



A submission by Community Law & Mediation to the Joint Committee on Justice on the *General Scheme of the Family Court Bill 2021 (the “Bill”)*

About Community Law & Mediation

Community Law & Mediation (CLM) is a community based, independent law centre operating in two locations: Dublin and Limerick. It was founded in 1975 and assists more than 3,000 people annually through its services, which include free legal advice and representation; information and education; and mediation and conflict coaching. CLM also campaigns for law reform, and for the safeguarding of rights already enshrined in law.

Background

Community Law & Mediation has seen a strong demand over the years for free legal advice and representation in relation to family law matters, in particular with respect to separation and divorce, guardianship and access, maintenance arrangements and not least domestic violence. Building on previous experience in delivering a legal advice clinic to improve access to justice for children with the Children’s Rights Alliance, CLM is currently collaborating with Empowering People in Care (EPIC) to provide legal advice and advocacy to young people in the care system on a diverse range of matters.

While difficulties surrounding the family law system in Ireland are well established, many families have experienced increased difficulties in recent months as a result of Covid-19 restrictions. Many families have encountered obstacles in maintaining access arrangements in light of restrictions on household mixing, while others have had to contend with unemployment and overcrowded housing. Domestic violence rates have also risen precipitously. These issues have led to increased conflict and stress and will need to be considered as part of a holistic overhaul of the Courts system.

CLM’s submission

CLM has carried out a review of the Recommendations in the 2019 Report on Reform of the Family Law System (“**2019 Report**”) as they relate to the General Scheme of Family Court Bill 2020. We welcome many of the measures envisaged in the Bill which will address some of these Recommendations. However, the Bill is a key aspect of broader reform of the Family Law System in Ireland and we highlight in our submissions additional measures which we consider necessary to meet the Recommendations and ensure that reform in the area is

comprehensive and ensures a user-friendly system which enables all users to vindicate their rights in particular children as indirect users.

We welcome that in line with Recommendation 1, the Bill establishes a new District Family Court, Circuit Family Court and Family High Court. At Head 5, Section 3(c) calls for all family court proceedings to be conducted in a manner which is user friendly, identifies issues in dispute, minimises conflict and is just and expeditious. In this regard, provision is made in the Bill for the scheduling of sittings, development of court rules and training of judges.

It is our submission however, that further provision is required in the Bill in relation to the following matters to meet the Recommendations for family law reform in Ireland, to fulfil the requirements of Article 42(A) of the Constitution, the International Convention on the Rights of the Child and to be in accordance with Council of Europe standards for Child-Friendly Justice.

- (i) providing a user friendly service;
- (ii) hearing the voice of the child;
- (iii) supports for children and families; and
- (iv) training of judges in order for the Bill;

One detail is provided in respect of each of these matters below. Of course, some aspects of reform are outside the remit of the present Bill and we have limited ourselves accordingly in these submissions.

(i) User friendly Family Court system

Family law proceedings are often highly adversarial and can be re-traumatising for both children and other family members. The new Family Court system should endeavour to mitigate the harmful effects of litigation. The development of a new Family Court system must be both family and child friendly. In its Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, the Council of Europe defines child-friendly justice as follows:

“Child-friendly justice is...broader than the actual justice system and court proceedings. It is aimed at all professionals dealing with children in and outside judicial proceedings. Sectors such as police, social and mental health services are also responsible for making justice more child friendly”

We welcome the introduction of separate sittings for family law matters in the Bill and hope that this will reduce stress and delay for families. However, many of the issues with the current family law system arise from a lack of physical infrastructure. The construction of new facilities at Hammond Lane must be accelerated and funding should also be made available to Family Courts at all levels in the rest of the country. Provision must also be made for ADR venues and separate waiting rooms for children and vulnerable persons. The Bill does require that Family Court sittings occur at a different time to general sittings which should go some way to tackling delays and overcrowding, but we suggest that further measures should be implemented. Any new infrastructure should allow for sensitive family law proceedings to be held away from other civil and criminal matters. The negative effect of contentious family law

proceedings on families could be reduced by making the Family Courts more family friendly and less intimidating by design.

