

Submission to the Family Justice Oversight Group

March 2021



1. Introduction

The Children’s Rights Alliance unites over 100 organisations working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services. We identify problems for children. We develop solutions. We educate and provide information and legal advice on children's rights.

The Children’s Rights Alliance welcomes the opportunity to make a written submission to the Family Justice Oversight Group on the reform of the family justice system.

Reform of the family justice system and the establishment of the new family law courts are long overdue. It is welcome that Heads of Bill were published in 2020 for the new family law system and that the Family Justice Oversight group has been established. It is key that this momentum is maintained, and that the legislation is prioritised and moved through the Houses of the Oireachtas. A timeline for the Bill should be published as a matter of urgency.

Children are key stakeholders in the family justice system. Too often, the adversarial system of family law places two opposing parties’ interests against each other with children often not being central to the proceedings. The Alliance welcomes the proposals to reform and develop a modernised family justice system. Any reform of the family justice system must have children front and centre. It is welcome that that a future strand in the work of Family Justice Oversight Group will involve a targeted consultation involving children themselves.

Article 3(1) of the UN Convention on the Rights of the Child (UNCRC) states that the best interests of the child should be a primary consideration in all actions concerning a child:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹

In addition to holding consultations with children and young people, the best interests of children should be a primary consideration in the reform process and in the operation of the new system.

The reform process should also aim to ensure that family law disputes are resolved in a safe, speedy and sustainable manner where families have access to services that can divert disputes away from the courts. An emphasis should be placed on empowering families to support and reach their own decision where possible with recourse to alternative dispute resolution mechanisms (ADR) and going to court should be a last resort.

¹ UN Convention on the Rights of the Child, A/RES/44/25 (20 November 1989), Article 3.

Summary of Recommendations

- Consider setting up a public model whereby the State covers the cost of child views expert reports in private law proceedings. To ensure equality for children in line with Article 42A of the Constitution, the GAL Executive Office could be moved now to the Courts Service to oversee both the public and private mechanisms as there would be significant crossover in the oversight required.
- In reforming the family justice system, consider developing detailed guidelines for meetings between judges and children which adhere to the Council of Europe *Guidelines on Child-Friendly Justice*.
- Consider extending the training requirement for Family District and Circuit Judges, by the proposed Judicial Studies Committee, to judges of the Family High Court.
- Consider including a requirement for specialist training for all professionals working in the family law courts, including solicitors and barristers, in the next iteration of the Bill and for this to specifically include training on the mechanisms for meeting with and hearing from children and young people, including children with intellectual disabilities.
- Ensure that court settings are designed to be child-friendly by including the provision of interview and waiting rooms for children 'in a child-friendly environment'.
- Make proceedings more child-friendly by including provisions to ensure that children are familiarised with the Court setting, the layout and the roles and identities of officials ahead of attending proceedings. Court sessions involving children should be adapted to the child's pace and attention span with planned regular breaks and hearings that are limited in duration.
- Introduce mechanisms to provide that relevant child-friendly information is given to children and their parents or legal representatives and that child-friendly materials on legal proceedings could be made available and widely distributed.
- Introduce a specialist child court liaison officer in all regions to provide information and support for children and young people who come into contact with the family law system.
- Consideration should be given to how to ensure that court hearings related to children are prioritised and ensure that they are held in a timely manner.
- Consider using the reform of the family law system as an opportunity to house key services and agencies under the one roof and develop a new model that will promote an interdisciplinary system to ensure effective communication between all disciplines.
- Consider updating and amending the civil legal aid financial thresholds for family law cases so that eligible families have access to legal advice and representation.
- When reviewing the Civil Legal Aid scheme, ensure that children can access civil legal aid in relation to family law proceedings to ensure that their interests are independently represented and they can access justice in proceedings that directly impact their lives.
- Alternative Dispute Resolution models should be encouraged and used when these are in a child's best interests.
- Consider the role family support and prevention and early intervention can play in diverting families out of the courts to resolve family law disputes.
- Consider introducing information sessions where families can find out about alternative dispute options and parenting courses.
- Establish a process for the professionalisation, regulation and training of family law mediators through the enactment of s12 of the Mediation Act 2017 which provides for the Mediation Council to be established for this purpose.
- Use the opportunities of reforming the family law system, the design of the new Family Law Complex and new courthouse buildings and refurbishments to ensure that such reform is informed by the Council of Europe's *Guidelines on Child Friendly Justice* and that a consultation with children and young people is carried out.

