



A submission by Community Law & Mediation to the Phase 1 Consultation of the Family Justice Oversight Group

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 Family Justice system.

CLM`s submission

We welcome the efforts of the Department of Justice to reform a system of family law which does not currently serve the interests of participants. We have reviewed the topics for discussion provided in the Department`s letter of 18 December 2020 concerning the following topics:

- (i) Optimising the Delivery of Family Justice including the use of modern technology and additional support services;

- (ii) The place of mediation in the family court system including consideration of the issue of obligatory mediation and educating court users on the benefits of mediation;
- (iii) The role of civil legal aid in the family court system including its application to other forms of dispute resolution i.e. arbitration, collaborative law and non-court based solutions;
- (iv) The family courts including priority of cases and the need for professional supports; and
- (v) The voice of the child including how to incorporate the voice of the child in proceedings, how to make the new family justice system more child-friendly and keeping children informed on the operation of the family court system.

More detail is provided in respect of each of these matters below. Some reference is made to the proposals made in the Family Courts Bill 2020 (the “**Bill**”), where relevant to the above.

(i) [Optimising the Delivery of Family Justice](#)

Use of Modern Technology

Covid-19 restrictions have represented a particular challenge for the Courts system as a whole, however it has been a challenge that the Courts system has largely risen to. We submit that the Family Courts should continue to build on the technological advances brought about by the pandemic into the future. Video conferencing software may not only be less stressful and intimidating for participants in family law proceedings, but also avoids a number of practical obstacles including securing child care during Court hearings, travel expenses and requiring extra time off work. Video conferencing software may also be applied effectively in domestic abuse situations where vulnerable family members may not wish to be in the physical presence of abusive relatives or partners. Hearings by way of video conference also allow families a greater degree of privacy than an open court room and may reduce delays.

This being said, it is important that any shift towards the use of technology in a family court setting is conscious of the vulnerabilities of participants. Video conferencing software requires access to a laptop or smartphone and a good internet connection which may not be available to all. It may also pose difficulties for those who are hard of hearing or do not speak English as a first language, or who have other difficulties with literacy or learning disabilities. The continued use of video conferencing software must be reserved for situations where it is appropriate and proper support must be available for those who may find it a more difficult means of accessing the Courts.

Video conferencing may also not be ideal for particularly sensitive matters, given that it is more difficult to interpret body language or reactions. This may make it difficult for judges and other professionals to relate to participants in a humane and sensitive way.

Provision of facilities and supports in family justice locations

The Joint Committee on Justice and Equality's Report on Reform of the Family Law System (the "2019 Report") recommends that a range of ancillary supports should form part of the 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

(ii) [The place of mediation in family justice](#)

Desirability of using mediation to resolve family law issues

Mediation is an essential tool in the resolution of many family law disputes. 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. In these contexts, mediation may be re-traumatising and serve to prolong contentious family law matters rather than to resolve them. Given the stressful and expensive nature of family law proceedings, it is understandable that every effort should be made to resolve those matters outside of court where possible, however this should not be at the expense of protecting vulnerable family members. In addition, training and legislative provision should ensure that the voice of the child is adequately heard in mediation.

Maximising family court users' understanding of the role of mediation

Many family court users may perceive mediation as an unnecessary delay or obstacle towards their ultimate goal of a particular outcome in Court. In order for family court users to make full use of the mediation services available, it is important that they understand the nature and purpose of mediation, including its advantages and disadvantages.

Accessible literature on the cost and time benefits of mediation, compared to litigation, should be prepared using case studies. It would be helpful for families to be able to clearly see the extra expense and time which must be committed to court proceedings compared to that required by mediation.

Participants should also be provided with information on the stress and anxiety which may be caused by Court proceedings for both adults and children. It must be established what court users wish to gain from legal proceedings (which may be simply `having their day in Court`, perceived finality of decisions, a furtherance of existing antagonisms between parties) and how these issues could be resolved through mediation. Many court users do not fully understand the time and stress generated by court proceedings until they are already involved. These individuals should also be informed that mediation can be commenced after proceedings have begun, if that is the option they wish to pursue.