A functioning and user friendly family court system will not be possible unless a review is undertaken of means testing for civil legal aid. Currently, eligibility criteria for receipt of civil legal aid are extremely restrictive, in particular for those living in large towns and cities who must contend with higher cost of childcare and rent. This is compounded by anomalies such as the inclusion of HAP as a form of income, despite the fact that it is deposited directly to the landlord's account by the local authority. Means testing should reflect the reality of families' living situations and seek to minimise the number of people who are ineligible for civil legal aid but cannot afford a solicitor. As per the 2019 Report, review of the Legal Aid Scheme with regard to means test rates, contribution requirements and eligibility is necessary, as is review and analysis of funding requirements of Legal Aid Board with a view to reducing waiting times and to ensure that cases are progressed in a reasonable and child centred timeline.

In the absence of a review of civil legal aid eligibility criteria, every effort should be made to ensure that the Family Courts system is accessible to lay litigants. Forms should be clear and in plain English. Clear information on the process and procedure of the family system should be readily available to lay litigants. Accommodations must also be made for family members who do not speak English as a first language or who have learning difficulties. This is in conjunction with recommendations in the 2019 Report for a review of the language used in the Family Courts with a view to making it more child-centred and accessible.

(ii) Hearing the voice of the child

We regret the failure to introduce provision for legislative guidance in respect of the voice of the child in the Bill. The application of Article 42A of the Constitution has been patchwork since its introduction and significant progress is needed in this respect.

The United Nations Convention on the Rights of the Child (UNCRC) sets the standard in terms of children's rights. The right to be heard in Ireland should be interpreted in line with the UNCRC General Comment no. 12 on the right of the child to be heard. General Comment no.12 states that "[a]fter the child has decided to be heard, he or she will have to decide how to be heard: "either directly, or through a representative or appropriate body". The Committee recommends that a child be given the opportunity to be directly heard in any proceedings. Moreover, it states:

*Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered. **The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously. The information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint.** (Para. 35 and 36; emphasis added.)*

While judges are currently permitted to meet with children in order to ascertain their wishes, there is no guidance as to why and when this should happen, leaving it at the discretion of the individual judge. The training offered to judges, solicitors and barristers must also deal with how to ensure a child's voice is heard. The Council of Europe states the

following in respect of the relationship between professional standards and the voice of the child:

A child-friendly system protects the young from hardship, makes sure that they have a place and say, gives due consideration and interpretation to their words without endangering the reliability of justice or the best interests of the child. It is age-sensitive, tailored to children's needs and guarantees an individualised approach without stigmatising or labelling children. Child-friendly justice is about fostering a responsible system solidly anchored in a professionalism that safeguards the good administration of justice and thereby inspires trust among all parties and actors involved in the proceedings.

Mediation is an essential tool in the resolution of many family law disputes however this is only possible when proper facilities such as private rooms are made available. We recommend that increased funding is made available for the provision of mediation facilities, including the Family Mediation Service, to accommodate the families referred to mediation under the Bill.

Mediation however should only be utilised in circumstances where it may be of benefit to all parties and should always be a voluntary process. There are many circumstances in which mediation will be inappropriate or harmful, including in circumstances of domestic violence, coercive control or where there is a risk of harm to children. Specialist training in these matters should be provided to judges to ensure that mediation and other forms of ADR are only recommended to appropriate candidates. Mediation must also accommodate the voice of each child concerned in all matters that are relevant to them.

(iii) Supports required to ensure that children can participate in family law proceedings where they wish to do so

The 2019 Report recommends that a range of ancillary supports should form part of new court infrastructure. This includes provision for crèche facilities, translators and private consultation rooms. It further recommends that Family Court facilities work alongside other services, including social welfare advice and child assessment services. By housing these services and facilities under one roof, families will be able to access and engage in supports more easily. This is in addition to the significant improvements in the physical infrastructure of Courts envisioned by the 2019 Report, in order to address issues such as overcrowding and the unsuitability of existing premises for the sensitive nature of family law proceedings.