2. Voice of the Child

2.1 How best to incorporate the voice of the child in proceedings

Every child has the right to have their views heard in any judicial proceedings that affect them. The views of the child should be given due weight in accordance with the age of the child and the child's maturity.² The UN Convention on the Rights of the Child makes specific reference to the child being heard in court proceedings either directly or indirectly through a representative body³ such as a Guardian *ad litem* (GAL).⁴ The Council of Europe's *Guidelines on Child-Friendly Justice* provide that judges should respect the right of children to be heard in matters that affect them and that children should be consulted about the manner in which they would like to be heard.⁵ The *Guidelines* also provide that children should not be precluded from being heard on the basis of age⁶ and that these protections should apply to both in court and out-of-court mechanisms.⁷

Article 42A.4 of the Irish Constitution states that provision shall be made by law for the best interests of the child to be 'the paramount consideration' in child protection and care, adoption and family law proceedings, and for the views of the child to be 'ascertained and given due weight'.⁸ This constitutional provision therefore refers to two types of proceedings: (1) public law proceedings which deal with issues that are of direct concern to society and which govern relationships between individuals and the State, and (2) private law proceedings which relate to the adjudication of an issue between two private parties.

We hear directly from children and families on our legal information line and through our legal advice clinics that they feel that the views of children are not being adequately heard in family law proceedings, in particular in disputes about access.⁹

Child Views Experts and Guardian ad Litem

In 2016, the UN Committee called on Ireland to:

...[t]ake measures to ensure the effective implementation of legislation recognising the right of the child to be heard in relevant legal proceedings, particularly family law proceedings, including by establishing systems and/or procedures for social workers and Courts to comply with the principle.¹⁰

The Committee has set out requirements for the appropriate representation of the views of the child. A person who is being appointed as a child's representative must have sufficient knowledge and understanding of the various aspects of the decision-making process, as well as experience of working with children.¹¹ The representative must be aware that they represent the interests of the child exclusively and not the interests of other persons (parent(s); institutions or bodies – for example, residential home, administration or society).¹² The Committee is clear that if a representative is used to hear the voice of the child 'it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative'.¹³ In *Better Outcomes*,

2 *ibid* Art 12.

3 *ibid* Art 12(2).

4 A Guardian *ad litem* is a person who facilitates the voice of the child to be heard in care proceedings before a court, and strives to ensure that the child's views are taken into account when decisions are made by the court in respect of these applications. The Guardian *ad litem* also gives a professional view on what they believe is in the child's best interests given all the circumstances.

5 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 29.

6 *Ibid.*

7 *ibid* 70.

8 Constitution of Ireland, Art 42A.4.

9 Children's Rights Alliance, Helpline and Legal Advice Clinics Annual Report 2019 (CRA 2020).

10 UNCRC 'Concluding Observations: Ireland' (2016) UN Doc CRC/C/IRL/CO/3-4 para 32(a).

11 *ibid* para 36.

12 *ibid* para 37.

13 *ibid* para 36.

Brighter Futures: The National Policy Framework for Children and Young People 2014-2020, the Government commits to creating mechanisms to provide children with the opportunity to be heard in judicial proceedings affecting them; this includes independent representatives, where appropriate.¹⁴ Currently there are two different systems in place for the hearing the voice of the children in private family law and in child care law.

In public childcare law, section 24 of the Child Care Act 1991 obliges the Court, 'in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child'. The Act provides two mechanisms for hearing the views of the child, (1) making a child a party to the proceedings¹⁵ or (2) the appointment of a Guardian *ad Litem* (GAL) to report to the Court on the child's views and best interests.¹⁶ The cost of appointing a GAL is borne by the State and the reform of the GAL system is ongoing in the Department of Children, Equality, Disability, Integration and Youth (DCEDIY). A new Executive Office has been established to house the GAL service in the DCEDIY which is intended to move under the auspices of the Department of Justice in the longer-term.¹⁷

The Children and Family Relationships Act 2015 gives effect to Article 42A.4 in private law proceedings that involve adjudication upon issues relating to the guardianship, custody, upbringing of, and/or access to a child, as well as the administration of any property which belongs to a child or which is held on trust for a child.¹⁸ The Act is not prescriptive about the way in which the voice of the child is to be heard in proceedings.¹⁹ Different methods vary from the child being heard directly in the Court, being heard in chambers by the Judge (see below) or the use of an expert to hear the views of the child and report back to the court.

