) could be embedded into the Irish family courts and the types of ADR which might be suitable in Ireland are examined. Comparisons are made with other jurisdictions which have successfully adopted ADR processes in relation to family law cases.

## Proposed Reforms

This submission calls for the establishment of a specialised court structure. It outlines the manner in which such a structure would operate with judges with specific training, certain courts of limited jurisdiction and other courts of unlimited jurisdiction, a less adversarial approach to proceedings and other mechanisms that would enable a more efficient and skilled disposal of family law cases.

A comprehensive review of the Family Justice Service Review in the United Kingdom is set out as a possible blueprint for how Ireland might structure its specialised family law court system.

<sup>1</sup> Law Reform Commission Report on Family Courts (LRC52- 1996).

# CHAPTER 1: INTRODUCTION

## Introduction

**1.1–01** Ireland does not have a family courts structure *per se*. Family law cases are presently dealt with primarily by the District and Circuit Courts, with the possibility of appeal to the High Court. Outside Dublin, such cases are heard on particular days in the general Circuit and District courts. Outside Dublin, therefore, judges do not specialise in family law, but instead preside in such cases as the necessity arises. Delay is also a feature in family law, which is particularly problematic in cases concerning children, and may breach the right to a fair trial within a reasonable period of time under Article 6 of the ECHR. There have been numerous findings against Ireland on this basis recently.<sup>2</sup>

**1.1–02** The Minister for Justice, Equality and Defence, Alan Shatter TD, has raised the possibility of establishing a specialised family courts structure,<sup>3</sup> as has the Chief Justice, Mrs. Justice Susan Denham.

**1.1–03** Chief Justice Denham has recommended a constitutional amendment to enable the establishment of specialist superior courts, including courts which would deal with family law. In a paper given on the 75th anniversary of the Constitution, the Chief Justice referred to the establishment of specialist family courts:<sup>4</sup>

*“Over the last twenty years there has been, and there continues to be, a growth in the volume and complexity of family law cases. These cases require specialist knowledge and skill in a specialist family court structure, whereby issues arising in family law cases could be addressed in a holistic manner, as appropriate, including access to mediation and to other forms of support.”*

## Is A Referendum Necessary?

**1.1–04** The question as to whether there is a need to hold a referendum to amend the Constitution in order that a separate Family Court structure can be established was discussed at a seminar hosted by the Minister for Justice, Equality and Defence, Alan Shatter TD, on the 6th of July. The Society is of the opinion that there would be considerable benefit in holding any such referendum, not least because the people will have an opportunity to support or oppose the proposed amendment. A referendum would also increase the public’s awareness of this area of law. It should stimulate debate as to the sensitivities, complexities, issues and flaws apparent in the present system and the need for reform. In addition a Constitutional referendum would lead to certainty and clarity into the future about the need for and the basis of a separate family and child justice system. It is imperative that we have a system that will not be vulnerable to upheaval on a change of government.

**1.1–05** The Programme for Government 2011-2016 commits to the introduction of a constitutional amendment to allow for the establishment of a distinct and separate system of family courts to streamline family law court processes and make them more efficient and less costly, as soon as resources permit.<sup>5</sup> The Minister for Justice, Equality and Defence, Alan Shatter TD, has announced that a referendum to establish a new family court may be held.<sup>6</sup> Regardless of whether or not a referendum is held, it is vital that there would be a policy discussion as to the nature of the court structures which are appropriate to dealing with family law disputes.

## Reviews of Reports Relating to Family Courts in Ireland

**1.2–01** The Law Reform Commission published a Report on Family Courts in 1996 and identified a “system in crisis”. Much has changed, yet little has changed. Many of the recommendations remain relevant – reforming the court structure by unifying jurisdictions and establishing regional courts presided over by judges with appropriate expertise and experience; access to information, advice and mediation; case management; judicial studies and representation of children and their views.

**1.2–02** The Chief Justice chaired the Working Group on a Courts Commission (the Denham Commission) which reported in 1998. This also recommended the establishment of a separate division of regionalised Family Courts; appropriate staffing and venues with relevant support services.

**1.2–03** The Courts Service Board decided in 2006 to invite proposals for the provision of a Family Law Reporting Service on a pilot basis for a twelve month initial period. Dr. Carol Coulter carried out this work and her terms of reference were extended to include consideration of the family law system as a whole. The first four recommendations of her report relate to the establishment of a family court division of the Circuit Court, based on a network of regional courts and the intro-

<sup>2</sup> Michael Farrell, *Justice Delayed: Decisions against Ireland at the European Court of Human Rights* (Public Interest Law Alliance, 2012).

<sup>3</sup> ‘Reforming the courts’ *The Irish Times*, 19 July 2012.

<sup>4</sup> ‘Some thoughts on the Constitution of Ireland at 75’, lecture by the Honorable Mrs. Justice Susan Denham, Chief Justice, Royal Irish Academy, June, 2012.

<sup>5</sup> Speech by the Minister for Justice, Equality and Defence, Alan Shatter TD at the Seminar on Constitutional Reform relating to the Courts, 2<sup>nd</sup> March, 2013.

<sup>6</sup> ‘Referendum to establish family court to be held next year’, *The Irish Times*, 7 July, 2013.



duction of compulsory mediation prior to litigation, with provision for the separate listing and ruling of cases ending in a mediated settlement. In addition she recommends:

- Establishing a panel of District and Circuit Court Judges with a special interest in family law cases to be deployed on a rotating basis to hear such cases;
- Publication of comprehensive information on remedies in family law cases; implementation of a uniform policy for Courts Service staff on assisting litigants in completing family law application forms; provision of information advising lay litigants how to make and respond to family law applications;
- Requiring parties to undertake mediation sessions prior to litigation;
- Expansion of the Family Mediation Service and closer liaison with courts, and greater use of collaborative law;
- A recommendation that the Rules Committees redraft the template for the initiating document in family law proceedings;
- Allocation of judges for family law lists based on the waiting times in each County, and allocation of judges to family law lists to ensure judicial continuity in dealing with cases;
- Establishing separate lists for uncontested cases;
- A recommendation that county registrars should adopt a uniform policy on length of court day and adopt case progression as soon as Rules of Court are in place;
- Consideration being given to making costs orders and interim orders capable of immediate execution to reduce delays;
- Obtaining advice on best practice for obtaining the views of children and securing the welfare of children in family law disputes;
- Liaison with relevant external agencies to ensure parties to family law disputes have access to appropriate ancillary services;
- Considering mechanisms for recording and compiling District Court jurisprudence in family law cases<sup>7</sup>;
- Introduction of a Practice Direction requiring all Judges to seek an indication of the fees payable in family law cases before making a financial order;
- The abolition or expansion of income limits for eligibility for civil legal aid in family law cases.

**1.2-04** Further recommendations were made in respect of judicial training in family and child law and enhancement of the civil legal aid service.

**1.2-05** The Courts Service Family Law Reporting Project Committee considered Dr. Coulter's recommendations, consulted with judges and issued a detailed response which is set out in full in its report, having identified the following as the most ambitious recommendations:

- Arrangements for reporting family law cases and providing information about family law courts generally;<sup>8</sup>
- The creation of a family court division of the Circuit Court, based on a network of regional courts;
- The introduction of case management and case progression and the allocation of Circuit and District Court Judges for family law lists;
- The significant development in conflict resolution models which offer many challenging opportunities for family law matters, including options such as mediation, collaborative law and case progression;
- Obtaining the views of children and securing their welfare in family law matters.

<sup>7</sup> This has already been commenced in relation to child care decisions from the District Court, which are now published on the courts.ie website. Decisions from the child care courts are also being reported by the Child Care Law Reporting Project.

<sup>8</sup> See Courts and Civil Law (Miscellaneous Provisions) Act 2013. This Act will allow for the reporting of family law cases subject to the restrictions set out in Section 5 thereof. As a result of this provision, the public will be able to see what happens behind previously closed doors which, in the event of perceived wrongs, can help individuals challenge unfavorable decisions.

## CHAPTER 2: CURRENT STRUCTURE

### 2.1 Existing Court Structure

**2.1-01** As with other forms of civil litigation, what may be termed “private” family law proceedings are dealt with in the District Court, Circuit Court and High Court. Proceedings in relation to child care proceedings (sometimes termed “public” family law proceedings), are dealt with separately in this submission.

**2.1-02** Cases dealing with judicial separation, divorce and nullity must be brought either in the Circuit Court or the High Court. Applications under the Adoptions Acts and cases of child abduction (under the Hague Convention and Brussels Regulation) must be brought in the High Court as well as any application for a Special Care Order. Proceedings between civil partners and co-habitants on foot of the Civil Partnership and Certain Rights and Obligations of Co-Habitants Acts, 2010 (“the 2010 Act”), are brought in the District, Circuit or High Court, subject to certain limitations in relation to what may be dealt with in the District Court.

**2.1-03** In respect of any Orders made in the District Court, there is a right of appeal and a right to a full re-hearing in the Circuit Court. In relation to any Orders made in the Circuit Court, there is a general right of appeal and a right to a full re-hearing in the High Court.

**2.1-04** The jurisdictions of the various courts may be summarised generally as follows:-

| Court                 | Primary Areas of Jurisdiction  |
|-----------------------|--|
| <b>District Court</b> | <ul style="list-style-type: none"><li>• Applications under domestic violence legislation, specifically Barring Orders (interim and full), Safety and Protection Orders.</li><li>• Applications for maintenance.</li><li>• Custody, access and guardianship in respect of children (both marital and non-marital).</li><li>• Applications for court orders re welfare of children under s.11 of 1964 Act e.g re medical procedures/religious events or education, moving away applications dispensing with consent for signing of passports.</li><li>• Application by civil partners and qualified co-habitants for certain reliefs under the 2010 Act.</li></ul>   |
| <b>Circuit Court</b>  | <ul style="list-style-type: none"><li>• Appeals from the District Court.</li><li>• Concurrent jurisdiction with the High Court in respect of applications for judicial separation, divorce and nullity.</li><li>• Concurrent jurisdiction with the High Court in respect of applications by civil partners and qualified co-habitants under the 2010 Act.</li><li>• Concurrent jurisdiction with the District Court in relation to applications under domestic violence and maintenance legislation and issues affecting the welfare of children.</li><li>• Applications by civil partners and co-habitants under the 2010 Act.</li><li>• Applications where there has been less than 3 months notification to the Registrar pre marriage.</li></ul> |
| <b>High Court</b>     | <ul style="list-style-type: none"><li>• Appeals from the Circuit Court.</li><li>• Special care cases.</li><li>• Applications for judicial separation, divorce and nullity.</li><li>• Applications by civil partners and qualified co-habitants under the 2010 Act.</li><li>• Applications under the Adoption Acts.</li><li>• Applications in respect of child abduction.</li><li>• Cases stated from the lower Courts for interpretation on matters of law.</li><li>• Judicial Review in respect of the lower Courts.</li></ul>  |
| <b>Supreme Court</b>  | <ul style="list-style-type: none"><li>• Appeals on matters of law from the High Court.</li></ul>   |

**2.1-05** In overall terms, it can be argued that there is no clear coherent approach in terms of which court(s) should have jurisdiction to deal with differing types of family law cases. There is a view that Child Care Orders have such profound implications for parents and children that these cases merit a High Court hearing.



**2.1-06** Further difficulties arise where Orders are made in one court (typically maintenance or access Orders) but where it may be financially more prudent that any potential variation of those Orders would be made in a lower court. At present the rules do not permit a lower court to vary Orders made in a higher court, even if the parties are agreeable to the lower court having jurisdiction.

## **2.2 District Court**

**2.2-01** The District Court can only deal with a limited number of issues which may affect separating marital couples, primarily maintenance, issues affecting the welfare of children (custody, access and guardianship) and domestic violence. These are dealt with by way of separate and distinct applications to the court. The District Court cannot deal with a wider range of financial issues which may affect separating marital couples, such as property, pensions, succession rights etc. However, even in cases involving marital couples, it may be appropriate to bring those dealings in the District Court to address specific issues rather than to bring elaborate proceedings for judicial separation or divorce.

**2.2-02** Interestingly, the 2010 Act provides that civil partners and qualified co-habitants may apply in the District Court for a broader set of reliefs other than those that are available to married couples or couples who do not come within the definition of a qualified co-habitant. In all cases the District Court has jurisdiction to deal with maintenance applications. However in respect of civil partners, subject to certain limitations, the District Court has jurisdiction to deal with proceedings under Part 4 of the 2010 Act which relate to the protection of a shared home. In relation to qualified co-habitants, subject to certain limitations, the District Court has concurrent jurisdiction with the High Court to hear and determine applications for redress referred to in Section 173 of the 2010 Act which provides for application for redress by qualified co-habitants under various other sections of the Act (including the Property Adjustment Orders, Compensatory Maintenance Orders and Pension Adjustment Orders).

**2.2-03** The primary advantage of the District Court, as it currently operates, is that it provides a simpler and therefore, cheaper, manner of addressing certain disputes between separating couples. To initiate an application in the District Court, it generally requires the completion of a one-page form and is therefore procedurally less cumbersome than procedures in the Circuit or High Courts. With the exception of child care cases, applications to the District Court tend, in the main, to be dealt with on the initial hearing date given when the application is made.

In summary, the District Court is a more accessible court as it is more timely than the higher courts and has local and limited jurisdiction.

**2.2-04** Difficulties with the District Court include:

1. There are infrequent hearings in some parts of the country e.g. once monthly in many venues.
2. Excessive case-loads - this is particularly acute outside Dublin where a list of 100 cases on any given day is not unknown.
3. Inadequate hearings - excessive case-loads inevitably give rise to complaints that judges cannot or do not allocate sufficient time for the proper hearing of cases resulting in frustration for legal representatives and parties at best and at worst decisions which are unfair and/or may be materially adverse to the welfare of children.
4. Significant inconsistency in decisions - this is generally attributed to lack of transparency in the family law proceedings due to the *in camera* rule but is also significantly attributable to the lack of judicial training. This is compounded by a paucity of written judgments (however short) as a guide to decision making by judges. That said, the Society welcomes the initiative by the President of the District Court to publish child care cases.
5. Inability to manage high conflict cases - this is more acute outside the major cities, and in particular Dublin, but is also a problem the Dublin District Court encounters which has sittings on a daily basis. Adjournments in the District Court tend to be for longer periods (e.g., several weeks up to several months) as opposed to shorter adjournments which may be required to actively manage such cases.
6. Case load and approach of judges - other than the limited number of District Court Judges dealing full time with family law matters, most District Court Judges deal with different types of cases, in particular criminal matters. Very often criminal matters are given priority over family law matters with both cases listed on the same day before the court. This is most unsatisfactory for family law litigants. Furthermore the approach of some judges to family law cases is not appropriate. This may partly be caused by a considerable workload but also by judges switching from dealing with other civil law and criminal cases to family law matters.
7. Inadequate facilities, in particular consultation rooms, often results in consultations between lawyers and clients oc-

curing in corridors, outside the courthouses, etc. To some considerable extent, the situation that prevails can serve to undermine the *in camera* nature of the proceedings

8. Inadequate support services for judges, e.g. access to mediation services, etc.
9. Inability of District Court Judges to order social reports in respect of the welfare of children. While District Court Judges can order reports pursuant to Section 20 of the Child Care Act, 1991, such reports should only be ordered in circumstances where the Judge believes there is a possibility that Care Orders may ultimately be required. Previously District Judges interpreted this provision very widely. More recent practice is to restrict the ordering of Section 20 reports, not least because of the lack of capacity of the HSE to prepare such reports. District Court Judges do not have the power (available in the Circuit and High Courts) to order reports in relation to children pursuant to Section 47 of the Family Law Act, 1995. This deficit in jurisdiction will become increasingly problematic in giving effect to the constitutional amendment regarding the hearing of the voice of the child in all family law proceedings. Previously Probation Officers produced reports which were of enormous value to the Judge and the parties and, very often, provided the basis for settlement talks

**2.2-05** Notwithstanding the difficulties outlined above, it is clear that the District Court, as currently constituted, provides an essential function to deal with less complex family law disputes in a relatively efficient and cost effective manner. Furthermore preliminary evidence from the District and Circuit Court pilot mediation projects may suggest that the District Court offers possible litigants easier access to the mediation route as opposed to the Circuit Court, as matters currently stand.