The 2019 Report also recommends that interdisciplinary communication and information sharing should form part of reforms to the family law system. Judges should be empowered to make orders in respect of parenting plans, engaging with anger management treatment or to facilitate and monitor access arrangements. These recommendations also do not feature in the Bill and we encourage their incorporation

We regret the failure to introduce provision for Child Court Liaison Officers in the Bill. A Child Court Liaison Officer could ensure that children understand and interpret legal systems, which may be highly adversarial and impenetrable, and empower them to engage in them should they wish to do so. Child Court Liaison Officers would provide a valuable, non-biased contact person for children and families to ask questions and to fully engage in the wider legal process.

The 2019 Report calls for a review of the language used in Family Courts with a view to making proceedings more accessible and child-friendly. For example, *parental responsibility* may replace the term *guardianship* and *contact* may replace the term *access*. This is similarly important for people for whom English is not a first language and those with learning difficulties. We recommend that Family Law Rules Committee should address this issue in light of the general requirement in the Bill for the informality of proceedings.

(iv) Training of judges

We welcome the implementation of specialist training in family law for District and Circuit Court judges, however we recommend that this be expanded to High Court judges as well as to solicitors and barristers planning to work in the field. In particular, this training should focus on methods of communicating with children and ensuring that the voice of the child is heard, in particular in the absence of an expert report. It should also include matters such as pressure or coaching by parents which may impact the ability of the child to truly make their thoughts and wishes known. The selection criteria for judges should also be more specific and make greater reference to the nature of training undertaken by judges who are to be considered for the position of Family Court judge.

Key recommendations

CLM has considered the Consultation Paper and makes the following recommendations: In order to ensure the new Family Courts are both family and child-friendly, waiting room space and ADR venues separate from other civil and criminal law matters should be provided.

1. Any new facilities being developed as part of the Family Court system should be specifically designed to be both family and child friendly. Ancillary supports should form part of any new court infrastructure. This includes provision for crèche facilities, translators and private consultation rooms.
2. The proposed Rules Committee should be tasked with ensuring that the language used in the Family Court system, including all existing and new material, is child-centred and accessible. Informality utilised in the Children's Court should be applied to Family Court in order to reduce negative impact of adversarial context.

3. In the absence of a review of civil legal aid eligibility criteria, every effort should be made to ensure that the Family Court system is accessible to lay litigants. Forms should be clear and in plain English. Clear information on the process and procedure of the Family Court system should be readily available to lay litigants. Accommodations must also be made for family members who do not speak English as a first language or who have learning difficulties.
4. Specialist training should be stipulated for all judges, solicitors and barristers working in the Family Court system and must address communication with children and how to ensure a child's voice is heard.
5. Selection criteria for judges should also be more specific and make greater reference to the nature of training undertaken by judges.
6. Supports should be implemented to ensure children can engage in proceedings if they wish to do so. This includes the introduction of guidelines in respect of the circumstances in which judges should meet with children, a shift towards more child-friendly language and the introduction of interdisciplinary strategies in family law proceedings.
7. Provision should be made for Child Court Liaison Officers in the Bill.
8. The Rules Committee should be tasked with the development of measures to ensure that Judges are empowered to make orders in respect of parenting plans, engagement with anger management treatment or to facilitate and monitor access arrangements.
9. Guidance and training should also be provided on the appropriateness of mediation in different family circumstances.

Conclusion

CLM welcomes the proposals in respect of the new Family Courts, which we hope will mark the beginning of a more family friendly and child centred family law system. It is encouraging to see such innovation and willingness to engage in consultation in reaching solutions. However, we call on the Oireachtas to ensure that all necessary supports are provided to ensure that the new Family Court system functions to the best of its ability. It is essential that the opportunity for reform the Bill presents be maximised at this stage. We accept that extra resources may be required to provide such supports, in particular with respect to providing better court and mediation infrastructure. We also hope that more will be done to ensure that the provisions of Article 42A of the Constitution in respect of a child's right to be heard are fully vindicated in any plans for a new Family Court system. Finally, we would welcome the opportunity to provide further information or to discuss any elements of this submission.

**Community Law & Mediation
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