The Act provides that the Court can 'appoint an expert to determine and convey the child's views'.²⁰ The legislation requires that one or both of the parties must pay the fee of the expert appointed, as this will not be covered by the State. The Guardianship of Infants Act 1964 (Child's Views Expert) Regulations came into operation on 1 January 2019.²¹ The regulations specify the necessary qualifications and experience for Child's Views Experts as well as the fees and expenses that may be charged by such experts. The Regulations also define the minimum standards that a views expert must adhere to, this includes being independent, facilitating the free expression of the views by the child and preparing an accurate report.²²

The fact that parents, not the State, will have to cover the fee of the child views expert in private law proceedings means that a child's access to this service will be dependent on their parent(s) being able to afford, or being willing, to pay for the service. A disparity will therefore remain between hearing the views of children in private law proceedings as it will dependent on cost and public law proceedings where the state covers the costs. The UN Committee on the Rights of the Child expressed its concern on this issue and has been clear that the approach proposed constitutes a breach of children's rights.²³

The pending reform of the GAL system presents an opportunity to adopt a common approach in the mechanisms used to hear the voice of the child in both public and private law proceedings.

14 Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014–2020* (DCYA 2014) Commitment G18.

15 Child Care Act 1991, s25.

16 *ibid*, s26.

17 Family Court Bill General Scheme (September 2020) Head 3; Communication received by the Children's Rights Alliance from the Department of Children and Youth Affairs, 8 January 2018.

18 Guardianship of Infants Act 1964, s 3(1)(a)-(b), as inserted by, Child and Family Relationships Act 2015, s45.

19 Part V of the Guardianship of Infants Act 1964, as amended by the Children and Family Relationships Act 2015, s63.

20 Children and Family Relationships Act 2015, s63 inserts Part V into the Guardianship of Infants Act 1964. This Part outlines the factors to consider in determining the best interests of the child and s 32(1)(b) provides for the appointment of an expert by the Court 'to determine and convey the child's views'. This provision was commenced in January 2016. Children and Family Relationships Act 2015 (Commencement of Certain Provisions) Order (SI No. 12/2016).

21 Communication from the Department of Justice and Equality, 4 January 2019, Guardianship of Infant Act 1964 (Child's Views Expert) Regulations 2018 (SI No.587/2018).

22 Guardianship of Infant Act 1964 (Child's Views Expert) Regulations 2018 (SI No.587 of 2018) s5.

23 UNCRC 'Concluding Observations: Ireland' (2016) UN Doc CRC/C/IRL/CO/3-4 para 31(b); para 32(b).

Consideration should be given to setting up a public model whereby the State covers the cost of reports. As part of this, the GAL Executive Office could be moved to the Courts Service to oversee both the public and private mechanisms as there would be significant crossover in oversight required.

Children being heard by Judges

Sometimes judges will speak to children in chambers rather than obtaining an expert report. Professor Geoffrey Shannon, the-then Special Rapporteur on Child Protection, in his 2018 report, noted that there were no guidelines for meetings between judges and children apart from some points set out in the 2008 case of *O'D v O'D*.²⁴ Professor Shannon noted that while they are useful, these points are not comprehensive and that they fail to acknowledge that under Article 12 of the UNCRC, the process should begin with an assumption in favour of hearing children. In reforming the family justice system consideration should be given to developing detailed guidelines for meetings between judges and children.

Training of Professionals

The UN Committee on the Rights of the Child notes that the 'context in which a child exercises their right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate'.²⁵

The proposed specialisation of the judiciary, as provided for in the General Scheme of the Family Court Bill General Scheme is welcome. The Heads of Bill provide that in order for a person to be assigned as a Judge to any of the Family Courts they have to be a 'a suitable person to deal with matters of family law' by reason of their 'training or experience and temperament'.²⁶ It is welcome that the General Scheme provides that all proceedings at every level shall be 'as informal as practicable' and Judges, barristers and solicitors shall not wear wigs and gowns during proceedings.²⁷

The proposed establishment of specialised Judges is to be welcomed as currently in Ireland, most child and family law cases are heard by generalist judges in the general court system. Specialised family or children's court systems are commonplace across Europe and in other common law jurisdictions where the judiciary and lawyers have specialised training.²⁸ In 1996, the Law Reform Commission (LRC) published a report on the reform of the Family Law Courts in which it highlighted the issues in the system and noted that that 'judges dealing with family disputes do not always have the necessary experience or aptitude' and recommended that judicial training should include an interdisciplinary element.²⁹

In examining Ireland's progress on the UNCRC in 2016, the Committee on the Rights of the Child expressed concerns at the delays in hearing family law cases and that judges in family law cases are not provided with 'systematic training for dealing with cases concerning children'.³⁰ The Committee recommended that sufficient resources be provided to train judges hearing family law cases involving children and that these cases 'are prioritised in the court system'.³¹

Head 6 (8) of the General Scheme provides that judges of the District Court will be required to undertake 'courses of training or education, or both, as may be required by the Judicial Studies Committee established by the Judicial Council'. Head 11 (8) contains a similar requirement for Circuit Court judges. However, no such requirement is contained in Head 16 in respect of Family High Court

24 [2008] IEHC 468; Dr G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection*, (DCYA 2018) 86.