**2.2-06** It is arguable that the jurisdiction of a newly established District Court could be extended in relation to other family law disputes, where appropriate.

### **2.3 The Circuit Court**

**2.3-01** The Circuit Court has greater and more regionalised jurisdiction. The main components are as follows:

1. Location - Circuit Court proceedings may be brought in the County where either party to the proceedings ordinarily resides or carries on any profession, business or occupation.
2. Monetary Limitation - The rateable valuation of any property relevant in the proceedings cannot exceed €253.95. The monetary limitation of the Circuit Court generally was extended from a limitation of €38,092.14 to claims not exceeding €75,000 by the Courts and Civil Law (Miscellaneous Provisions) Act, 2003 (s.14) but this amending section is not yet in force. The Civil Liability and Courts Act 2004, sections 50-52, removes the notion of rateable valuation from the Family Law legislation as limitations and substitutes the notion of a market value not exceeding €3,000,000.00. However, this part of the Act is not in force yet and the old reference to rateable valuation or claims not exceeding €38,092.14 is still appropriate. The financial limitation may be waived on consent of the parties and invariably this monetary limitation is not considered and cases involving assets of considerable value are dealt with in the Circuit Family Law Court.

**2.3-02** Unlike other family law proceedings in the District Court, judicial separation and divorce proceedings encompass and can address all matters arising from marital breakdown. In addition to being able to grant a judicial separation or divorce, the Circuit Court has unfettered discretion to make ancillary relief orders in relation to all financial matters, including all property and other assets of the parties. The Circuit Court has similar powers in respect of proceedings arising from the dissolution of civil partnerships and applications for relief by qualified cohabitants.

**2.3-03** In cases where the Applicant has obtained legal aid for an application for Judicial Separation or Divorce, there is a requirement under the Civil Legal Aid Act, 1995 that the case be brought in the lowest level of jurisdiction which would generally be the Circuit Court. However, if an Applicant qualifies for civil legal aid, it is difficult to imagine that the assets in such a case would justify bringing an application in the High Court.

**2.3-04** Difficulties with the Circuit Court replicate some of those in the District Court and include: -

1. Delays - other than in the Dublin Circuit Court which generally speaking has three permanent sitting judges, Circuit Court judges generally sit "on circuit" which involves attending different courthouses within the Circuit on different weeks throughout the year. This can result in significant delays in cases being efficiently managed to conclusion. The Courts Service Annual Report for 2012 identifies specific waiting times.
2. Excessive case loads - this is particularly acute outside Dublin. More recently the practice in some circuits has been to list cases on a weekly rollover. This results in a lengthy list, often in excess of sixty cases, which are listed on a

Tuesday of a given 'family law' week and each case rolls over during the week unless and until disposed of by the Friday. While this practice may be useful in trying to deal with a backlog of cases in Circuits outside of Dublin, it places a considerable burden on both parties and practitioners.

3. Significant inconsistency in decisions - this may be caused by similar factors to those that pertain in the District Court. It is clear to practitioners that different judges approach cases in very differing ways. While this is not uncommon in all areas of law and it perhaps to be expected within the discretionary model of our family law legislation, it is nonetheless regrettable that the 'spectrum' of decisions is so wide. In addition there tends to be small variations in the procedural approach of different judges which can cause problems for practitioners and ultimately for the client.
4. A corollary to judicial inconsistency is the lack of written judgments emanating from the Circuit Court. In circumstances where the overwhelming majority of cases of judicial separation and divorce are dealt with in the Circuit Court, it is disappointing that many judges are not in a position to provide written judgments setting out the Orders being made and the reasoning for those Orders. It would greatly assist if concise reasoned judgments were to be provided in appropriate cases. It is submitted that providing short written judgments in a limited number of cases of general interest would not add any significant additional burden to Circuit Court judges.
5. Inability to manage high conflict cases - this is again more acute outside Dublin in particular. Given the current delays and the rotation of judges on Circuit, cases may be allocated between numerous judges with consequent difficulties in terms of a lack of continuity of decision making. The aptitude and training of judges hearing such cases is again a crucial factor.
6. Approach of judges - the system reflects differing levels of interest, aptitude and suitability to hear family law cases.
7. Inadequate facilities and inadequate support services for judges - similar issues as arise in the District Court, but again perhaps not as acute as in some District Courts.

**2.3-05** The Circuit Court deals with the vast majority of judicial separation and divorce proceedings and is likely also to deal with the majority of proceedings arising from the dissolution of civil partnerships. As compared to the High Court, it provides a more cost effective arena for the resolution of more complex family law disputes.

## **2.4 The High Court**

**2.4-01** The High Court has unlimited jurisdiction to deal with all judicial separation and divorce cases, and proceedings under the 2010 Act. However as with any court proceedings, the default position is that proceedings should be brought in a lower court, where possible. Unlike in other forms of litigation, such as personal injury cases, there are no hard or fast rules, nor indeed even any substantive guidelines, as to when it is appropriate to initiate family law proceedings in the High Court.

**2.4-02** That determination is based on a number of factors including, but not limited to, the value of the assets and the complexity of the case. This issue has been addressed in cases initiated in the High Court where an application is brought by the Respondent to remit the case to the Circuit Court. In *D. v D.*, McGuinness J. stated:-

"It does appear that it is the policy of the law in the legislation that family law matters should be in the main dealt with in the Circuit Court, certainly family matters such as separation and divorce. There is concurrent jurisdiction in the High Court for cases of considerable complexity, but it does not appear to me that the matters involved in this case are of such complexity that they require hearing in the High Court. The asset is of considerable value but nonetheless I would agree that the Circuit Court has considerable experience of dealing with property of this nature in the Landlord and Tenant jurisdiction."

**2.4-03** This case would appear to indicate that the primary consideration for dealing with cases in the High Court is the complexity of the particular case. This complexity could stem either from legal issues which might arise in a case or from the assets of the parties. Therefore, certain cases which involve potentially complex issues may be more appropriately brought in the High Court even if the assets are relatively modest. In reality, however, the practice is that the main determining factor in bringing High Court proceedings is the value of the assets involved.

**2.4-04** Litigation in the High Court tends to be significantly more costly than in the Circuit Court. Furthermore, if proceedings are issued in the High Court, the proceedings will mostly likely be dealt with in Dublin, rather than in the locality of one or both of the parties, as in the case of Circuit Court proceedings. This can lead to circumstances where there is a rush to issue proceedings in either the Circuit or High Court, depending on whether one court is seen as more advantageous to one party over the other.

**2.4-05** The number of cases before the High Court has been consistently reducing since the recent economic downturn. This is generally viewed as being a result of the reduction in high value or “ample resources” cases before the courts. The majority of cases now coming before the High Court are appeals from the Circuit Court. Some relevant figures from 2012 are as follows:

**Trends: Applications received**

| Year        | Judicial Separation |              | Divorce   |              | Nullity  |           |
|-------------|---------------------|--------------|-----------|--------------|----------|-----------|
|             | High                | Circuit      | High      | Circuit      | High     | Circuit   |
| <b>2012</b> | <b>21</b>           | <b>1,269</b> | <b>20</b> | <b>3,462</b> | <b>0</b> | <b>28</b> |
| 2011        | 27                  | 1,352        | 28        | 3,330        | 0        | 39        |
| 2010        | 27                  | 1,393        | 24        | 3,357        | 2        | 39        |
| 2009        | 35                  | 1,592        | 33        | 3,683        | 0        | 55        |

| Circuit Court to High Court Appeals | 2012 | 2011 |
|-------------------------------------|------|------|
| Received                            | 167  | 146  |
| Orders made                         | 74   | 91   |

**2.4-06** The High Court does not currently experience any significant delays generally in processing cases, due to the drop-off in cases being initiated there. However, the Court’s caseload is expanding with increasing numbers of Circuit Court appeals. In addition, the High Court does not tend to hear high conflict cases which may be difficult to case manage, particularly in Circuits outside Dublin.

**2.4-07** Difficulties with the High Court include: -

1. Geographical access, with the two standing judges sitting in Dublin.
2. Costs— the legal costs in High Court cases have tended to be significantly higher than in the Circuit Court.
3. Disconnect from the financial realities of ordinary families. This was a concern expressed by practitioners when High Court judges were regularly dealing with cases which generally involved significant assets. The reduction in the number of such cases and the fact that the workload of the High Court is now geared towards hearing Circuit Court appeals has reduced that concern.
4. Inadequate facilities and inadequate support services for judges. Similar issues as arise in the lower courts. It is generally acknowledged that the facilities available in Aras Uí Dhálaigh are inadequate.

**2.4-08** The reducing numbers of cases being initiated in the High Court might support the argument that the Circuit Court should have originating jurisdiction for more complex family law disputes with the High Court being available as an appeal court. In addition the High Court could retain exclusive jurisdiction over areas such as adoption, child abduction and certain child care cases.

## CHAPTER 3: CONDUCT OF FAMILY LAW CASES

### 3.1 Introduction

**3.1-01** It is generally accepted that the conduct of family law hearings tend to be different to other civil proceedings. In general, this might be characterised as a more informal approach, in particular in relation to the application of rules of evidence and normal court practice and procedure. There are concerns from many practitioners that this informality can give rise to unfairness and injustice to the parties in such proceedings.

**3.1-02** Strictly speaking all family law courts operate within the same rules as other courts and therefore it is properly speaking the case that those rules of practice and procedure should be enforced in all family law hearings. Certain formal changes have been made to make family law proceedings more informal and less intimidating, e.g. in relation to the attire of judges and legal representatives. Further, there are legislative provisions that family law proceedings be as informal as is practicable and consistent with the administration of justice. However, Irish law does not provide any specific derogation for family law proceedings from the adversarial nature of the litigation in Ireland.

**3.1-03** Notwithstanding that position, it cannot be disputed that family law proceedings, particularly those involving children, are inherently distinct from many other types of civil proceedings. In the cases involving children, the welfare of the child is the paramount consideration in formulating decisions which may affect those children. However those children are not a party to those proceedings. This results in a separate and distinct obligation in respect of the children being imposed not just upon the judge dealing with the proceedings but also legal representatives. This separate and distinct obligation to a non-party to the proceedings gives family law proceedings a distinct quality. In a sense, it could be stated that in disputes between parents, the judge, while impartial as between those parents, must in fact be partial towards the interests and welfare of the children.

**3.1-04** In the context of the proposed reform of family law courts, it is thus opportune that proper consideration be given as to how family law proceedings should be conducted. At present it would appear that the family law courts operate to some extent on an *ad hoc* basis. Proceedings are dealt with to a greater or lesser degree of formality depending on a number of factors including jurisdiction of the court, the judge, the parties, whether there are legal representatives or otherwise and the nature of the proceedings. However, there does not appear to be a coherent view, either amongst the judiciary or legal practitioners, as to how family law proceedings should be conducted.

**3.1-05** It is submitted that the starting point of this consideration should be an acknowledgment that family law proceedings are by their nature distinct from other civil proceedings. It is arguable that this distinction is not fully acknowledged or accepted by the key stakeholders in the system. In a recent Supreme Court decision regarding the awarding of costs in family law proceedings, an interesting discussion arose as to whether and how judges in family law proceedings might exercise their discretion and depart from the normal rule that “costs follow the result”. The Supreme Court was dealing with costs of an appeal to the High Court from the Circuit Court and it could be argued that different considerations should apply when determining the costs in family law appeal cases. However, the Supreme Court judgment did not appear to reflect the fact that in many family law cases the issue of one or other party achieving “a result” or a “win” simply does not arise. Similarly, and unlike in other civil cases, the Irish Constitution provides for compulsory recourse to the courts in order to obtain a divorce. Can or should an Applicant for divorce be considered “successful”, from a costs perspective, if the divorce is subsequently granted?

**3.1-06** Many judges, particularly in cases where a party may not be represented, take a more inquisitorial approach to proceedings. In circumstances where there are an increasing number of lay litigants in family law cases, it is likely that this approach will continue. It could be argued that consideration needs to be given to reformulation of how the rules of practice and procedure should be applied in family law cases.

**3.1-07** There is, however, an alternative argument. It is generally undisputed that the overall administration of disputes between separating couples should be directed towards encouraging alternative dispute resolution (ADR), an issue discussed in detail in Chapter 5. The advantages of ADR to resolve disputes are manifest. However, it could be argued that one way to encourage the use of ADR is for potential litigants to be aware that, should their dispute not be resolved by an ADR method, then they will be subject to a robust litigation process. In that regard, many practitioners would argue that the conduct of family law proceedings is at present not sufficiently robust. This applies in particular to the conduct of cases in the Circuit and High Courts. This approach, some argue, encourages participants to delay and frustrate the progress of proceedings, resulting in substantial additional distress and costs to the other parties.

**3.1-08** The rationale for this less than robust approach to the conduct of family law proceedings appears to stem essentially from sympathy for the parties and a desire to lessen the trauma of litigation, coming as it does on top of the initial trauma of a relationship breakdown. That said, consideration may need to be given as to whether the approach of the

courts to litigants generally is too sympathetic to the detriment of a speedier and less costly resolution of such disputes. In considering that issue, it may be borne in mind that it is generally accepted that protracted litigation can in fact increase the trauma to one or both of parties, not to mention the children.

## **3.2 Costs of Family Law Proceedings**

**3.2-01** Related to the issue of the conduct of family law proceedings is that of costs. No consideration should be given to the re-structuring of family law courts without an examination of the implication in terms of legal and related costs to participants.

**3.2-02** The starting point of any such consideration is that all costs of family law proceedings must be paid from the combined resources of the parties. For most parties, those resources are limited. Therefore, the system must be designed so as to limit the imposition of costs and certainly to limit the imposition on one or more parties of unnecessarily incurred costs. As a consequence of that and other factors, most family law cases are either settled or decided on the basis that each party pays their own costs. Judges may factor in a costs liability of each party when determining how capital assets are divided. However, generally speaking there are few costs awards in family law cases.