Parents and other adults in family law proceedings which involve children should also be reminded of the length of most court proceedings as compared to the duration of childhood. A child centred timeline of dispute resolution is easier to achieve by way of mediation than through court proceedings where hearing dates may be months or years apart. Parents should be informed as to the benefits of protecting their children from the most challenging aspects of family law proceedings and the advantages to resolving matters as quickly as possible, in a non-adversarial manner.

Interdisciplinary training in mediation for family justice practitioners

As discussed above, there are several circumstances in which mediation will not be productive and may work against the interests of participants in family law proceedings. To mitigate this, all family law practitioners including solicitors and barrister should be provided specialist training as to the nature and purpose of mediation, as well as where it may be helpful or harmful. Practitioners should be taught to recognise situations in which participants will be able to meaningfully participate in mediation and where they will not, including where issues of coercive control or domestic violence may be at play. Different forms of mediation should be available which make use of different interdisciplinary strategies including co-mediation, where there may be two or more mediators who complement each other by way of different gender, background or specific expertise.

Requirement for mediation at different stages of family law proceedings

We submit that mediation should never be a prerequisite to any stage of proceedings. Mediation is a voluntary procedure by its nature. In addition to concerns around mediation in circumstances of domestic abuse described above, it is unlikely that participants will meaningfully participate in mediation if it is perceived as merely a necessary hurdle or formality in order to move proceedings forward. This concern is equally true whether the mediation comes before proceedings are initiated or towards the end of irresolvable cases.

We would suggest instead that more work is done to educate participants on the benefits of mediation and the risks that arise with legal proceedings as discussed above.

(iii) Reimagining the structure of civil legal aid in family justice

Focus of civil legal aid system on promotion of non-court based solutions

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 Housing Assistance Payment (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 ensuring that cases are progressed according to a reasonable and child centred timeline.

CLM would not support a recommendation to shift the focus of civil legal aid towards other forms of dispute resolution or non-court based solutions. Access to the courts is a right enshrined in the Irish Constitution, the European Convention on Human Rights and, in certain instances, the EU Charter of Fundamental Rights and Freedoms. Legalaid is essential in ensuring all citizens can avail of this right. While it is desirable that disputes be solved out of court where possible, this is not the primary role of the civil legal aid system.

Role of other forms of alternative dispute resolution

Removing family law to the confines of arbitration may exacerbate existing imbalances of power between parties to a dispute and may remove any opportunity of appeal. In addition, we are concerned that increasing the use of other forms of ADR may reduce the number of useful precedents created by the Courts and may worsen existing issues with transparency in the family law system.

Any attempt to broaden the range of dispute resolution venues available to those in family law disputes must ensure that the process is fair and does not close off routes to the Court. Provision must be made in legislation allowing parties' recourse to the Courts in cases of serious injustice or where an appeal is needed on a point of law. Guidance must also be provided on the circumstances in which arbitration may be inappropriate i.e. where child safeguarding risks become apparent or in cases of domestic abuse or substance abuse. Arbitration is generally reserved for commercial contexts where an expert knowledge of a particular subject matter is required to arrive at a decision. Unless specific arbitrators were trained with specialist knowledge in particular forms of family dispute – it is difficult to see

what advantage an arbitrator could bring to a family law dispute above that of a mediator or a judge.

Legal Aid in family justice – more than legal advice and representation

Reforms to the Legal Aid Scheme in respect of family justice must also include a measure of public engagement. To be able to participate fully in the family justice system, it is important that individuals are aware of their rights and entitlements as well as how to access support. It is also important that public engagement is properly developed so as to ensure that schemes and programmes receive proper funding and support proportionate to demand.

(iv) The Family Courts

Hearing Priority

Throughout the pandemic, the Courts have continued to prioritise cases involving family law, child care and domestic violence applications. This is a positive decision which minimises the impact of uncertainty on the lives of families. Going forward, we submit that cases should be prioritised based on the age of any children involved or the risk of psychological or mental harm to the parties.