25 UN Committee on the Rights of the Child (2009) *General Comment No. 12: The right of the child to be heard (para. 42)*, CRC/C/GC/12

26 Family Court Bill: General Scheme, Heads 6(4), 11(4) and 16(4).

27 *ibid* Heads 10(5), 15(5) and 17(3).

28 Prof. G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (DCYA 2018) 7.

29 Law Reform Commission, *Report on Family Courts* (LRC 1996) 117.

30 UN Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland (2016) CRC/C/IRL/CO/3-4, para 47.

31 *ibid*, para 48.

judges. Consideration should be given to extending the requirement to undergo training to judges of the Family High Court.

It is disappointing that the Heads of Bill do not make any reference to the need for solicitors and barristers to undergo training. The Council of Europe's *Guidelines on Child-Friendly Justice* provide that states should establish 'a system of specialised judges and lawyers for children'.³² The *Guidelines* provide that 'all professionals working with and for children should receive necessary interdisciplinary training on the rights and needs of children of different age groups, and on proceedings that are adapted to them', which should incorporate training in communicating with children and young people.³³ In 2019/2020 the Law Society of Ireland working in association with the Children's Rights Alliance developed a first-of-its kind training course to upskill lawyers working with children to gain the practical skills to communicate effectively and take instructions from children and young people. The course provided hands-on practical skills training in how to take instructions from children equipping participants with effective active listening and interviewing skills.

Recommendations:

- Consider setting up a public model whereby the State covers the cost of child views expert reports in private law proceedings. To ensure equality for children in line with Article 42A of the Constitution, the GAL Executive Office could be moved now to the Courts Service to oversee both the public and private mechanisms as there would be significant crossover in the oversight required.
- In reforming the family justice system, consider developing detailed guidelines for meetings between judges and children which adhere to the Council of Europe *Guidelines on Child-Friendly Justice*.
- Consider extending the training requirement for Family District and Circuit Judges, by the proposed Judicial Studies Committee, to judges of the Family High Court.
- Consider including a requirement for specialist training for all professionals working in the family law courts, including solicitors and barristers, in the next iteration of the Bill and for this to specifically include training on the mechanisms for meeting with and hearing from children and young people, including children with intellectual disabilities.

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

Despite the fact that most proceedings involving children are subject to the *in camera* rule (meaning they are heard in private), a large number of Court facilities still lack basic privacy. There is a lack of consultation rooms which results in delays in the hearing of family law applications and leads to the provision of legal advice sometimes in hallways, rather than in child-friendly consultation rooms.³⁴ Generally, there is no special provision made to accommodate children involved in family law proceedings and children who are present in the Court may witness or experience violence or other upsetting behaviour due to insufficient staffing of Gardaí in Courthouses.³⁵

The Child Care Law Reporting Project has highlighted issues around access such as the lack of ramps, poor acoustics, lack of proper waiting areas and lack of privacy.³⁶ It recommended the establishment of a specialist family court sitting in court venues that 'afford the litigants dignity and privacy and provide for private consultations with their lawyers along with a minimum level of physical comfort'.³⁷ They recommended that the venues should have easy access, a reception area with information on the proceedings of the day, waiting areas with seating and access to water and

32 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (Council of Europe 2010) 33.

33 *ibid* 14.

34 The Bar of Ireland, 'Submission by Council of The Bar of Ireland to the Joint Oireachtas Committee on Justice and Equality on the Reform of the Family Law System' (The Bar of Ireland 2019) 7.

35 *ibid*.

36 Carol Coulter, *District Court Child Care Proceedings: A National Overview* (Child Care Law Reporting Project 2019) 38.

37 *ibid*.

vending machines, consultation rooms and a separate waiting area for vulnerable litigants, witnesses and children.³⁸

The Council of Europe's *Guidelines on Child-Friendly Justice* provide that States should ensure that proceedings involving children are dealt with in 'non-intimidating and child-sensitive settings'.³⁹ The *Guidelines* recommend that interviewing and waiting rooms for children 'in a child-friendly environment' be provided in court settings.⁴⁰ They recommend that children should be familiarised with the Court setting, the layout and the roles and identities of officials ahead of attending proceedings and that Court sessions involving children should be adapted to the child's pace and attention span with planned regular breaks and hearings that are limited in duration.⁴¹

Recommendations:

- Ensure that court settings are designed to be child-friendly by including the provision of interview and waiting rooms for children 'in a child-friendly environment'.
- Make proceedings more child-friendly by including provisions to ensure that children are familiarised with the Court setting, the layout and the roles and identities of officials ahead of attending proceedings. Court sessions involving children should be adapted to the child's pace and attention span with planned regular breaks and hearings that are limited in duration.