**3.2-03** Areas of consideration around costs would include:

- Failure to compromise disputes. This is a difficult area in family law cases, not least in relation to possible penalties for failure to engage in ADR processes. However, the courts could insist that parties make more determined and formal efforts to settle cases at an earlier stage e.g. by the insistence of Calderbank letters or other procedures. Some judges have made isolated efforts to encourage such practices. That said, it will not work effectively without a co-ordinated approach and systematic implementation in practice.
- Time is money. It is clear that costs escalate if proceedings are drawn out over time. While both the Circuit and High Courts have detailed systems in place to manage cases to a hearing, those systems are open to abuse. It is arguable that such abuse is facilitated by the lack of any coherency around penalties for parties who abuse the system. The imposition of adequate costs penalties must not only be considered but, in appropriate cases, effectively enforced.
- Appeals in family law cases. Should different considerations apply to costs in family law appeals? Assuming that there is no award of costs in the initial proceedings, should a party be penalised if he or she wants the parties to incur the further costs of an appeal? If the appeal is heard, is it possible to quantify if the appellant has been successful or unsuccessful? If that can be quantified, is there a greater argument for stating that the costs should follow the event? In the absence of some level of costs penalty, it may be argued that the family law system does nothing to discourage unmeritorious appeals and therefore permits greater economic burdens to be inflicted on families.
- Rate of VAT - The VAT rate applying to costs incurred in family law proceedings is very high at 23%. This places a considerable burden on the parties involved in a family law dispute who often have serious financial issues related to the breakdown of the relationship. It is recommended that the VAT rate applying to the cost of family law proceedings be reduced to 13.5%.
- The availability of legal aid.

**3.2-04** The reality of the current system is that neither practitioners nor parties have any real concern about being obligated to pay some or all of the costs of the opposing party. This undoubtedly contributes to a more cavalier approach to family law litigation than might pertain if there was a clear and definite risk to a litigant of an adverse costs award, in certain limited and defined circumstances.

## **3.3 Domestic Violence and the Courts**

**3.3-01** In a review of the conduct of family law cases where domestic violence is alleged, it would be important to extend the definition of Domestic Violence to include physical, psychological and sexual abuse.

**3.3-02** In tandem with the recommendations of the Law Reform Commission, a more coherent statutory structure should be put in place to enable breaches of Domestic Violence Orders to be processed. A clear and uniform protocol should be put in place which will enable both victims and alleged perpetrators know how the process works and how effective the Garda action can be in the event of a breach. Such protocols should be consistent also with the implementation of the Non-Fatal Offences Against the Person Act in circumstances where the Applicant may not qualify under the current Domestic Violence Legislation.



**3.3-03** There is a growing trend of children between the ages of 10 and 18 exhibiting violent tendencies at home and there are no clear guidelines for parents who are victims of such abuse. Domestic Violence Orders are not appropriate as the children are under age and it is suggested that the soon to be established Child and Family Agency together with the Department of Justice could discuss this issue and identify a clear path. Were these children to be evicted from the family home under an Order of the Court they then become the responsibility of the State.

#### **3.4 Jurisdiction of the Court**

**3.4-01** There are considerable cross jurisdictional issues in the enforcement of family and child Orders between the Circuit and the District Court. In the event that an Order is granted in the Circuit Court such an Order cannot be amended or changed by the District Court as this would exceed its jurisdiction and in many cases would be over its limit particularly in maintenance situations. Reference should be made to Section 15 of the Courts Act, 1981, Section 12 of the Courts Act, 1981 and Section 26 of the Family Law (Divorce) Act, 1996.

**3.4-02** In many instances, it is recommended that the court of lowest jurisdiction and ease of access should be used by Applicants and Respondents and in a number of cases Circuit Court judges having made access and guardianship Orders, refer the parties back to the District Court. In such cases, the District Court quite properly refuses jurisdiction.

## CHAPTER 4: CHILDREN IN FAMILY LAW PROCEEDINGS

### 4.1 Overview

**4.1–01** The new Constitutional requirement to hear the voice of the child in certain family law proceedings has the potential to be of transformative effect in such proceedings. In private family law proceedings to date, hearing the voice of the child has been sporadic at best. In light of the proposed obligation to be incorporated into the Constitution, the first question to be asked is how can the voice of the child be heard. The options include the following:

- Through parents or others *in loco parentis*. Insofar as the voice of the child has traditionally been ‘heard’, this is the most common form in which it has occurred. It can be said that, in the main, parents express a genuine view as to what they see as being in a child’s best interests and what wishes a child may have indicated to the parent. However, certain issues arise:
- At its simplest, such evidence is clearly hearsay;
- Irrespective of the individual, no parent can be said to be entirely objective;
- It is well established that children can express different and even contradictory wishes to their parents (and others), whether out of a genuine desire not to hurt either parent, playing parents off each other or for other reasons;
- Notwithstanding the strong argument that parents know their children better than anyone else, they are, generally speaking, not qualified to assess their child. That is particularly so in cases of high conflict where the full impact on the child can be unseen and unknown;
- The parents may themselves be under high levels of stress/anxiety, which may impair their ability to be objective. This may be further exasperated when a parent has mental health issues.
- Notwithstanding the above considerations, there does not appear to be a prohibition in principle in arguing that the voice of the child can be heard solely through the parents. What perhaps can be said is that a judge would need to be satisfied that the evidence of the parents provides the judge with a genuine understanding of the child. To that extent, there is an obligation on the judge not simply to accept that evidence at face value but to interrogate it in more detail. That obligation perhaps arises, even where there may be agreement between the parents as to a child’s circumstances and/or wishes. In mediation, it is common practice to pose what are termed ‘dissonant’ questions to both parents. Such questions are designed to prompt the parents to examine more critically their own views and assumptions as to the child’s needs and wishes. While parents almost universally have their child’s interests at heart in proposing arrangements post separation, parents nonetheless sometimes lose sight of practical issues. The experience of using dissonant questioning is that it can both elicit a better understanding of a child’s needs and wishes and prompt parents to re-consider their own assumptions and decisions. In overall terms it could be said that, in order to hear the voice of the child through parents in a Constitutionally-compliant manner, it is necessary not just to hear the parents’ evidence and pro forma questions, but also to undertake a meaningful examination of the circumstances of the child. There is a concern that cases are settled between parents where a child’s views are not taken into account. This can happen where a child may be at risk. The extent of such examination would be dependent upon the circumstances of each case.
- Directly by giving direct evidence in court. This method is not unheard of but is most uncommon. It must be viewed as undesirable that a child would be asked to give evidence in a dispute between parents involving the child’s welfare. Many would regard the idea of a child giving evidence as a witness and being subject to cross-examination (even if conducted very sympathetically) as unpalatable.
- By interview with the judge, whether in chambers or otherwise. There are very differing views on this approach both within the judiciary and within the practitioner community. The concern for practitioners would include whether the judge has the aptitude, skills and training to conduct such interviews. In mediation, it is recommended that the voice of the child would be heard through a properly trained and qualified child care professional. The concern is that some judges may not only lack the required expertise, but also may be unaware of the difficulties and complexities involved in undertaking such interviews or of the impact on the child.
- A third party expert report (e.g. s.20 or s.47 Report). As indicated earlier in this submission, the District Court lacks jurisdiction to order s.47 reports, due to the fact that the provision in the Children Act, 1997 allowing for the procurement of such a report has not yet been commenced. In the Circuit and High Courts, such reports, while common, are not obtained in a significant number of cases. They would tend to arise only in mid to high conflict cases. The costs

of such reports have reduced in recent years but tend to be in excess of €3,000.00. While some judges have sought to reduce that cost by requesting the assessor to undertake a more ‘focused’ assessment, that in practice can be difficult to define. The major issue is the cost and delay to parties in funding such assessments.

- Guardian *ad litem*. This is not currently used in private family law proceedings as section 28 of the Children Act, 1997 has not yet been commenced. There is in fact no legislative underpinning for such appointments other than in child care cases. The widespread use of guardians may not be appropriate in private family law cases. However, the Constitutional amendment may be relied upon to seek such appointments in certain high conflict cases. Generally the costs of such appointments, with attendant legal representation for the guardian, must call into question whether the use of guardians in most private law cases is an effective and cost efficient way to hear the voice of the child. Moreover, why should appointments of guardians be confined to high conflict cases if we are looking to hear the voice of the child?
- Through mediation attended by the parents.

**4.1-02** The potential implications of the recent Constitutional change have yet to be considered. For instance, it is arguable that the courts will have an obligation to hear the voice of the child, even where there is no dispute between the parents in relation to custody or access issues.

**4.1-03** The amendment could be viewed as an opportunity for a fundamental reappraisal of how disputes concerning children are dealt with by the courts. Rather than see the obligation to hear the voice of the child as a burden or procedural hurdle which must be addressed, the focus of the courts should perhaps be to make the child the genuine centre of focus. That would entail putting consideration of the child’s needs in matrimonial matters at the forefront of cases with the court requiring both parents to participate in that process e.g. by undertaking appropriate courses in parenting (and specifically post-separation parenting), undergoing counselling as appropriate (particularly where the actions of the parent are impacting negatively on the child), attending compulsory mediation information sessions and concluding child centred parenting plans.

**4.1-04** It is generally recognised that parents, while in dispute with each other, are overwhelmingly disposed to doing the best they can for their children. By placing the needs of the child at the forefront of the process, it is possible that parents may have a greater opportunity to find a resolution to the entirety of their dispute, including in relation to financial matters, as these may more naturally flow once there is agreement in relation to what is required to provide for the needs of the child.

**4.1-05** Therefore, any re-structuring of the family law courts and processes should in fact focus on trying to integrate children into the process as much as possible, through appropriate mechanisms, rather than seeking *de minimis* solutions to comply with the intended Constitutional imperative.

## **4.2 Private Law Proceedings**

**4.2-01** In private law proceedings children are not automatically heard at present.

**4.2-02** Often the courts will seek assistance in terms of formalising their views by either appointing an independent expert under Section 47 of the Family Law Act, 1995 or sometimes if there is a concern that things are difficult for the children and that it may require the intervention of the HSE, the court can request the HSE to investigate under Section 20 of the Child Care Act, 1991.

**4.2-03** The 31st amendment to the Constitution is likely to lead to considerable change in the conduct of private family law proceedings involving children. The people voted for the voice of the child capable of forming his or own views to be ascertained in all proceedings concerning adoption, guardianship, custody and access.

**4.2-04** The proceedings referred to are proceedings concerning adoption, guardianship or custody of, or access to any child which includes all private family law proceedings.

**4.2-05** The options available as to how the voice of the child should be heard, discussed above, range from the judge speaking to the child directly in chambers to the appointment of a guardian *ad litem* to represent the views and wishes of the child. It does not appear that there is a consensus as regards how this can best be achieved nor is there consensus on what method is best for the child. Some experts are of the view that a judge speaking directly to a child may not always be appropriate. Judges are not specifically trained to interview children in this way and many have indicated that they would not be comfortable with this<sup>9</sup>. On the other hand, there will be a significant cost to the state if a guardian *ad litem* system is introduced and an independent person is appointed to view the wishes of the child. Yet, it is hard to escape the

conclusion that this is what the Irish people voted for.

**4.2-06** The Section 47 Report is often described as a means for hearing the voice of a child. That said, the reality of the situation is that the independent professional is not there to represent the views and wishes of the child but is there to make a professional assessment as to the question posed by the judge in the context of the application before the court. In summary, such reports have the potential to determine how the adults relate to children rather than the children's interests *per se*. This is a challenge but one which will have to be responded to and it is appropriate that in the formulation of the new family law structure, decisions are made as to how this would best be achieved.

**4.2-07** If it is the case that it is intended to locate the guardian *ad litem* service within the Courts Service system then it may prove cost effective to provide for the guardian *ad litem* system in family law proceedings also. If there is a properly resourced guardian *ad litem* system available to the courts, with a guardian *ad litem* available to take up appointment immediately on the request of the court, such a system is likely to be effective. Many practitioners have raised concerns about the overuse of guardian *ad litem* in private family law proceedings. One issue is the cost of such a service, even if it is publically funded by the Courts Service or otherwise. Further concerns also arise. In particular, proceedings could become very unwieldy if one or more guardians *ad litem* are appointed. In that regard, where a case involves two or more children, their interests are often distinct and may require separate representation. In private family law proceedings, it is arguable that a guardian *ad litem* should only be appointed in exceptional cases. The emphasis should be on early intervention in a manner that allows the voice of the child to be heard from the outset of the proceedings in the hope of avoiding more contentious cases downstream.

**4.2-08** It is arguable that children aged 16 and 17 could speak directly to judges as they would have sufficient maturity to do so. Accordingly, it may be the case that a guardian *ad litem* could be appointed for younger children. The provision in the Constitution does not seem to go so far as to indicate that the voice of the child must be heard where children are not capable of forming their own views so it is probably confined to children over the age of 7.

**4.2-09** In the context of a new family court structure, if it is the case that certain children are likely to be interviewed by judges, steps will need to be taken to ensure that the environment is child friendly and appropriate and is one which allows the child to be relaxed and comfortable during an interview with the judge. The issue of who should be present needs to be considered (e.g. clerk, solicitors for the parents) and what happens if a parent is not represented or present.

**4.2-10** It is interesting to review the research emerging in this area. Professor Janice Walker in a paper titled "Through the Child Lens - Messages from Research" concludes that over the years, while there has been substantial debate as to how the voice of the child should be heard, there is no clear consensus as to the answers to the following three key questions:

- How should children's voices be heard?
- When should they be heard?
- Where should they be heard?

**4.2-11** As part of her research, she interviewed judges in a number of jurisdictions. She concluded that the views of the judiciary are quite polarised. At one end of the spectrum, there are judges who believe in consulting directly with children, if children want to be consulted. In fact in Quebec, it is a duty of judges to talk to the children in family proceedings and the majority are very positive about this practice. Moreover, Krinsky and Rodriguez (2006) reported the benefits identified by judges as follows:

- The child is an important source of information;
- The judge can ascertain the child's wishes and feelings at first hand;
- Options can be explored;
- Information about the child is up to date in the here and now;
- Seeing a child shows respect;
- The conversation can be an important step in promoting settlement.

**4.2-12** It does, however, seem that other judges are at the opposing end of the spectrum and are very much opposed to talking directly to children. The preponderance of the research supports this approach (Parkinson and Cashmore 2007; Paetsch et Al, 2006). This research indicated that judges believe;

- They have insufficient skills and lack appropriate training;
- They lack psychological knowledge;
- A one off conversation is superficial;
- It would be too stressful for children;
- They cannot see any benefits;
- Older judges might be too “gruff”.

### **4.3 Child Care Proceedings**

#### **4.3.1 General**

**4.3.1-01** It is clear from the proposals outlined in very general terms by Minister Shatter that child care is to be grouped with family law and is to operate out of the same pillar. At present there are different arrangements in place countrywide.

**4.3.1-02** The Dublin Metropolitan District has two dedicated judges full time, five days per week and on two days another Court sits which means there are three dedicated Courts, two days per week.

**4.3.1-03** Arrangements around the country vary, with on occasion child care matters on the family law day once per month other than emergency applications and in other cases child care is at the conclusion of an ordinary District Court list.

**4.3.1-04** It is recommended that child care law should always take place on a separate day at a separate sitting in light of the highly sensitive matters being litigated and the emotional trauma associated with being a Respondent in these proceedings. At a minimum, child care matters should be heard on the same day as family law matters.

#### **4.3.2 Training for Judges**

**4.3.2-01** The present arrangements as regards training for judges are that judges newly appointed since 1995 receive some training.

**4.3.2-02** It is recommended that judges who are to be assigned to deal with child care matters should be given comprehensive training in regard to issues which are particular to child care law.

**4.3.2-03** It is recommended that 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 such far reaching consequences for children and families.

**4.3.2-04** Training should be provided in advance of an assignment of a judge to hear child care cases. This should be ongoing and regular.

#### **4.3.3 Guardian *ad litem***

**4.3.3-01** The guardian *ad litem* system has been in place since 1995. All stakeholders would agree that the system is haphazard and *ad hoc*. The Children’s Act Advisory Board was tasked with seeking to establish guidelines for guardians *ad litem* and following lengthy and wide ranging consultation, a booklet was prepared and published. These remain guidelines, however, and have no binding effect.