Child-friendly court proceedings must apply the `urgency principle` which provides a speedy response to dispute and prioritises the best interests of children. Children`s perception of time is different to that of adults - any guidelines as to court priority must be conscious that one year of proceedings is much longer to a ten year old child than to an adult. This is particularly true in cases of abuse as children and other vulnerable family members must be permitted to commence their recovery as soon as possible

Additional services for participants in family law disputes

Child Contact Centres were highlighted in the 2019 Report as a particularly important resource for families and we recommend that funding should be provided for the re-establishment of these centres. Due to the housing crisis in Ireland, many separated parents struggle to find suitable, child-friendly accommodation and as a result cannot avail of access to their children. Child Contact Centres provided a safe, friendly and neutral place where children could spend time with the parent they did not live with. Child Contact Centres also provided a venue for access where parents were unable to agree appropriate contact arrangements as well as for children in care who required support to have contact with their parents. We support the proposal in the 2019 Report that Family Resource Centres be considered as potential venues for Child Contact Centres.

We also recommend that increased funding be provided for a range of ancillary services, detailed in the 2019 Report, to be housed alongside court facilities. These include mediation services, translators, crèche facilities and space for child and welfare assessment services. Child Court Liaison Officers should also be employed to assist children and families during the course of family law proceedings.

(v) The voice of the child

How best to incorporate 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.)*

Effective legislative guidance is essential to ensuring that children's voices are adequately heard in family law proceedings. In particular, we would encourage the development of guidance in respect of when and in what circumstances, a child should be offered to meet a judge to discuss their case.

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

Central to any plans to make the family justice system more child-friendly should be a plan to properly train all judges, barristers and solicitors involved in family law proceedings. 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.

We recommend that training provided to judges and other legal professionals have specific reference to the voice of the child. 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.

The family court system may also be made more child friendly by ensuring that proceedings are made as informal as possible and that they are held separately to other civil and criminal matters.

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

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.

Child Court Liaisons would also be helpful to other vulnerable family court users including those who do not speak English as a first language or who have other literacy issues or learning disabilities.

Child friendly materials containing relevant legal information should also be widely distributed. More detailed information should be available on child-friendly websites. Children should also be fully consulted and informed of legal proceedings relating to them in a manner appropriate to their age and maturity. Providing information to parents only is not a substitute for communicating with a child.

Key recommendations

CLM has considered the Consultation Paper and makes the following recommendations:

1. The Courts should build on progress made during the pandemic with video conferencing software, in order to create a family law system which is more flexible and responsive to the needs of family law users;
2. Plans for increased use of technology in family law proceedings should consider the needs of those with language or literacy issues or who do not have access to a good internet connection;
3. Family Courts should provide ready access to other support services including crèche facilities, consultation rooms and translators in the same location as the Courts;
4. Clear guidance and training should be developed for practitioners as to when mediation is appropriate in a family law dispute;
5. Families should be provided with information about the benefits of alternative dispute resolution, where appropriate, in particular the importance of resolving disputes on a child-friendly timeline;
6. Mediation should not be mandatory at any stage of family law;
7. Eligibility criteria for civil legal aid should be made less restrictive;
8. The legal aid system should not shift its focus to alternative dispute resolution or non-court based outcomes;
9. Any introduction of family arbitration or collaborative law should be developed with the participants` constitutional right of access to the courts in mind;
10. Cases involving domestic violence or abuse should be prioritised for hearing, however all cases should be progressed on a child-friendly timeline;
11. Legislative guidance should be introduced concerning how to include the voice of the child in proceedings;
12. Funding for Child Contact Centres should be re-established;
13. Training for all legal professionals should be developed concerning the voice of the child and communicating with children; and
14. Child Court Liaison officers should be introduced to ensure children and other vulnerable family members understand proceedings. Educational materials appropriate to age and maturity should also be distributed.

Conclusion

CLM welcomes the plans to reform the family justice system, in particular with respect to providing better court and mediation infrastructure. Covid-19 restrictions have created new and complex challenges for many families with respect to access to children, dispute resolution and access to support services. Reforms to the Irish family law system must take full account of the new circumstances faced by families and respond in a holistic and

thoughtful manner. This must include a renewed focus on domestic violence and abuse, as well as the consequences of poverty and the housing crisis on children and families.

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 to reform the family justice system. This will require input and cooperation from all participants of the family law system, including judges, solicitors, barristers, mediators and any other professionals involved in private or public family law. 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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