2.3 How children can be kept informed in the family court system

Children and families contact the Children's Rights Alliance on an ongoing basis as they find the family law system hard to navigate and are seeking information on their rights and the legal process.⁴² According to the Council of Europe's *Guidelines on Child-Friendly Justice*, at the outset of any legal process, children should be promptly provided with information on their rights, the system and procedures involved. The child's role should also be explained to them and the parties involved along with any existing support mechanisms and the appropriateness and possible consequences of using in-Court or out-of-Court proceedings such as mediation for proceedings involving children.⁴³ The proposed reform of the family justice system could introduce mechanisms to provide that relevant information is given to children and their parents or legal representatives and that child-friendly materials on legal proceedings could be made available and widely distributed as outlined in the *Guidelines*.⁴⁴ Any information provided to children should be adapted to their age and maturity and be in a language they can understand, which is sensitive to gender and culture.⁴⁵ Digital technology could help to make information accessible to children, families and organisations who support and work with them. All children should be able to access relevant information, including children with intellectual disabilities. Legislators could also consider making a provision to employ a specialist child court liaison officer in all regions to provide information and support for children and young people who come into contact with the family law system. A specialist website, helpline and suite of resources could also be developed to inform and assist children and families involved in family law proceedings.

38 *ibid.*

39 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 29.

40 *Ibid.*

41 *ibid.*

42 Children's Rights Alliance, *Helpline and Legal Advice Clinics Annual Report 2019 (2020)* 9.

43 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (Council of Europe 2010) 20-21.

44 *ibid.* 21.

45 *ibid.*

Recommendations:

- Introduce mechanisms to provide that relevant child-friendly information is given to children and their parents or legal representatives and that child-friendly materials on legal proceedings could be made available and widely distributed.
- Introduce a specialist child court liaison officer in all regions to provide information and support for children and young people who come into contact with the family law system.

3. The Family Courts

3.1 What issues should always be prioritised for hearing?

The UNCRC obliges the State to ensure that the child's best interests are a primary consideration in all actions concerning children, including in courts of law.⁴⁶ In examining Ireland's progress in 2016, the Committee on the Rights of the Child expressed concerns at the delays in hearing family law cases.⁴⁷ The Committee recommended that cases involving children should be prioritised in the court system.⁴⁸ The Council of Europe's *Guidelines on Child-Friendly Justice* recommend that all proceedings involving children should be heard in a speedy manner and the urgency principle should be applied.⁴⁹ Furthermore, Court sessions involving children should be adapted to the child's pace and attention span with planned regular breaks and hearings that are limited in duration.⁵⁰

Recommendation:

- Consideration should be given to how to ensure that court hearings related to children are prioritised and ensure that they are held in a timely manner.

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

This reform presents an opportunity to house key services and agencies under the one roof and develop a new model that will promote an interdisciplinary system to ensure effective communication between all disciplines. This could mean that family law judges could refer parties to skilled personnel to draw up parenting plans, carry out assessments such as parenting capacity assessments; implement supervised access orders; and monitor and facilitate the restoration of custody and access orders if they breakdown.

Alternative means of dispute resolution (ADR) are key drivers in facilitating and encouraging less acrimonious ways of resolving the family law matters. While ADR will not be suitable for every case, in particular those involving child protection and domestic violence, consideration should be given to the role that family support and prevention and early intervention can play in diverting families out of the courts to resolve family law disputes.

In the UK, Cafcass (Children and Family Court Advisory and Support Service) safeguard and promote the welfare of children going through the family justice system by giving advice to the court; making provision for the child to be represented; providing information, advice and other supports for the

46 UN Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (UNCRC) Art 3.

47 UN Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland (2016) CRC/C/IRL/CO/3-4, para 47.

48 *ibid* para 48.

49 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 28.

50 *Ibid* 29.

child and their family pre-court and post-court.⁵¹ A similar model could be replicated and expanded upon in the Irish context to include ADR mechanisms and a comprehensive pre-court assessment of a family's needs using a similar model to the Cafcass Child Impact Assessment Framework which assesses what is happening for each individual child.⁵²

Recommendation:

- Consider using the reform of the family law system as an opportunity to house key services and agencies under the one roof and develop a new model that will promote an interdisciplinary system to ensure effective communication between all disciplines.