**4.3.3-02** Guardians *ad litem* can arrange themselves into groupings or can be individual. There is no supervision built into the legislation which is unduly vague in terms of assigning duties and obligations. This is an opportunity to properly regulate the guardians so that there is clarity as to their role and function. Ideally, if the Minister is to follow through on his Family Law Division, guardians *ad litem* should be grouped with the other services that are available to the judges and practitioners, possibly under the Court Services rubric, thus establishing their independence and ensuring transparency in terms of appointment. Many papers have been written and presented and we do not intend to rehearse all the reasons why this would be a good idea but from an independence point of view, a financial view and a clarity and transparency point of view, this opportunity should not be missed.

#### 4.3.4 Children giving evidence

**4.3.4-01** Section 23 of the Children Act, 1997 governs the giving of evidence by children. It was designed to deal with admitting children's statements into evidence, without the necessity of bringing the children to court, and subjecting to them to a potentially traumatic experience. Section 23 states that:

A statement made by a child shall be admissible as evidence of any fact therein of which direct oral evidence would be admissible in any proceeding to which this Part applies, notwithstanding any rule of law relating to hearsay, where the court considers that (a) the child is unable to give evidence by reason of age; (b) the giving of oral evidence by the child, either in person or under section 21, would not be in the interests of the welfare of the child.

**4.3.4-02** The HSE's usual position regarding disclosures by children is to work to avoid children coming to court to give evidence as witnesses as to fact, for fear of unquantifiable trauma to the children. Therefore, when the HSE wishes to rely on hearsay evidence of children it is appropriate to (a) lodge an application under section 23 of the Children Act, 1997; and (b) offer the best possible evidence available [*i.e. avoid multiple hearsay*]. An example arose in a case where a child told their teacher, their social worker, and a psychiatrist and wrote multiple entries in their diary about consistent abuse at home. Each professional came to court to give evidence, and the diary entries were shown. Nonetheless, on the technical hearsay ground alone, the parents objected to the admission of these statements as hearsay.

**4.3.4-03** For the disclosures to be admitted, the court must inquire (a) whether the children are unable to give evidence in court, due to their age; or (b) whether it would not be in their interests to give evidence.

**4.3.4-04** In this particular case, the Social Worker was not considered by the court to be capable of giving evidence that it was not in the child's best interests to give evidence and the court directed that a Clinical Child Psychologist should assess this question. A period of four weeks was required for a Clinical Child Psychologist to meet with the children and ascertain whether the children could come to court to give evidence of the abuse they suffered. The psychologist concluded that while the children had an intellectual capacity to give evidence of their abuse, they did not have an emotional capacity.

**4.3.4-05** The HSE's position has been unambiguously against bringing children to court to give evidence in family law proceedings; and even more so in child care proceedings. This has largely been accepted as an unspoken rule by the various judges who have presided in the Dublin Metropolitan Courts over recent years. Anecdotally child care practitioners have described children coming to court in a child abuse case as "*a form of abuse in and of itself*" and "*barbaric*".

**4.3.4-06** Section 23 needs to be reviewed in the particular circumstances of care proceedings whereby the evidence of the child should be admissible but with safeguards built in as the weight to be attributed to it and an assessment as to the particular circumstances of the disclosure.

#### 4.3.5 District Court Practice Direction

**4.3.5-01** The President of the District Court issued a Practice Direction which has been worked on a pilot basis in the Dublin Metropolitan District since September, 2012. This direction has been welcomed and is very much a step in the right direction. The purpose of the direction is to demonstrate a very clear pathway for these proceedings and to ensure that when the matter comes on for hearing all relevant documentation has been exchanged on all sides.

**4.3.5-02** This direction should be rolled out nationally to avoid geographical injustice. It is not appropriate that there are different practices in different areas and this will go some way towards achieving consistency in child care practice across the country taking into account local issues.

#### 4.3.6 Practical Matters

**4.3.6-01** Any Court dealing with child care matters must have, where necessary, available to it translators as there has been a significant increase in the number of non-nationals who are finding themselves Respondents in care proceedings.

**4.3.6-02** A Court environment should be sympathetic to the plight that the Respondent parents find themselves in. There should be sufficient space for people to consult with their legal representatives in that it can be assumed that many of these people's lives are so chaotic that they will not be in a position to give adequate instructions to their solicitors other than on the day of hearing. It is therefore critical that there are sufficient comfortable consultation rooms with access to refreshments to allow instructions to be given in as calm a manner as possible.

**4.3.6-03** Given the amount of time that child care professionals spend in court it is also critical that they would have



space to carry on with their file work while waiting outside of the court. It is not appropriate, but it is the current position that in many of the courthouses around the country, there is no dedicated room for practitioners and while in very recent times in the Dublin Metropolitan District a room was assigned for child care practitioners there is no access to a computer and there is an insufficient number of tables and chairs. This is something which should be relatively easy to address.

**4.3.6-04** In areas of the country where there are heavy child care lists, it is our recommendation that there should be two sittings per day so that Respondents, child care practitioners and legal practitioners alike can productively utilise an entire day waiting until five o'clock to have a 20 minute application heard. It was the practice in the Dublin Metropolitan District Court to have a 10.30 am and 2 pm sitting and for some reason that changed to a 10. 30 am sitting. This does not maximise the use of scarce resources.

## CHAPTER 5: THE USE OF ADR

### 5.1 Introduction

**5.1–01** This chapter considers how all forms of ADR could be embedded within the family courts in Ireland. In order to explore the integration of ADR into an Irish family justice system let us examine first the definitions and scope of ADR, secondly, how ADR has been embedded into family justice systems in other jurisdictions, thirdly, what ADR systems are already in existence and fourthly, how ADR can be embedded into an Irish family justice system.

### 5.2 What is ADR?

**5.2–01** The Law Reform Commission (LRC) in its *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010) defines ADR as:

a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which a (sic) involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes.

**5.2–02** Various defined as alternative dispute resolution or appropriate dispute resolution, (it is known as external dispute resolution in some jurisdictions such as Australia) ADR is essentially an alternative to a formal court hearing. It is a collective term for the manner that parties can settle disputes with (or without) the help of a third party.

### 5.3 Types of ADR

**5.3–01** The LRC also notes that some ADR processes, such as collaborative practice, do not necessarily involve the assistance of a neutral and independent third party<sup>10</sup>. We believe the use of conciliation, as referred to in the LRC Report, can also be appropriate in family law matters. This is particularly true if both parties in mediation consent in writing to it being turned into conciliation. At present in Ireland, in the context of family law, mediation and collaborative law are more widely used as dispute resolution mechanisms. That is not to rule out conciliation and/or arbitration in the future. Conciliation is defined as:

a process whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

**5.3–02** The terms conciliation and mediation are often used interchangeably, but they need to be distinguished as two intrinsically different processes.<sup>11</sup> ‘Conciliation’ usually takes place under the court’s direction, whereas ‘mediation’ is an independent, settlement-seeking process that provides a resource for the courts in suitable cases. Both processes aim to facilitate settlement and increase co-operation, especially in cases concerning children, but there are significant differences between them in terms of processes and outcomes.<sup>12</sup>

**5.3–03** With regard to Arbitration, the American Bar Association defines it as:

The reference of a dispute at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision.

**5.3–04** This type of dispute resolution has been pioneered in England and Wales by Resolution<sup>13</sup>, the Law Society of England and Wales, the FLBA and the Chartered Institute of Arbitrators. The arbitrator’s ‘award’ will be final and binding on the parties who, if necessary, will take reasonable steps to ensure that a Court Order is made in the same terms. Although it will be interesting to see arbitration being put to use in family law matters in this jurisdiction, it may well be argued that this is a quasi-judicial procedure and indeed the Law Reform Commission considers that arbitration is a determinative ADR process.<sup>14</sup>

<sup>10</sup> LRC 98-2010, para 2.13.

<sup>11</sup> Lisa Parkinson *Family Mediation: ADR in a new family justice system* (2<sup>nd</sup> edn, Jordan Publishing, 2011), p12.

<sup>12</sup> *Ibid.*

<sup>13</sup> Previously the Family lawyers association of England & Wales.

<sup>14</sup> LRC 98-2010, pp 15 and 16.

## 5.4 Why Choose ADR?

**5.4-01** In short, a party may choose ADR to avoid expensive and acrimonious litigation. By making this choice the probability of reducing unnecessary traumatic impact on the children of the marriage or broken relationship is much higher. ADR works best when run parallel to independent legal advice. ADR is not designed to replace it.

**5.4-02** Prior to examining ADR in this jurisdiction, let us examine how ADR has been embedded into some international jurisdictions with similar legal systems. There are many commonalities across the globe in the all-encompassing attitude of jurisdictions in assisting ADR to become more mainstream in family law matters. Many countries attempt to integrate ADR into their particular family justice system in a cohesive and highly effective manner. The key is on resolution not litigation.

## 5.5 ADR in Australia

**5.5-01** In Australia, the term ‘primary dispute resolution’ has been formally adopted to describe all forms of non-court dispute resolution methods, relegating the last resort option, the court, to the alternative or secondary role.<sup>15</sup> In the realm of family law, there has been a court-based dispute resolution service and an extensive community-based mediation sector operating for over a quarter of a century. However, the stronger push towards the use of ADR mechanisms began relatively recently during the office of the previous Liberal government. In 2004, the family court introduced the Children’s Cases Programme and then in July, 2006 followed this with the less adversarial approach to hearing cases involving children, called the less adversarial trial.<sup>16</sup> Also in 2006, the government established a network of community-based Family Relationship Centres (FRCs) throughout Australia, where potential family law clients could seek to resolve their disputes with the assistance of an ADR practitioner instead of a legal practitioner.<sup>17</sup>

**5.5-02** Furthermore, in 2007, the government mandated that divorcing parents must turn to ADR mechanisms, such as mediation, before seeking a legal solution to their dispute.<sup>18</sup> Parties are now required to obtain a certificate of exemption from the compulsory dispute resolution process in order to issue parenting proceedings. Part IIA of the Family Law Act, 1975 refers to family dispute resolution and the Family Law Rules 2004 which cover the practical application of the Family Law Act.

**5.5-03** In Australia it is fair to say that ADR mechanisms have now become the mainstream, and court is the alternative route to resolving family disputes. Save in exceptional circumstances, court applications in Australia cannot proceed until such time as mediation or another ADR process has failed or broken down.

## 5.6 ADR in New Zealand (NZ)

**5.6-01** New Zealand has also embraced ADR into its family justice system. The NZ Law Reform Commission undertook a wide-ranging view of the family court in 2003 which included a review of mediation services and a recommendation that ‘legislation be amended so services such as counselling and mediation are available for a wider range of matters than they are now’.<sup>19</sup>

**5.6-02** The family court encourages people to resolve their disagreements themselves. The first step is counselling. That said, if counselling does not solve their problems, the family court can be asked to make an order to determine the matter. In that case, the first step a court is likely to take is to refer the parties to mediation<sup>20</sup>

**5.6-03** There are two types of mediation in the NZ family court:

- Counsel-led mediation: this takes place away from the court and is carried out by a lawyer, who is also a qualified mediator, appointed by the judge.
- Judge-led mediation: this takes place at a court and is carried out by a family court judge.

**5.6-04** Counsel-led mediation is generally held when someone has asked the family court to make a decision about the care of the child. This is usually an application for a parenting order. If one person refuses to come to mediation, the matter will be referred to the Court so a judge can decide what should happen next. The court cannot order a person to come

<sup>15</sup> Resolution Family Disputes Handbook Andrew Greensmith (ed) (Law Society publishing, 2010), p xvii.

<sup>16</sup> Jill Howieson ‘The Professional culture of Australian Family Lawyers: Pathways to Constructive Change’ *International Journal of Law, Policy and the Family*, 2011.

<sup>17</sup> The Attorney-General, Philip Ruddock MP *A New Family System- a message from the Attorney-General, the Hon Philip Ruddock MP* (Press Release, 29<sup>th</sup> July 2005); House of Representatives Standing Committee on Family and Community Affairs, Parliament of the Commonwealth of Australia *Every Picture Tells a Story: Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation* (December 2003), 60.

<sup>18</sup> Family Law Act, 1975 (Cth) s 601 (7).

<sup>19</sup> Law Commission *Dispute Resolution in the Family Court* (NZLC RN82, 2003).

<sup>20</sup> See <http://www.justice.govt.nz/courts/family-court/what-family-court-does/mediation>.

to counsel-led mediation.<sup>21</sup> A judge-led mediation is called a mediation conference. It is interesting to note that nothing said at a mediation conference can be admitted at a later court hearing.<sup>22</sup> The scope of mediation to operate in the family court was enhanced with the enactment of the family court matters legislation in September 2008.<sup>23</sup>

**5.6–05** The changes to mediation that were enacted include options for parties to request mediation for disputes regarding guardianship issues, agreements for day-to-day care, contact or upbringing, before applying for a parenting order, and when a party is in breach of a parenting order. The emphasis on using mediation as a first option, thereby leaving the adversarial litigation processes as a last resort, recognises the opportunity to continue to develop the family court in New Zealand as a conciliatory model.<sup>24</sup> New Zealand is forward-thinking, therefore, in embracing ADR as an integral part of its family justice system.

## 5.7 ADR in England and Wales

**5.7–01** Since the introduction of the Family Law Act, 1996, legally aided couples in England and Wales have been obliged to attend mandatory mediation information and assessment meetings (MIAM) prior to issuing separation or divorce proceedings. Domestic violence and some other cases were exempted from the requirement to consider mediation before legal aid could be obtained.<sup>25</sup> Since 6th April 2011, this rule applies to *all* couples. In other words, since this date any couple wishing to issue separation or divorce proceedings in either the public or private sector *must* attend a MIAM meeting. This change has harmonised the position between privately funded parties and those who are publicly-funded.<sup>26</sup> There are, however, some opt outs to the protocol e.g. it can be disregarded in international cases, where it is often important to secure jurisdiction and in other cases where the petitioner's lawyer is of the view that a mediation assessment is inappropriate and is prepared to tick a box to that effect.

## 5.8 ADR in the United States of America

**5.8–01** The United States has been at the forefront of identifying the values of ADR and has encouraged its use over many years. The US Attorney General Janet Reno issued an order in 1995 promoting the use of ADR within the Department of Justice. In 1998, President Clinton signed a Presidential memorandum to encourage the use of ADR in disputes involving the US.

**5.8–02** In 2001, the National Conference of Commissioners on Uniform State Law completed a draft Uniform Mediation Act. The Uniform Collaborative Act was published in 2009. Many states have a mandatory divorce mediation requirement. However, with few exceptions, the mandatory mediation is limited to child custody and visitation matters. The mediator will assist the parents in reaching a parenting agreement. However, each state enforces the mandatory mediation requirement in its own unique way.<sup>27</sup> ADR in the United States of America refers to any means of settling disputes outside of the courtroom. ADR typically includes early neutral intervention, negotiation, conciliation, mediation and arbitration. As burgeoning court queues, rising costs of litigation, and time delays continue to plague litigants, more states have begun experimenting with ADR programmes. Some of the programmes are voluntary; others are mandatory.

## 5.9 ADR in Canada

**5.9–01** Section 9 of the 1985 Divorce Act provides that mediation *must* be offered in the case of a divorce:

9 (1)

It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in divorce proceedings-

- a. to draw to the attention of the spouse the provisions of this Act that have as their object the reconciliation of the spouses, and
- b. to discuss with the spouse the possibility of reconciliation of the spouses and to inform the spouse of the marriage counselling or guidance facilities known to him or her that might be able to assist the spouses to achieve a reconciliation, unless the circumstances of the cases are of such a nature that it would clearly not be appropriate to do so.

<sup>21</sup> See <http://www.justice.govt.nz/courts/family-court-does/mediation>.

<sup>22</sup> *Ibid.*

<sup>23</sup> Principal Family Court Judge Peter Boshier *Mediation in the Family Court: Where to Now?* Arbitrators' and Mediators' Institute of New Zealand, Conference at Pullman Hotel, Cnr Waterloo Quadrant and Princes Street on 23<sup>rd</sup> February 2011.

<sup>24</sup> *Ibid.*

<sup>25</sup> Lisa Parkinson *Family Mediation: ADR in a new family justice system* (2<sup>nd</sup> edn, Jordan Publishing, 2011).

<sup>26</sup> Ministry of Justice website.

<sup>27</sup> Mark B Baer Inc (a professional law corporation).

(2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in divorce proceedings to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist spouses in negotiating those matters.

**5.9-02** A certificate must also be produced in court to prove that the above section has been complied with.

**5.9-03** In Ontario, mediation has proven to be very successful. Ontario has an integrated system in the Unified Family Court that focuses on resolution not litigation. In 2009, 81.1% of the cases that proceeded to mediation through court affiliated services reached full or partial settlement-it is also cost-effective for both participants and the state.<sup>28</sup> The Ontario system<sup>29</sup> emphasises early settlement discussions, meaningful court appearances and consistent judicial supervision.

**5.9-04** It is evident therefore that many international jurisdictions have successfully embedded ADR into their own family justice system in a culturally appropriate manner. Let us now look to Ireland and to how ADR is already in practice in our family justice system and how this can be both improved upon and extended.

## 5.10 ADR and 2008 EC Directive

**5.10-01** The 2008 EC Directive defines mediation as:<sup>30</sup>

...a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.

## 5.11 Mediation

**5.11-01** Mediation is the most prevalent form of ADR in use in Ireland. That is particularly true in family law. Cornerstones of mediation are confidentiality, neutrality of the mediator, voluntary process, flexibility and the clients' autonomy. The Judicial Separation and Family Law Reform Act, 1989 introduced ground breaking provisions directing practitioners to discuss and advise their clients about *inter alia* mediation. Solicitors are obligated to swear certificates advising separating clients (Section 5 and 6 of the 1989 Act) and divorcing clients (Section 6 and 7 of the Family Law (Divorce) Act, 1996) that the option of mediation has been discussed with them prior to issuing court proceedings.

**5.11-02** Notwithstanding these statutory requirements, the Law Reform Commission (LRC) in its *Report on Alternative Dispute Resolution: Mediation and Conciliation*<sup>31</sup> notes that it has been suggested that the 1989 Act and 1996 Acts appear to have had little impact on the use of mediation by those whose relationships have broken down and that 'some judges express scepticism as to whether the option of mediation is seriously discussed by many solicitors with their clients'.<sup>32</sup>

## 5.12 Collaborative Law

**5.12-01** The Law Reform Commission in its *Report on Alternative Dispute Resolution: Mediation and Conciliation*<sup>33</sup> states that to ensure clarity in the terms to be used in ADR processes, collaborative practice should be defined in legislation as:

an advisory and confidential structured process in which a third party, called a collaborative practitioner, actively assists and advises the parties in a dispute in their attempt to reach, on a voluntary basis, a mutually acceptable agreement.

**5.12-02** It is a dispute resolution mechanism involving four way meetings with two collaborative lawyers (who have received special training in this area) and their respective clients. All parties sign a participation agreement to stay out of court. If the process fails to result in a settlement, the clients cannot retain the same lawyers but must retain new lawyers to represent them in future court contested proceedings. Therefore, it follows that the environment conducive to effective negotiation is heightened. This is in stark contrast to negotiations that take place with the threat of court proceedings in the background. Furthermore, as clients retain control of the collaborative process, they will be under less time constraints to 'settle' their issues as distinct from time limits in traditional litigation. This form of dispute resolution seems to be under-utilised in this jurisdiction though close to six hundred family law solicitors have received the requisite training.

<sup>28</sup> See <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>.

<sup>29</sup> *Ibid.*

<sup>30</sup> Article 3(a) of the 2008 Directive.

<sup>31</sup> LRC 98-2010.

<sup>32</sup> Dr Carol Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service, October 2007), p40 and Chapter 1 of this submission.

<sup>33</sup> LRC 98-2010, para 6.62.

Some counties, however, have strong and growing groups of active collaborative lawyers such as South Dublin, Bray and Cork.

**5.12-03** Whatever the type of ADR, many family lawyers are of the view that ADR should be the mainstream and therefore the *appropriate* form of dispute resolution. This is particularly in the context of family law where high conflict litigants become embroiled in an adversarial family justice system that often exacerbates the conflict and hinders resolution. The LRC further states that despite the evident increases in family law applications to the courts, research has indicated that<sup>34</sup>

The adversarial nature of proceedings does little to resolve conflict in families' lives but rather compounds and increases that conflict in many cases. Alternatives, such as mediation and collaborative law, should be better supported and encouraged, and be widely available countrywide.

**5.12-04** The LRC further states in its Report that it is of the view that ADR processes remain under-utilised in this jurisdiction in resolving appropriate family law disputes, many of which the Commission considers are ripe for mediation and conciliation.<sup>35</sup>

**5.12-05** ADR is, however, not designed to replace litigation. Urgent litigation is necessary where emergency applications are going to be required for example in domestic violence applications. This is also relevant in instances where there is an immediate threat or concern as to the welfare of a child such as in the case of child abduction. In those circumstances, an adjudicated outcome is not merely the best option but is vital. The best interests of the child come first and if a court imposed outcome is necessary to protect those interests then ADR will be of very limited assistance. Nevertheless, it is our view that ADR can be of assistance in the vast majority of cases. In order to determine how these forms of ADR can be embedded into an Irish family justice system, we need to ascertain what is already in existence in this jurisdiction.

### **5.13 Existing ADR Initiatives in the Irish Family Justice System**

#### **a. The High Court Mediation Rules**

**5.13-01** In 2002, the European Union proposed a directive dealing with alternative dispute resolution, in particular mediation. This directive, known as the EC Directive on Mediation and outlined at paragraph 5.10-01 above, was adopted in 2008 and it gave each member state until 21 May 2011 to 'transpose the measure into national law'. The aim of this Directive is to 'facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation'. Order 56A of the Rules of the Superior Courts meets the requirements of Art 5 of the Directive.

**5.13-02** This Order implements Statutory Instrument 512 of 2010. The Rules, known as the Rules of the Superior Courts (Mediation and Conciliation), 2010, came into operation on the 16th November 2010. The ADR process is cited as meaning mediation, conciliation or another dispute resolution process approved by the court but not arbitration.

**5.13-03** Under this Order, the court can *invite* the parties to use an ADR process to settle or determine the proceedings, or, where the parties consent, *refer* them to the process. The court may also invite the parties to attend such an information session on the uses of mediation.

#### **Circuit Court Rules (SI 2009/539)**

**5.13-04** Order 19A, in particular, Rule 7 provides that a judge or a county registrar may perform essentially what was outlined above for the role of the High Court judge.

#### **Dolphin House District Court Project**

**5.13-05** The Legal Aid Board, through the auspices of the Family Mediation Service (the FMS) and with the assistance of the Courts Service, set up the Dolphin House District Court family mediation service. This commenced on 21st March 2011. Free mediation is provided on site on the 4th floor of Dolphin House, East Essex Street, Dublin 2. As this is the District Court, a considerable number of the mediations deal with issues such as access, custody, guardianship and maintenance. This initiative commenced as a tripartite one year pilot project but has not only extended but flourished. In lieu of issuing court proceedings, clients are told of the mediation service by Courts Service staff. If clients are interested they can attend and meet with a mediator. This has proved to be of considerable assistance to couples in conflict over access, custody and guardianship.

**5.13-06** Figures for the Dolphin House project between 21 March 2011 and 29 February 2012<sup>36</sup> are as follows:

<sup>34</sup> LRC 98-2010, para 6.06.

<sup>35</sup> LRC 98-2010, para 6.06.

<sup>36</sup> See [http://www.irishtimes.com/newspaper/health/2012/0320/1224313565051\\_pf.html](http://www.irishtimes.com/newspaper/health/2012/0320/1224313565051_pf.html).



- First contact information sessions attended: 1,144.
- Second contact information sessions attended: 686.
- Mediation sessions attended: 740.
- Agreements reached: 264, plus a substantial number of mediations in progress.<sup>37</sup>

**5.13-07** It is anticipated that this project will continue and it is hoped to extend it to other centres. The FMS sees about 1,500 couples a year.<sup>38</sup> It is further reported that while the numbers of clients attending its 16 full-time and part-time mediation centres around the State have remained static over the past five years, ‘the issues and circumstances brought on by the recession have become increasingly complex.’<sup>39</sup> The FMS has also stated that although there are waiting lists of up to six months in some centres, the use of additional, private mediators in recent months is helping to reduce waiting times.<sup>40</sup>

### **Draft General Scheme of Mediation Bill 2012**

**5.13-08** For the very first time this legislation will provide that all barristers representing a client before the initiation of litigation must advise their client to consider the usefulness and appropriateness of using mediation in an effort to resolve the dispute and to certify that he or she has done so. The Bill also provides that a court can consider unjustified and unreasonable refusals when awarding Costs.

**5.13-09** Although at present the draft general scheme does not provide for mandatory mediation information meetings, it is hoped that this will be reflected in a final draft of the Bill. The benefits of such meetings are outlined in the Recommendations section below.

### **5.14 Recommendations to embed ADR into an Irish Family Justice System**

In the context of a new family court structure in this jurisdiction, we believe all forms of ADR should be available to a client including arbitration, mediation (which can be converted into conciliation if all parties agree in writing) and collaborative law.

Mandatory ADR information meetings should be introduced prior to any client issuing family law proceedings and a certificate of exemption produced in exceptional circumstances (see below).

**5.14-01** The LRC in its *Report on Alternative Dispute Resolution: Mediation and Conciliation* reported the following:<sup>41</sup>

International research has indicated that voluntary participation in information sessions on ADR is quite low, and so the trend has been to make them mandatory for all parents who seek the assistance of the courts for disputes about their children, or at the very least to provide courts with the authority to order the information session.<sup>42</sup>

**5.14-02** It is clear that several jurisdictions now mandate that separating couples attend an information session on ADR prior to the commencement of legal proceedings.<sup>43</sup> As the Commission noted in its consultation paper, there is an important distinction to be drawn between mandatory attendance at an information session about mediation or at a mediation session and mandatory participation in mediation itself.<sup>44</sup> A party can be compelled to attend an information session but participation in an ADR process cannot be compelled as this undermines the fundamental principle of voluntariness in processes such as mediation, collaborative law and conciliation. Where the LRC simply refers to mediation information sessions, all ADR options should be described.

The LRC recommended mandatory mediation information sessions should be a statutory requirement:<sup>45</sup>

The Commission considers that, given the low uptake of family mediation in Ireland, coupled with the general lack of public awareness of this option, attendance at an information session on family dispute resolution, should, in general, be a statutory mandatory requirement for parties in family law proceedings.

The Family Law Reporting Committee also strongly favoured the introduction of compulsory information sessions at

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Polly Phillimore, Service Manager of Family Mediation Service.

<sup>40</sup> *Ibid.*

<sup>41</sup> LRC 98-2010, para 6.12.

<sup>42</sup> See Kelly ‘The United States Experience’, keynote address at the Proceedings of the International Forum on Family Relationships in Transition-Legislative, Practical and Policy Responses, December 2005. Available at <http://www.aifs.gov.au/>.

<sup>43</sup> LRC CP 50-2008, para 3.09.

<sup>44</sup> LRC CP 50-2008, para 3.09.

<sup>45</sup> *Report of the Family Law Reporting Committee to the Board of the Courts Service* (Courts Service, 2009) at 33. The Family Law Reporting Project Committee by the Board of the Courts Service primary function was to consider the recommendations contained in the report made by Dr Carol Coulter to the Board of the Courts Service in October 2007 (*Family Law Reporting Pilot Project*) and to make proposals to the Board of the Courts Service in relation to recommendations contained in that Report.

which parties to family law proceedings could be made aware of the full range of alternative dispute resolution models including mediation, arbitration, conciliation and the collaborative law approach, any or all of which may be of assistance in securing an acceptable resolution in a family law dispute.

### 5.15 Exemptions from Mandatory Mediation information sessions:

**5.15–01** Mediation may not be appropriate where there is a lack of financial disclosure or where there are addiction or mental health issues. The Report of the *Family Law Reporting Committee* recommended the following exemptions from mandatory mediation information sessions:

- a. Where the proceedings involve an application for a safety order, a barring order or a protection order under the Domestic Violence Act, 1996;
- b. Where a party satisfies the court that his or her personal safety, or the safety of his or her children is or are at risk.<sup>46</sup>

**5.15–02** The Commission further recommends that the person providing the information session may give those attending the information session one of the following certificates:

- a. a certificate stating that the person did not attend the information session; or
- b. a certificate stating that the person attended the information session.<sup>47</sup>

**5.15–03** The Commission also recommends that in instances where a party to a family law proceeding fails to attend the information session and is not subject to one of the exceptions stated above, the court may in its discretion adjourn the case until the party has attended the information session.<sup>48</sup> The LRC Report further recommends that the court should not, however, adjourn proceedings for this purpose unless satisfied that no additional risks would be involved in respect of any family members whose safety or welfare was in issue. Where one or both of the parties still refused to attend, the court would proceed with the hearing, but written information would be sent to the parties.<sup>49</sup>

### 5.16 Recommendations

- Information sessions can be held *in situ* in the District Court, Circuit Court and High Court nationwide.
- ADR specialists such as accredited mediators, conciliators and collaborative lawyers only should provide the information sessions, adhere to a code of conduct and should not furnish legal advice, but merely information on ADR. Such specialists should also not seek to screen clients for the suitability for ADR nor should they seek to gain referrals from the information session. Only lawyers who have either trained as a mediator or a collaborative lawyer should be qualified to provide the information sessions.
- Family law clients should also be recommended and preferably mandated to attend either a course or an information session on shared parenting.
- Judges should also have, at their discretion, the authority to either determine or mediate a case<sup>50</sup> All judges and county registrars should therefore be trained as mediators.
- Judges and county registrars should also have the power to direct parties to attend an ADR information meeting if they deem the exemption/refusal is unreasonable.

**5.16–01** From a cursory analysis of the international family justice systems above, it is evident that we do not need to reinvent the wheel in this jurisdiction. If the draft General Scheme of Mediation Bill 2012, in a final draft, culminates in mandatory mediation information meetings, there will be a statutory duty to provide such meetings to all family law clients which will result in ADR becoming embedded in our family justice system at the very outset. These information meetings should be expanded to include all forms of dispute resolution mechanisms including conciliation and collaborative law. Ensuring that judges have the discretion to either determine or mediate a case, or refer it to mediation will provide a clear message that ADR should be embraced by lawyers, clients and the judiciary for the benefit of family law clients. The powers of county registrars could also be enhanced. It would be beneficial to have the information meetings available in the

<sup>46</sup> Report, p 108. As the Commission noted in its Consultation Paper, some family law cases will and should be resolved in court and may not be appropriately resolved by mediation. Such cases, as previously noted by the Commission, include those where there is serious violence against one of the spouses, or where there are allegations of child sexual or physical abuse. LRC CP 50-2008, para 5.43.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> See Judge-Led mediation referred to in New Zealand.

family law court, with the assistance of courts services, in order that lay litigants could be informed of the time and date of such meetings on arrival and indeed family lawyers could refer their clients to such meetings. The advantages of embedding ADR into an Irish family justice system are very considerable and the savings to clients in terms of cost, time and emotional expense are immeasurable.