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

In terms of accessing legal aid, the 2019 Joint Committee on Justice and Equality report on reform of the family law system noted that the under-funding of the Legal Aid Board has created lengthy waiting lists for initial consultations, which adds to delays in the courts system.⁵³ Further, it notes that many applicants are excluded from eligibility, despite having low disposable income.⁵⁴

To qualify for legal aid, an applicant must meet the financial eligibility criteria provided in the Civil Legal Aid Regulations 1996 to 2017. In general terms, the Regulations provide that a person's disposable income must be below €18,000 per annum. Disposable income is assessed by taking gross income and deducting certain allowances. This low qualifying threshold results in many families being excluded from obtaining legal aid and unable to independently fund representation.⁵⁵ Each applicant receives an allowance of €1,600 for each dependent child when calculating their disposable income.⁵⁶ This does not reflect the reality for families raising children and the costs associated with providing adequately for children.

Even when an applicant meets the financial threshold for legal aid, it is usually not free except in cases of domestic violence. Regulation 21(14) of the Civil Legal Aid Regulations 1996 to 2017 provides as follows.

No contribution shall be payable by an applicant where the subject matter of the application relates solely to proceedings in the District Court (or on appeal from the District Court to the Circuit Court) where the only remedy sought by the Applicant in those proceedings is an order pursuant to the Domestic Violence Act 1996.

However, in other family law cases, applicants are required to make a financial contribution. Legal aid applicants must make a minimum contribution of €130 for legal aid. If their disposal income is above €11,500, then that contribution amount can rise significantly, adding an additional layer of stress to families in the family justice system. The family courts offices do not charge fees for issuing and filing court documents in the same manner as the general civil courts. A similar approach should be considered for the Legal Aid Board, where eligible families are granted legal aid without the need for a financial contribution.

Ensuring a speedy resolution to family law matters includes timely access to legal aid for families. According to the Legal Aid Board, in December 2020, the average waiting time for a first, advice only,

51 Cafcass, About Cafcass <<https://www.cafcass.gov.uk/about-cafcass/>> accessed 2 March 2021.

52 Cafcass Child Impact Assessment Framework <<https://www.cafcass.gov.uk/grown-ups/professionals/ciaf/>> accessed 2 March 2021.

53 Joint Committee on Justice and Equality, *Report on Reform of the Family Law System*, , (Houses of the Oireachtas 2019).

54 *ibid* 32.

55 FLAC Opening Statement to the Joint Oireachtas Committee on Justice and Equality, Access to Justice & Costs (November 2019) <<https://bit.ly/3dylzUz>> accessed 22 February 2020.

56 Regulation 16(b) of the Civil Legal Aid Regulations 1996 to 2017.

consultation with a solicitor was 17.5 weeks.⁵⁷ Delays in accessing legal aid can have a knock-on impact and lengthen proceedings overall. Mediated agreements, already in place, could end up breaking down if not endorsed by a court in a timely manner. A 2012 research project found that where families adopt a low-conflict and co-operative approach after separation, this can alleviate some of negative effects on the children whereas unresolved or continued conflict is likely to have a negative impact on children and families.⁵⁸

Accessing legal advice specifically on children's rights and issues can be almost impossible for most families. Children and young people under 18 have no enforceable right to legal aid or legal advice. Consideration should be given to reviewing the Civil Legal Aid scheme to ensure that children are not prohibited from accessing their right to justice.

Recommendations:

- Consider updating and amending the civil legal aid financial thresholds for family law cases so that eligible families have access to legal advice and representation.
- When reviewing the Civil Legal Aid scheme, ensure that children can access civil legal aid in relation to family law proceedings to ensure that their interests are independently represented and they can access justice in proceedings that directly impact their lives.

5. The place of mediation in family justice

The desirability of using mediation to resolve family law issues; should mediation be a requisite to initiating or progressing family law proceedings with the court only being required in irresolvable cases or as the last step?

The Council of Europe's *Guidelines on Child-Friendly Justice* provide that alternatives to court proceedings such as 'mediation, diversion (of judicial mechanisms) and alternative dispute resolution' should be encouraged and used when these are in a child's best interests.⁵⁹ The consideration of the place of mediation in this consultation process should be widened to include the place of Alternative Dispute Resolution (ADR) more generally.

While ADR will not be suitable for every case, in particular those involving child protection and domestic violence where there is often an imbalance of power between the parties, consideration should be given to referring to dispute resolution methods beyond mediation to include arbitration and other quasi-judicial methods. In cases that involve child protection or domestic violence there should be no presumption made in favour of mediation, including where there is an application for guardianship, custody or access in these cases. Further consideration should be given to the role family support and prevention and early intervention can play in diverting families out of the courts to resolve family law disputes.

ADR mechanisms offer a meaningful solution to reducing the conflict and adversarial nature of family law proceedings. Mediation, Arbitration and other alternative dispute resolution approaches appear to result in more amicable and enduring arrangements, with the attention of families more likely to be on children's needs.⁶⁰ Mediation may facilitate families to better explore options and

57 Legal Aid Board, *Law centre waiting times and other statistical information*, December 2020, available at:

<<https://www.legalaidboard.ie/en/our-services/legal-aid-services/waiting-times/>> accessed on 12 February 2021.

58 Fahey, Tony; Keilthy, Patricia; Polek, Ela, *Family Relationships and Family Well-Being: A Study of the Families of Nine Year-Olds in Ireland*, December 2012, available at <<https://researchrepository.ucd.ie/handle/10197/5102>> accessed on 14 January 2021, 60.

59 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 25.

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

solutions themselves which they are more likely to adhere to in the longer-term rather than a court-imposed direction. For some families, there may be issues relating to power dynamics and children are often excluded from alternative dispute resolution. As such, ADR should be seen as a useful tool in resolving family disputes rather than as a cost-saving measure. ADR also could have a place in some aspects of public law child care cases. While it would not be appropriate in terms of child protection cases, it could be used for ancillary aspects of cases. For example, parties often have to return to court for further directions such as seeking permission to take a child in care on holidays.

Information sessions on ADR could be used as a means of encouraging its use as an alternative to court-imposed solutions, subject to limited, case-specific exceptions. By way of example, section 6 of the Family Law (Divorce) Act 1996 requires that a solicitor advise a client of mediation and counselling, and the solicitor must sign a certificate confirming that such advice was given. A similar model could be implemented to ensure that families are aware of options open to them and to confirm that families have attended an information session on alternative dispute resolution. Shared parenting information sessions or courses should be recommended to families or preferably they could be required to attend information sessions. While this may not be appropriate for cases involving child protection or domestic violence, consideration could be given to how children and vulnerable parents could be supported through this a process like this, for example by the provision of an advocate.

As part of the consideration of the role of mediation, the Review process should establish a process for the professionalisation, regulation and training of family law mediators. The Mediation Act 2017 provides for a Mediation Council to be established for this purpose, however the relevant sections have yet to be commenced.⁶¹

Recommendations:

- Alternative Dispute Resolution models should be encouraged and used when these are in a child's best interests.
- Consider the role family support and prevention and early intervention can play in diverting families out of the courts to resolve family law disputes.
- Consider introducing information sessions where families can find out about alternative dispute options and parenting courses.
- Establish a process for the professionalisation, regulation and training of family law mediators through the enactment of s12 of the Mediation Act 2017 which provides for the Mediation Council to be established for this purpose.

6. Optimising the delivery of family justice

The provision of facilities and supports in the family justice locations

The family law courts have not been designed with the presence of children and families in mind. In 1996 the Law Reform Commission (LRC) published a report on the reform of the Family Law Courts in which it highlighted 'the courts lack adequate support services, in particular the independent diagnostic services so important in resolving child-related issues'.⁶²

Family members are often at loggerheads and the physical environment does not provide them with the necessary space and privacy to deal with very personal and sensitive matters. The design of courtrooms has 'a direct impact on the way in which family law proceedings are conducted' and the

⁶¹ Mediation Act 2017, s12.

⁶² Law Reform Commission, *Report on Family Courts* (LRC 1996) 22.

way in which they are designed forces parties into close proximity with one another leading to increased 'anxiety, tension and has given rise to significant safety issues'.⁶³ Judges are making decisions in Courts around the country about intimate family issues often in the same room as they are dealing with other matters such as criminal law.⁶⁴

Despite the fact that most proceedings involving children are subject to the *in camera* rule (meaning they are heard in private), a large number of Court facilities still lack basic privacy. There is a lack of consultation rooms which results in delays in the hearing of family law applications and leads to the provision of legal advice sometimes in hallways, rather than in child-friendly consultation rooms.⁶⁵ Generally, there is no special provision made to accommodate children involved in family law proceedings and children who are present in the Court may witness or experience violence or other upsetting behaviour due to insufficient staffing of Gardaí in Courthouses.⁶⁶