## CHAPTER 6: PROPOSED REFORM

### 6.1 Introduction

**6.1-01** The objective of a new Family Court should be to create a dedicated and integrated Family Court structure that is properly resourced to meet the particular needs of people at a vulnerable time in their lives.

**6.1-02** This single Family Court structure must recognise and actively promote the 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.<sup>51</sup>

**6.1-03** Any restructuring of the family law court without the involvement and promotion of an interdisciplinary system would not achieve the objective of meeting the particular needs of the users of the family court structure.

**6.1-04** As Mr Justice White highlighted at the consultative seminar, alluded to at paragraph 1.1 of this submission, key services should be available to permit family law judges to refer couples or parties to skilled personnel to:

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

**6.1-05** The interdisciplinary system involves an acceptance that simply making a court order is not sufficient, 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. Without this, any new system remains as flawed as the current one.

**6.1-06** The new structure of the family courts should consist of:

- a lower family court of limited jurisdiction; and
  - a higher court of unlimited jurisdiction.
- a. The lower court should possess a similar jurisdiction to the current family District Court but could also deal with matters on consent where no dispute arises relating to the upbringing and best interests of children and where financial matters have been agreed in judicial separation or divorce proceeding and where the only evidence required would be the formalities to ensure the court orders can be made.

The current jurisdiction of the family District, Circuit and High Courts has been determined in a piecemeal fashion as various family law statutes have been introduced. What is required is an examination of matters which could be best described as complex matters which would be dealt with in the superior court and less complex matters which could be dealt with in the lower court. This requires an examination of the business of all three courts and a reassignment of the jurisdictions according to the action. The simple continuation of the current division of jurisdiction avoids a necessary recategorisation of the types of cases heard by each court. The widening of the jurisdiction and monetary limit of the lower court is a necessary prerequisite to reform.

b. The higher court would have all the jurisdiction of the current family Circuit and High Court. Appeals from the lower court would be heard by the higher court or possibly by the new Court of Appeal. The specialist ethos of the family courts should be maintained where cases are appealed from the higher court to the new Court of Appeal.

**6.1-07** The new family courts are proposed to be located separately from current venues with sufficient rooms for private consultations and welfare and assessment service to support public and private law proceedings. Mediation facilities are also proposed to be located in the new family law courthouses.

**6.1-08** The ancillary services referred to above are an essential part of any new family law court system and the recent success of the aforementioned Dolphin House initiative shows the value of having a variety of agencies such as legal aid, mediation services and the courts and court offices under one roof. As an interim measure the anomaly where a District Court judge is hampered from ordering a report on the welfare of a child where there is no public law element must be addressed. In addition, the provision of qualified staff who are available to the court to provide independent reports would be of assistance to the court and to the users.

**6.1-09** Both courts should be staffed by judges with specific training.

<sup>51</sup> Keehan, 2013, I.J.F.L. 2.

**6.1-10** While specialist family courts are to be welcomed, the idea of what constitutes specialist courts requires careful consideration. Judges with specific training play a vital role when necessary because of the complexity or specificity of the law or facts and for the proper administration of justice. Judges with specific training should always remain part of a single judicial body.

**6.1-11** A less adversarial approach by the lower court when dealing with guardianship, custody and access disputes, and child care and protection matters is recommended.

**6.1-12** While the less adversarial system is progressive, if evidence must be tested, we have yet to devise a better alternative than cross examination. The dangers of an inquisitorial system must be balanced with its advantages and a litigant's right to test the evidence should not be unduly fettered.

**6.1-13** Unresolved issues - will the new higher family law court or the High Court deal with constitutional challenges or issues relating to family law matters e.g. arising under Articles 41, 42 and 42A of the Constitution? Moreover, should the High Court or the new higher court deal with Article 40 habeas corpus applications in relation to children in care?

Interestingly Birmingham J. recently stated that habeas corpus applications should not be made in respect of a child who was the subject of an interim care order.

**6.1-14** If family law judges are judges with specific training, should they be allowed to transfer out of family law after a number of years.

**6.1-15** Appeals - it has been suggested that all appeals may not necessarily involve a rehearing of the case and it may be possible to have an appeal based on transcripts which would reduce delays and avoid unnecessary duplication of costs. This proposal, while worthy of promotion, should be reviewed in the context of the existing constitutional provision.

**6.1-16** Another issue worthy of consideration is whether an appeal from the lower family law court would proceed to the higher family law court or to the soon to be established Court of Appeal.

**6.1-17** Minister Shatter, at a conference in the Society, stated in relation to the *in camera* rule "the absolute nature of the *in camera* rule has led to a situation that family law cases are perceived to be shrouded in secrecy...there has been an absence of reliable information on the operation of the law in this area which is not conducive to confidence in our system of family law and child protection."<sup>52</sup>

**6.1-18** The Courts and Civil Law (Miscellaneous Provisions) Act, 2013 will amend the Courts Act, 2004 and the Child Care Act, 1991 to allow *bona fide* representatives of the press to attend court during proceedings heard otherwise than in public except in certain circumstances and to provide for the prohibition or restriction of the publication and broadcasting of matters by such representatives in certain circumstances.

**6.1-19** Minister Shatter said in relation to these changes that "the measure aims to retain protections on the privacy of the parties in respect of such court proceedings while providing that *bona fide* members of the press can be admitted to proceedings<sup>53</sup>." This is to be welcomed. Relaxing the *in camera* rule must balance the right to privacy with the right to a fair, transparent and accountable system of justice.

**6.1-20** Minister Shatter refers to the pre-trial role that judges in family courts may play and asks whether there should be a greater emphasis in judicial engagement in seeking to effect a resolution of family disputes through pre-trial conferencing where such conference is chaired by a judge of either tier of the family court<sup>54</sup>. This proposal is very much to be welcomed.

## **6.2 Family Justice Service Review**

### **6.2.1 Introduction**

**6.2.1-01** Comparisons are often drawn between the systems and services provided in Ireland and those of our nearest neighbours. There have been numerous reports and initiatives commissioned in the UK in recent times, particularly since the beginning of the current Conservative/Liberal Democrats coalition.

**6.2.1-02** The most wide-ranging of the reports commissioned by that government is the *Munro Review of Child Protection*, which was published in three parts. The first part analysed child protection systems and in essence asks the question, why have previous initiatives and reforms not produced the expected results? The second part of the report then tracks

<sup>52</sup> 'A New Structure for Family Courts' Address by the Minister for Justice, Equality and Defence, Alan Shatter T.D, 6 July, 2013.

<sup>53</sup> *ibid.*

<sup>54</sup> A New Structure for Family Courts' Address by the Minister for Justice, Equality and Defence, Alan Shatter T.D, 6 July, 2013.

the position of the child in the child protection system from the point of needing help to the point of receiving it. This concludes that the child protection system is not always child-centred. The third part of the report then sets out a comprehensive list of recommendations aimed at creating a child-centred system. Many of these recommendations could be adopted in the context of the new family law structure in this country and if adopted would ensure that our family justice system is also more child-centred.

**6.2.1–03** The coalition government has also invested heavily in researching early intervention strategies, and provided a grant of over €2 billion for early intervention programmes in both 2011–2012 and 2012–2013. Three reviews recently published have placed heavy emphasis on the effectiveness and economic benefits of using early intervention strategies and strongly encourages a move towards investment in early rather than late intervention.

### **6.2.2 Family Justice Service Review**

**6.2.2–01** The Family Justice Service review in the neighbouring jurisdiction provides some interesting suggestions as to reform. The report recommends the creation of a Family Justice Service which should ensure that:

- the interests of children and young people are at its heart and that it provides them, as well as adults, with an opportunity to have their voices heard in decision-making;
- children and families understand what their options are, who is involved and what is happening;
- the service is appropriately transparent and assures public confidence;
- proper safeguards are provided to protect vulnerable children and families;
- out of court resolution is enabled and encouraged, where this is appropriate;
- there is proportionate and skillfully managed court involvement; and
- resources are effectively allocated and managed across the system.<sup>55</sup>

**6.2.2–02** With regard to the structure of the system, the report recommends that the Ministry of Justice should sponsor the Family Justice Service.<sup>56</sup> The creation of a Family Justice Board was recommended to manage and govern the family justice system. Simplification of the current structure of overlapping bodies is also recommended, including the creation of Local Family Justice Boards which ought also to work closely with local authorities and Local Safeguarding Children Boards<sup>57</sup>

**6.2.2–03** The report recommends the creation of a dedicated post within the judiciary, a Senior Family Presiding Judge, “to report to the President of the Family Division on the effectiveness of family work amongst the judiciary”.<sup>58</sup> It emphasised the importance of judicial continuity for the provision of a more secure environment for children, for its potential to increase speed and efficiency and its promotion of firmer case management.<sup>59</sup>

**6.2.2–04** The report outlines its vision of the priorities of the Family Justice Service as amongst other things to:

- manage the budget of the consolidated functions, including monitoring their use of resources during the year and over time;
- provide court social work functions;
- ensure the child’s voice is adequately heard;
- procure publicly funded mediation and court ordered contact services in private law cases;
- coordinate the professional relationships and workforce development needs between the key stakeholders;
- coordinate learning, feedback and research across the system;
- ensure there is robust, accurate, adequately comprehensive and reliable management information;
- and manage a coherent estates strategy, in conjunction with key stakeholders.<sup>60</sup>

The report argues for the creation of a single family court, with a single point of entry.<sup>61</sup>

### **6.2.3 The Public Law System**

**6.2.3–01** The Family Justice Service review again highlights the issue of delay within the public law system. While stating that there is no single cause of delay, the report emphasises the following issues as contributory factors:

- A culture where the need for additional assessments and the use of multiple experts is routinely expected;
- A lack of trust in the judgment of local authority social workers “driven by concerns over the poor presentation of some assessments coming from often under-pressure staff”;

55 *Ibid.*, at p. 7.

56 *Ibid.*

57 *Ibid.*, at p. 8.

58 *Ibid.*

59 *Ibid.*, at p. 9.

60 *Ibid.*, at p. 11.

61 *Ibid.*, at p. 10.



- A shortage of court capacity, delays in appointing guardians and the need to meet the various demands of both local authority and court processes.<sup>62</sup>

**6.2.3–02** The report gives a clear outline of its vision for a successful court system within the context of family justice. It states that “courts should refocus on the core issues of whether the child or children can safely remain with, or return to, the parents or, if not, to the care of family or friends” and substantially reduce their scrutiny of the detail of the care plan.<sup>63</sup> In particular, the report considers that the courts should not examine the following details:

- whether residential or foster care is planned;
- plans for sibling placements;
- the therapeutic support for the child;
- health and educational provision for the child; and
- contingency planning.<sup>64</sup>

#### Timetabling of Cases

**6.2.3–03** The report, at the interim stage, considered whether a time limit of six months for the completion of care proceedings should be stipulated by legislation.<sup>65</sup> The Society is not suggesting that a six month time limit should be introduced in this jurisdiction but is of the view that care proceedings should not be allowed to drift indefinitely.

#### Case Management

**6.2.3–04** With the aim of enabling “effective and robust case control by the judiciary”, the report proposes measures to: confirm the central role of the judge as case manager;

- simplify processes;
- develop wider system reform that will facilitate effective case management; and
- develop the skills and knowledge of judges so they will be better case managers.<sup>66</sup>

The report advocates the removal of the requirement to renew interim care orders after eight weeks and then every four weeks, proposing instead that the length of renewal requirements ought to be a matter of judicial discretion with perhaps a six month maximum before renewal is required.<sup>67</sup>

#### Use of Experts

**6.2.3–05** The report strongly recommends making “the criteria against which it is considered necessary for a judge to order expert reports” more explicit and strict.<sup>68</sup>

#### Reform of the ‘tandem model’<sup>69</sup>

**6.2.3–06** The report suggests that the tandem model be retained but in a more proportionate manner. It considers that the core role of the guardian ought to be “to represent and act as the child’s voice in support of the court’s welfare decision on whether a care order is in the child’s best interests”, and that of the solicitor should be to “act as advocate for the child in court and to advise the court on legal matters”, resulting in the guardian’s presence not always being required at court.<sup>70</sup>

#### Alternative Approaches to Dispute Resolution

**6.2.3–07** The report suggests that there is scope to further develop and extend the use of alternatives to court in public law, including Family Group Conferences, the use of mediation in child protection issues, and the Family Drug and Alcohol Court.<sup>71</sup> More specific proposals are outlined in the final report considered in Appendix 1.

### **6.2.4 Private Law System**

**6.2.4–01** The Family Justice Service review summarises the issues involved in the current system as follows:

- Arrangements for children following parental separation made with minimal court involvement, can become entrenched and parents can lose the opportunity for meaningful contact with their child;
- The emotional and financial cost of using the private law system is great;
- There are many limitations on the degree to which judicial intervention can provide real resolution of issues;
- Many parties are made aware of alternatives to use of the courts only after they have entered the court system.<sup>72</sup>

<sup>62</sup> *Ibid.*, at p. 14.

<sup>63</sup> *Ibid.*, at p. 16.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, at p. 17.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, at p. 18.

<sup>69</sup> *Ibid.*, at p. 20. The report explains that the ‘tandem model’ refers to the provision of a guardian and legal representative for the child in the court process.

<sup>70</sup> *Ibid.*, at p. 18.

<sup>71</sup> *Ibid.*, at p. 19.

<sup>72</sup> *Ibid.*, at p. 20.

## The Way Forward

**6.2.4-02** The report outlines its vision for future progress as follows:

- Disputes should be resolved independently, as far as possible, or using dispute resolution services when it is safe to do so and people need to expect court to be a “last resort, not a first port of call”;
- Swift and decisive action is required when serious child protection concerns come to light.<sup>73</sup>

## Principles and Process

**6.2.4-03** The report questions whether “more should be said in legislation to strengthen the rights of children to a continuing relationship with both parents after separation” and states that much evidence on this issue was heard, both for and against such legislation. The report summarises its position as follows:

No legislation should be introduced that creates or risks creating the perception that there is an assumed parental right to substantially shared or equal time for both parents. But we do recommend that there should be a statement in legislation to reinforce the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm.<sup>74</sup>

**6.2.4-04** The report affirms that the requirement for grandparents to seek leave of the court before making an application for contact should remain.<sup>75</sup>

## The Private Law Process

**6.2.4-05** The report recommends the creation of an online hub and helpline to offer “support and advice in a single, easy to access point of reference at the beginning of the process of separation or divorce”.<sup>76</sup> The report’s vision for the hub is that it would collate:

- clear guidance about parents’ responsibilities towards their children whether separated or not, including their roles and responsibilities as set out in legislation;
- information and advice about services available to support families, whether separated or not;
- information and advice to resolve family conflicts, including fact-sheets, case studies, peer experiences, DVD clips, modelling and interactive templates to help with Parenting Agreements;
- advice about options for supported dispute resolution, which would highlight the benefits of alternative forms of dispute resolution, including mediation, and Separated Parents Information Programmes (PIPs);
- information about court resolution, should alternative dispute resolution not be suitable, and costs of applications;
- support for couples to agree child maintenance arrangements;
- guidance on the division of assets; and
- what to do when there are serious child welfare concerns.<sup>77</sup>

**6.2.4-06** After accessing the hub, the report recommends that if parties do not feel the need for further help, a meeting with a mediator should be compulsory. The role of the mediator would be to:

- assess the most appropriate intervention, including mediation and collaborative law, or whether the risks of domestic violence, imbalance between the parties or child protection issues require immediate referral to the family court; and
- provide information on local dispute resolution services and how they could support parties to resolve disputes.<sup>78</sup>

**6.2.4-07** Following assessment, the report suggests, parents ought to be required to attend a Separated Parents Information Programme, which would include a description of the relevant law, court process and likely costs.<sup>79</sup> The report provides the following rationale for this suggestion:

Experience shows that the programme can deter parents from court and bring them to agreement when they realise the effects on their children, the cost, and the fact that the judge will not necessarily condemn their former partner.<sup>80</sup>

**6.2.4-08** Thereafter, the report recommends that parents attend mediation or another form of accredited dispute resolution which would not be compulsory but would aim to become the norm.<sup>81</sup>

**6.2.4-09** Only in cases where parents cannot agree on a specific aspect of a Parenting Agreement, or where an exemp-

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, at p. 21.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, at p. 22.

<sup>77</sup> *Ibid.*, at p. 23.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

tion is raised by a trained professional, would one or both parties be permitted to apply to court for a determination on a specific issue.<sup>82</sup>

**6.2.4–10** The report praises the First Hearing Dispute Resolution Appointment (FHDRA) system, in which the judge and a Cafcass officer intervene in order to resolve issues at an early stage, and recommends that this process remain as it currently is.

**6.2.4–11** If further court involvement is required after the FHDRA, the report recommends the application of a ‘track’ system (either ‘simple’ or ‘complex’) which matches the level of complexity of the case.

**6.2.4–12** For cases allocated to the complex track, the report recommends that the same judge hear each session throughout the process.<sup>83</sup>

## **6.2.5 Financial Implications**

**6.2.5–01** The Family Justice Service review states that it was not possible to estimate the cost of its proposals at the point of publication.<sup>84</sup> However, the report clearly states its belief that the removal of duplication, the refocusing of the court’s attention and the encouragement of other methods of dispute resolution will result in costs being reduced.

## **6.2.6 Family Justice Review: Final Report**

**6.2.6–01** The final report of the Family Justice Service review was published on 3 November 2011.<sup>85</sup> This document is a stand-alone report which contains the final recommendations for reform. The report acknowledges that while the legal framework underpinning the family justice system is robust, it is subject to “immense stress and difficulties”.<sup>86</sup> The final recommendations are set out in Appendix 1.<sup>87</sup>

**6.2.6–02** Hearing the voice of the child in private family law proceedings will be a requirement once legislation to implement the provisions of the 31st Amendment to the Constitution has been commenced. The final report of the Family Justice Service review suggests the following:

- Children and young people should be given age appropriate information to explain what is happening when they are involved in public and private law cases;
- Children and young people should as early as possible in a case be supported to be able to make their views known and older children should be offered a menu of options of the methods in which they could do this when they wish to;
- The Family Justice Service should take the lead in developing and disseminating national standards and guidelines on working with children and young people in the system. It should also:
  - ensure consistency of support services, of information for young people and of child-centred practice across the country, and
  - oversee the dissemination of up-to-date research and analysis of the needs, views and development of children;
- There should be a Young People’s Board for the Family Justice Service, with a remit to consider issues in both public and private law, and to report directly to the service on areas of concern or interest.

**6.2.6–03** As mentioned earlier in the submission, in this jurisdiction section 47 of the Family Law Act, 1995 makes provision for the High Court and Circuit Court to procure a report on any question affecting the welfare of a party to proceedings, including children. The cost of preparing a section 47 report can be expensive.

**6.2.6–04** Mr. Justice Michael White observes that the difficulty with this model is that the dispute generally is not about the psychological or psychiatric welfare of the child but a protracted custody dispute between the parents and the report is usually very wide ranging focussing on the wider family and not merely the children.<sup>88</sup>

## **6.3 Specialist Family Law Courts - Reviewed**

**6.3–01** A specialist family court in Ireland would involve judges with specific training dealing with cases more expeditiously. It could also enable issues in family law cases to be addressed in a more holistic manner, and could facilitate access to mediation as well as other forms of support.<sup>89</sup> A number of jurisdictions have such a court structure. The jurisdiction of England and Wales (discussed in detail above in terms of its reform proposals), for example, does not

<sup>82</sup> *Ibid.*, at pp. 23–24.

<sup>83</sup> *Ibid.*, at p. 24.

<sup>84</sup> *Ibid.*, at p. 25.

<sup>85</sup> *Family Justice Review: Final Report* (Justice UK, 2011), available from <http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-final-report.pdf>.

<sup>86</sup> *Ibid.*, at p. 5.

<sup>87</sup> *Ibid.*, pp. 26–36.

<sup>88</sup> ‘Current Challenges in the Family Law Courts’ Mr. Justice Michael White, Chairperson of the Family Law Development Committee of the Board of the Courts Service, 29 May, 2013.

<sup>89</sup> *Ibid.*

have a distinct family law court *per se*, but has a comprehensive linked system of family law courts (primarily ‘divisions’ of existing courts), exercising similar jurisdiction and staffed by judges with particular training in family matters.<sup>90</sup> The system involves the hearing of family law cases in both County Courts and Magistrates’ Family Proceedings Courts, and both operate under Family Procedure Rules. There also exists a specialist division of the High Court – the Family Division – which hears family law cases. There are 18 judges in the Family Division who spend a large part of their judicial time hearing family law cases. They are, therefore, highly experienced in dealing with disputes in the area of family law.

**6.3–02** The majority of private family law cases are heard by the County Courts, though the Magistrates’ Courts hear a significant minority of cases involving children. There are special divisions of the County Courts which are staffed by specially trained judges. There are, for example, divorce county courts, family hearing centres (for private law cases), care centres (for public law cases concerning children), and, more recently, an adoption centre. All public law cases involving children must commence at the level of the Magistrates’ Courts, where unpaid lay persons (known as ‘Magistrates’) sit, advised by a trained lawyer. There are special ‘family proceedings’ courts within this system which are staffed by Magistrates who are drawn from a ‘family panel’. Those on the panel receive an induction and a basic course of training for this purpose. The High Court handles a small number of difficult or significant cases across all family law matters.

**6.3–03** Lowe and Douglas state of the system in England and Wales that “[t]here are differences in the courts’ powers due to the piecemeal accretions of jurisdiction” and that “[t]his has presented problems in efficiency and efficacy of the courts to handle family problems.” Therefore, despite the benefits for family law of a linked system of family law courts, a more holistic approach would be best in Ireland.

**6.3–04** In a report published in England and Wales in July 2012 entitled “Judicial proposals for the modernisation of family justice” one of the key recommendations made by Mr. Justice Ryder is the creation of a single Family Court. The single Family Court is the vehicle for a significant change of culture characterised by strong judicial leadership and management and evidence-based good practice.<sup>91</sup>

**6.3–05** The single Family Court will be a network of local Family Court centres organised around care centres which will be judicially led and managed. Judges at all levels will be members of the same court, which will be led by the President of the Family Division. The Family Court centres will provide judges with specific training, magistrates and legal advisors who are able to undertake work in the full range of family matters. In addition to the creation of the single Family Court, there are proposals for an effective framework for leadership and management. The effective management of judicial resources will help to reduce delay by better deployment practices which improve judicial continuity and listing. The single family Court in England and Wales is due to become operational in April 2014. By way of example in terms of existing Courts, there will be three single family Court Centres in London for servicing the city. The Society recommends that for the Dublin Metropolitan area there would be at most one such family law Court.

**6.3–06** The recommendations in the aforementioned report are to resolve the current difficulties facing the family courts in England and Wales, in particular delays and the significant increase in the number of litigants who are self-represented. It is submitted that similar problems are experienced in the Irish family law system.

**6.3–07** The Family Court of Australia is worthy of consideration in that it provides a broad system of judges with specific training and staff to deal with family law disputes. Since 1976 the Court has had registries in almost all Australian states and territories,<sup>92</sup> and consists of a Chief Justice, a Deputy Chief Justice and other judges specialising in family law.<sup>93</sup> This comprehensive system was established in order to ensure the simple and expedient resolution of family law matters. The Federal Magistrates Court, which has a broad general jurisdiction, including administrative law and consumer protection, was given responsibility for some aspects of family law. The reason for this was the perception of a creeping formalism in the Family Court of Australia, as well as the mounting costs of litigation.<sup>94</sup> The Federal Magistrates Court generally hears less complex family law cases than those heard in the other Federal Courts.

**6.3–08** The creation of such a structure in Ireland would certainly constitute an improvement to the current system. There is a clear need for judges with specific training and expertise in family law matters, as is the norm in many other jurisdictions. There is also a need to examine ways in which this issue is related to the problem of delay, and how to tackle that problem, which no doubt will improve with the establishment of the new Court of Appeal.

<sup>90</sup> See further Nigel Lowe and Gillian Douglas, *Bromley’s Family Law* (Oxford University Press, 2006).

<sup>91</sup> Mr. Justice Ryder “Judicial proposals for the modernisation of family justice” Judiciary of England and Wales, July 2012. Mr. Justice Ryder was appointed to carry out this report following the final report issued by the Family Justice Review panel in November 2011 and discussed earlier in this chapter. The final report had amongst other key recommendations recommended the creation of a single family court. This panel had been appointed to review the family justice system in England and Wales and was commissioned by the Ministry of Justice, the Department for Education, and the Welsh Government.

The final report can be accessed from <<http://www.justice.gov.uk/downloads/publications/moj/2011/family-justice-review-final-report.pdf>>. Mr. Justice Ryder’s report can be accessed from [http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/ryderj\\_recommendations\\_final.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/ryderj_recommendations_final.pdf).

<sup>92</sup> There is no registry in Western Australia, which has its own family law court.

<sup>93</sup> Chief Justice Diana Bryant, ‘Beyond the Horizon: State of Family Law & the Family Court of Australia 2004’ (Speech delivered at the National Family Law Conference, Gold Coast, 27 September 2004).

<sup>94</sup> See e.g. Nicholson CJ, ‘Review of the Family Court’ 64 *LMV Institute Journal* 628 (1990) at 628-629; and Alastair Nicholson, ‘Setting the Scene: Australian Family Law and the Family Court— A Perspective From the Bench’ 40 (3) *Family Court Review* 279 (2002).

## Key Recommendations

### Changes to Current Structure

1. Lower courts, in certain circumstances, should be permitted to amend the Orders of higher courts. At present, difficulties arise where parties must return to the court that made a certain Order for that Order to be amended. This can result in unnecessary expense and delay.
2. The range of Orders that can be made by the District Court should be expanded. At present, the District Court cannot deal with a range of financial issues affecting separating couples, such as property, pensions and succession rights.
3. The Circuit Court should have full original jurisdiction for all family disputes, with the High Court still retaining jurisdiction in relation to matters such as adoption and child abduction.

### Conduct of Family Law Cases

1. Consideration should be given as to whether the approach of the courts is too sympathetic, *i.e.* is the prospect of going to court not a sufficient deterrent?
2. Consideration should be given to the awarding of costs in family law disputes. Could unmeritorious applications and delaying tactics be eliminated with the threat of a costs order or an Isaac Wunder order?
3. A more coherent statutory structure should be put in place to enable breaches of Domestic Violence Orders to be processed more effectively. Any such structure should also provide an effective mechanism to address breaches of maintenance and custody/access orders.

### Children in Private Family Law Proceedings and Public Law Proceedings

1. The voice of the child must be heard in private family law proceedings. This could occur through parents or others *in loco parentis*, directly with the child giving evidence to the court, by interview with the judge, through a third party expert report, through the guardian *ad litem* or as a result of mediation, attended by the parents.
2. It is recommended that judges that are assigned to deal with child care matters should be given comprehensive training in relation to issues that are particular to child welfare and development.
3. Guardians *ad litem* should be grouped with the other services that are available to the judges and practitioners, possibly under the Courts Service rubric, thus establishing their independence and ensuring transparency in terms of appointment. Moreover, the role and function of the guardian *ad litem* should be clearly defined as well as the manner in which the guardian performs his or her duties.
4. Section 23 of the Children Act, 1997 should be reviewed in the particular circumstances of care proceedings whereby the evidence of the child should generally be admissible but with safeguards built in as the weight to be attributed to it and an assessment as to the particular circumstances of the disclosure.
5. Family and child care courts must be conducive to confidentiality and should provide appropriate facilities such as translators, waiting rooms etc.

#### 6.4.4 The Use of ADR

1. In the context of a new family court structure in this jurisdiction, ADR should be promoted having regard to the needs of the individual client.
2. Mandatory ADR information meetings should be introduced prior to any client issuing family law proceedings and a certificate of exemption produced in exceptional circumstances.
3. Information sessions should be held *in situ* in the District Court, Circuit Court and High Court nationwide. ADR specialists such as accredited mediators, conciliators and collaborative lawyers only should provide the information sessions, adhere to a code of conduct and should not furnish legal advice, but merely information on ADR.
4. Family law clients should also be recommended and preferably mandated to attend either a course or an information session on shared parenting.

5. Judges should also have, at their discretion, the authority to either determine or mediate a case. All judges and county registrars promoted should therefore be trained as mediators.
6. Judges and county registrars should also have the power to direct parties to attend an ADR information meeting if they deem the exemption/refusal is unreasonable.

### Proposed Reform

1. In order to bring a greater degree of certainty to the establishment of a new family courts structure, a Constitutional referendum may be advisable.
2. The new structure of the family courts could consist of a lower family court of limited jurisdiction and a higher court of unlimited jurisdiction. Both courts should be staffed by judges with specific training and aptitude for dealing with sensitive family law issues.

An alternative option worthy of consideration could involve streamlining of the family Courts without necessarily interfering with existing court structures. In particular, it would be possible to maintain the existing District Court on a summary basis to include the disposal of uncontested judicial separation and divorce applications. The existing Circuit Court could extend its current jurisdiction to deal with almost all other private law proceedings, perhaps with court rules which could provide that all separation and divorce proceedings must initially be brought before the Circuit Court with provision for an application to transfer to the High Court in special cases. The High Court could then sit as a Court of Appeal to deal with specialist issues such as adoption, child abduction, certain child care cases etc.

3. Efforts should be made to adopt a less adversarial approach by the lower court when dealing with guardianship, custody and access disputes, and child care and protection matters.
4. The new family courts should be located separately from current venues with sufficient rooms for private consultations and a welfare and assessment service to support public and private family law proceedings. ADR facilities should be located in the new family law courthouses linked into the welfare system.
5. The following recommendations from the Family Justice Service review in the United Kingdom should be considered:

**Children’s voices:** children and young people should be given age appropriate information to explain what is happening when they are involved in public and private law cases and should be able to make their views known.

**Judicial leadership and culture:** designated family judges should have leadership responsibility for all courts within their area. They will need to work closely with key stakeholders. The judiciary should aim to ensure continuity in all family cases.

**The court:** a single family court, with a single point of entry, should replace the current three tiers of court. All levels of the family judiciary should sit in the family court and work should be allocated according to case complexity.