The 2020 Programme for Government committed to construct a new family law court building in Dublin and work to ensure that court facilities outside of Dublin are suitable for family law hearings.⁶⁷ In 2015, it was announced that a site purchased by the Office of Public Works in Hammond Lane, Dublin would be used for building a purpose-built family law complex. However, progress had stagnated due to the failure to reach agreement on the structure and funding.⁶⁸ The project as originally proposed envisaged a court complex providing a Family Law court facility, a new Children Court to replace the existing Children Court in Smithfield and new accommodation for the Supreme Court.⁶⁹

In 2020, capital funding was provided for the ongoing preparatory works on the Hammond Lane site and the Department of Justice has made funding available to go ahead with the project.⁷⁰ Following detailed discussions regarding the cost and scale of the project together with the recent allocation of additional funding, the current proposal is for a family law court facility only.⁷¹ The exact amount of funding has not been specified as the project will have to go to tender.⁷² The final plans for the building are being progressed through the Courts Service and are expected to be considered at the Courts Services' Board meeting in February 2021.⁷³ The Alliance is aware that a revised business case to support this is being prepared at present in accordance within the requirements of the public spending code. Once completed this will be submitted to the Department of Justice for approval to proceed.⁷⁴

While the progress to date and the renewed commitment to build a dedicated family law court complex in Dublin is welcome, the new renewed momentum needs to be maintained. The Office of Public Works purchased the site for £4 million in 1999 and it has remained vacant since that time, some 20 years later.⁷⁵ In developing and designing the new family courts, all stakeholders should be consulted including legal professionals, families and those who work to support them. Children and young people should also be consulted for their views as was done with the development of the Children's Court in Smithfield. It is essential that the opportunity to provide a child-friendly environment is not missed. A number of courthouses outside of Dublin were refurbished in 2018 to provide 'state of the art' family law court facilities in Wexford, Waterford, Letterkenny, Mullingar

63 The Bar of Ireland, 'Submission by Council of The Bar of Ireland to the Joint Oireachtas Committee on Justice and Equality on the Reform of the Family Law System' (The Bar of Ireland 2019) 7.

64 Prof. G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (DCYA 2018) 72.

65 The Bar of Ireland, 'Submission by Council of The Bar of Ireland to the Joint Oireachtas Committee on Justice and Equality on the Reform of the Family Law System' (The Bar of Ireland 2019) 7.

66 *ibid.*

67 Government of Ireland, *Programme for Government, Our Shared Future*, 85.

68 Irish Legal News, Funding secured for Hammond Lane family courts complex, 15 July 2020 <<https://bit.ly/3601bs8>> accessed 21 January 2021.

69 Communication received by the Children's Rights Alliance from the Department of Justice, 6 November 2020.

70 Minister for Justice Helen McEntee TD, Dáil Debates, Written Answers, 17 November 2020 [36161/20].

71 Communication received by the Children's Rights Alliance from the Department of Justice, 6 November 2020.

72 Minister for Justice Helen McEntee TD, Dáil Debates, Written Answers, 17 November 2020 [36161/20].

73 Communication received by the Children's Rights Alliance from the Department of Justice on 21 January 2021.

74 Communication received by the Children's Rights Alliance from the Department of Justice on 6 November 2020.

75 Olivia Kelly, 'OPW targeted for criticism over vacant sites', *The Irish Times* 5 August 2013.

and Drogheda.⁷⁶ The *National Development Plan (NDP) 2018- 2027* commits to completing several courthouse projects outside of Dublin city; these will include new or refurbished courthouses in regional cities and county towns where facilities remain substandard (including Galway City, Wicklow Town, Portlaoise, Tralee and Roscommon) and at provincial locations such as Dungleoe and Tuam.⁷⁷ The NDP also allows for the construction of standard county town type court facilities at a number of locations in County Dublin and in North Kildare, Bray and Navan.⁷⁸ The Courts Service is in the process of identifying and acquiring suitable sites for the projects.⁷⁹

The Council of Europe's *Guidelines on Child-Friendly Justice* should inform the design and refurbishment of the court buildings around the country in particular to ensure that interview and waiting rooms for children are provided 'in a child-friendly environment' in court settings.⁸⁰

Recommendations:

- Use the opportunities of reforming the family law system, the design of the new Family Law Complex and new courthouse buildings and refurbishments to ensure that such reform is informed by the Council of Europe's *Guidelines on Child Friendly Justice* and that a consultation with children and young people is carried out.

76 Communication received by the Children's Rights Alliance from the Department of Justice, 21 January 2021.

77 *ibid.*

78 *ibid.*

79 *ibid.*

80 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (Council of Europe 2010)

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