**Workforce:** the Courts Service should establish a pilot in which judges would learn the outcomes for children and families on whom they have adjudicated. A system of case reviews of process should be created to help establish reflective practice in the family justice system.

**Case management:** judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child’s needs and timescales.



# Appendix 1

## Family Justice Service

- A Family Justice Service should be established, sponsored by the Ministry of Justice, with strong ties at both ministerial and official level with the Department for Education and the Welsh government. As an initial step, an interim board should be established, which should be given a clear remit to plan for more radical change on a defined time-scale towards a Family Justice Service;
- The Family Justice Service should have strong central and local governance arrangements;
- The roles performed by the Family Justice Council will be needed in any new structure, but the government will need to consider how they can be exercised in a manner that fits in with the final design of the Family Justice Service (and interim board);
- The Family Justice Service should be responsible for the budgets for court social work services in England, mediation, out of court resolution services and experts and solicitors for children (especially the potential for overtime);
- Charges to local authorities for public law applications and to local authorities and Cafcass for police checks in public and private law cases should be removed;
- A duty should be placed on the Family Justice Service to safeguard and promote the welfare of children in performing its functions. An annual report should set out how this duty has been met;
- An integrated information technology system should be developed for use in the Family Justice Service and wider family justice agencies. This will need investment. In the meantime, the government should conduct an urgent review of how better use could be made of existing systems;
- The Family Justice Service should develop and monitor national quality standards for system wide processes, using local knowledge and the experiences of service users;
- The Family Justice Service should coordinate a system wide approach to research and evaluation, supported by a dedicated research budget (amalgamated from the different bodies that currently commission research);
- The Family Justice Service should review and consider how research should be transmitted around the family justice system.

## Judicial Leadership and Culture

- A Vice President of the Family Division should support the President of the Family Division in his/her leadership role, monitoring performance across the family judiciary;
- Family Division Liaison Judges should be renamed Family Presiding Judges, reporting to the Vice President of the Family Division on performance issues in their circuit;
- Judges with leadership responsibilities should have clearer management responsibilities. Job descriptions should provide clear details of expectations of management responsibilities and inter-agency working;
- Her Majesty's Courts and Tribunals Service (HMCTS) should make information on key indicators for courts and areas available to the Family Justice Service. Information on key indicators for individual judges should be made available to those judges as well as judges with leadership responsibilities. The judiciary should agree key indicators;
- Designated Family Judges should have leadership responsibility for all courts within their area. They will need to work closely with justices' clerks, family bench chairs and judicial colleagues;
- The judiciary should aim to ensure judicial continuity in all family cases;
- The judiciary should ensure that conditions of undertaking family work include willingness to adapt work patterns to be able to offer continuity;
- The President of the Family Division should consider what steps should be taken to allow judicial continuity to be achieved in the High Court;
- In Family Proceedings Courts judicial continuity should if possible be provided by all members of the bench and the legal adviser. If this is not possible, the same bench chair, a bench member and a legal adviser should provide continuity;
- Judges and magistrates should be enabled and encouraged to specialise in family matters;
- The Judicial Appointments Commission should consider willingness to specialise in family matters in making appointments to the family judiciary;
- The Judicial Office should review the restriction on magistrate sitting days.

## Case Management

- HCMTS and the judiciary should review and plan how to deliver consistently effective case management in the courts.

## The Court

- A single family court, with a single point of entry, should replace the current three tiers of court. All levels of the family judiciary (including magistrates) should sit in the family court and work should be allocated according to case complexity;
- The roles of District Judges working in the family court should be aligned;
- Flexibility should be created for legal advisers to conduct work to support judges across the family court;
- The Family Division of the High Court should remain, with exclusive jurisdiction over cases involving the inher-

ent jurisdiction and international work that has been prescribed by the President of the Family Division as being reserved to it;

- All other matters should be heard in the single family court, with High Court judges sitting in that court to hear the most complex cases and issues;
- HMCTS and the judiciary should ensure routine hearings use telephone or video technology wherever appropriate;
- HMCTS and the judiciary should consider the use of alternative locations for hearings that do not need to take place in a court room;
- HMCTS should ensure court buildings are as family friendly as possible;
- HMCTS should review the estate for family courts to reduce the number of buildings in which cases are heard and to promote efficiency, judicial continuity and specialisation. Exceptions should be made for rural areas where transport is poor.

#### Workforce

- The Family Justice Service should develop a workforce strategy;
- The Family Justice Service should develop an agreed set of core skills and knowledge for family justice;
- The Family Justice Service should introduce an inter-disciplinary family justice induction course;
- Professional bodies should review continuing professional development schemes to ensure their adequacy and suitability for family justice;
- The Family Justice Service should develop annual inter-disciplinary training priorities for the workforce to guide the content of local inter-disciplinary training;
- The Family Justice Service should establish a pilot in which judges and magistrates would learn the outcomes for children and families on whom they have adjudicated;
- A system of case reviews of process should be created to help establish reflective practice in the family justice system;
- The Judicial College should review training delivery to determine the merits of providing a core judicial skills course for all new members of the judiciary;
- The Judicial College should develop training to assist senior judges with carrying out their leadership responsibilities;
- The Judicial College should ensure judicial training for family work includes greater emphasis on child development and case management;
- The Judicial College should ensure induction training for the family judiciary includes visits to relevant agencies involved in the system;
- There should be an expectation that all members of the local judiciary including the lay bench and legal advisers involved in family work should join together in training activities;
- The President's annual conference should be followed by circuit level meetings between Family Presiding Judges and the senior judiciary in their area to discuss the delivery of family business;
- Designated Family Judges should undertake regular meetings with the judges for whom they have leadership responsibility;
- Judges should be encouraged and given the skills to provide each other with greater peer support;
- The Judicial College should ensure induction training for new family magistrates includes greater focus on case management, child development and visits to other agencies involved in the system;
- The Judicial College should ensure legal advisers receive focused training on case management;
- Solicitors' professional bodies in tandem with representative groups for expert witnesses should provide training opportunities for solicitors on how to draft effective instructions for expert evidence;
- The College of Social Work and Care Council for Wales should consider issuing guidance to employers and higher education institutions on the teaching of court skills, including how to provide high quality assessments that set out a clear narrative of the child's story;
- The College of Social Work and Care Council for Wales should consider with employers whether initial social work and post-qualifying training includes enough focus on child development, for those social workers who wish to go on to work with children;
- The Children's Improvement Board should consider what training and work experience is appropriate for Directors of Children's Services who have not practised as social workers.

#### Public Law: The Role of the Court

- Courts must continue to play a central role in public law in England and Wales;
- Courts should refocus on the core issues of whether the child is to live with parents, other family or friends, or is to be removed to the care of the local authority;
- When determining whether a care order is in a child's best interests the court will not normally need to scrutinise the full detail of a local authority care plan for a child. Instead the court should consider only the core or essential components of a child's plan. These are:
  - planned return of the child to their family;
  - a plan to place (or explore placing) a child with family or friends;
  - alternative care arrangements; and

- contact with birth family to the extent of deciding whether that should be regular, limited or none.
- The government should consult as to whether section 34 of the Children Act, 1989 should be amended to promote reasonable contact with siblings, and to allow siblings to apply for contact orders without leave of the court.

#### Public Law: The Relationship between courts and local authorities

- There should be a dialogue both nationally and locally between the judiciary and local authorities. The Family Justice Service should facilitate this. Designated Family Judges and the Director of Children's Services/Director of Social Services should meet regularly to discuss issues;
- Local authorities and the judiciary need to debate the variability of local authority practice in relation to threshold decisions and when they trigger care applications. This again requires discussion at national and local level. The government should support these discussions through a continuing programme of analysis and research;
- The revised Working Together and relevant Welsh guidance should emphasise the importance of the child's time-scales and the appropriate use of proceedings in planning for children and in structured child protection activity.

#### Public Law: Case Management

- Different courts take different approaches to case management in public law. These need corraling, researching and promulgating by the judiciary to share best practice and ensure consistency;
- The government should legislate to provide a power to set a time limit on care proceedings. The limit should be specified in secondary legislation to provide flexibility. There should be transitional provisions;
- The time limit for the completion of care and supervision proceedings should be set at six months;
- To achieve the time limit would be the responsibility of the trial judge. Extensions to the six month time limit will be allowed only by exception. A trial judge proposing to extend a case beyond six months would need to seek the agreement of the Designated Family Judge/ Family Presiding Judge as appropriate;
- Judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales. There is a strong case for this responsibility to be recognised explicitly in primary legislation;
- The Public Law Outline provides a solid basis for child-focused case management. Inconsistency in its implementation across courts is not acceptable and the senior judiciary are encouraged to insist that all courts follow it;
- The Public Law Outline will need to be remodelled to accommodate the implementation of time limits in cases. The judiciary should consult widely with all stakeholders to inform this remodelling. New approaches should be tested as part of this process;
- The requirement to renew interim care orders after eight weeks and then every four weeks should be amended. Judges should be allowed discretion to grant interim orders for the time they see fit subject to a maximum of six months and not beyond the time limit for the case. The court's power to renew should be tied to their power to extend proceedings beyond the time limit;
- The requirement that local authority adoption panels should consider the suitability for adoption of a child whose case is before the court should be removed.

#### Public Law: Local Authority Practice

- The judiciary led by the President's office and local authorities via their representative bodies should urgently consider what standards should be set for court documentation, and should circulate examples of best practice;
- The use of the Letter Before Proceedings approach is to be encouraged. Its operation is to be reviewed once full research is available about its impact;
- Local authorities should review the operation of their Independent Reviewing Officer service to ensure that it is effective. In particular they should ensure that they are adhering to guidance regarding case loads;
- Effective links between the courts and Independent Reviewing Officer need to be created. In particular, the working relationship between the guardian and the Independent Reviewing Officer needs to be stronger.

#### Public Law: Expert Witnesses

- Primary legislation should reinforce that in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case. The Family Procedure Rules would need to be amended to reflect the primary legislation;
- The court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved. Independent social workers should be employed only exceptionally;
- Research should be commissioned to examine the value of residential assessments of parents;
- Judges should direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. Judges should set out, in the order giving permission for the commissioning of the expert witness, the questions on which the expert witness should focus;
- The Family Justice Service should take responsibility for work with the Department for Health and others as necessary to improve the quality and supply of expert witness services. This will involve piloting new ideas, sharing best practice and reviewing quality;
- The Legal Services Commission should routinely collate data on experts per case, type of expert, time taken, cost

and any other relevant factor. This should be gathered by court and area;

- It is recommended that studies of the expert witness reports supplied by various professions be commissioned by the Family Justice Service;
- Agreed quality standards for expert witnesses in the family courts should be developed by the Family Justice Service;
- A further pilot of multi-disciplinary expert witness teams should be taken forward, building on lessons from the original pilot;
- The Family Justice Service should review the mechanisms available to remunerate expert witnesses, and should in due course reconsider whether experts could be paid directly.

#### Public Law: Representation of Children

- The tandem model should be retained with resources carefully prioritised and allocated;
- The merit of using guardians in pre-proceedings needs to be considered further;
- The merit of developing an in-house tandem model needs to be considered further. The effects on the availability of solicitors locally to represent parents should be a particular factor.

#### Public Law: Alternatives to Conventional Court Proceedings

- The benefits of Family Group Conferences should be more widely recognised and their use should be considered before proceedings. More research is needed on how they can best be used, their benefits and their cost;
- A pilot on the use of formal mediation approaches in public law proceedings should be established;
- Proposals should be developed to pilot new approaches to supporting parents through and after proceedings.

#### Private Law: Making Parental Responsibility Work

- The government should find means of strengthening the importance of a good understanding of parental responsibility in information it gives to parents;
- No legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents;
- The need for grandparents to apply for leave of the court before making an application for contact should remain;
- Parents should be encouraged to develop a Parenting Agreement to set out arrangements for the care of their children post separation;
- The government and the judiciary should consider how a signed Parenting Agreement could have evidential weight in any subsequent parental dispute;
- The government should develop a child arrangements order which would set out arrangements for the upbringing of a child when court determination of disputes related to the care of children is required;
- The government should repeal the provision for residence and contact orders in the Children Act 1989;
- Prohibited steps orders and specific issue orders should be retained for discrete issues where a child arrangements order is not appropriate;
- The new child arrangements order should be available to fathers without parental responsibility, as well as those who already hold parental responsibility, and to wider family members with the permission of the court;
- Where a father would require parental responsibility to fulfil the requirement of care as set out in the order, the court would also make a parental responsibility order;
- Where the order requires wider family members to be able to exercise parental responsibility, the court would make an order that that person should have parental responsibility for the duration of the order;
- The facility to remove the child from the jurisdiction of England and Wales for up to 28 days without the agreement of all others with parental responsibility or a court order should remain;
- The provision restricting those with parental responsibility from changing the child's surname without the agreement of all others with parental responsibility or a court order should remain.

#### Private Law: A Coherent Process for Dispute Resolution

The Family Justice Service review in the UK recommends in relation to the setting up of a processes for dispute resolution that:

- The government should establish an online information hub and helpline to give information and support for couples to help them resolve issues following divorce or separation outside court;
- 'Alternative dispute resolution' should be rebranded as 'Dispute Resolution Services', in order to minimise a deterrent to its use;
- Where intervention is necessary, separating parents should be expected to attend a session with a mediator, trained and accredited to a high professional standard, who should:
  - assess the most appropriate intervention, including mediation and collaborative law, or whether the risks of domestic violence, imbalance between the parties or child protection issues require immediate referral to the family court; and
  - provide information on local dispute resolution services and how they could support parties to resolve disputes.
- The mediator tasked with the initial assessment (Mediation Information and Assessment Meeting) would need to be

- the key practitioner until an application to court is made;
- The regime would allow for emergency applications to court and the exemptions should be as in the Pre-Application Protocol;
- Those parents who are still unable to agree should next attend a Separated Parents Information Programme and thereafter if necessary mediation or other dispute resolution service;
- Attendance at a Mediation Information and Assessment Meeting and Separated Parent Information Programme should be required of anyone wishing to make a court application. This cannot be required, but should be expected, of Respondents;
- Judges should retain the power to order parties to attend a mediation information session and Separated Parents Information Programmes, and may make cost orders where it is felt that one party has behaved unreasonably;
- Where agreement could not be reached, and having been given a certificate by the mediator, one or both of the parties would be able to apply to court;
- Mediators should at least meet the current requirements set by the Legal Services Commission. These standards should themselves be reviewed in the light of the new responsibilities being laid on mediators. Mediators who do not currently meet those standards should be given a specified period in which to achieve them;
- The government should closely watch and review the progress of the Family Mediation Council to assess its effectiveness in maintaining and reinforcing high standards. The Family Mediation Council should if necessary be replaced by an independent regulator;
- The Family Justice Service should ensure, for cases involving children, that safeguarding checks are completed at the point of entry into the court system.

#### Private Law: Divorce and Financial Arrangements

- The process for initiating divorce should begin with the online hub and should be dealt with administratively by the courts, unless the divorce is disputed;
- People in dispute about money or property should be expected to access the information hub and should be required to be assessed for mediation;
- Where possible all issues in dispute following separation should be considered together, whether in all-issues mediation or consolidated court hearings. HMCTS and the judiciary should consider how this might be achieved in courts. Care should be taken to avoid extra delay particularly in relation to children;
- The government should establish a separate review of financial orders to include examination of the law;
- The Ministry of Justice and the Legal Services Commission should carefully monitor the impact of legal aid reforms. The supply of properly qualified family lawyers is vital to the protection of children.