

Submission to the Joint Committee on Justice on the General Scheme of the Family Court Bill

19 February 2021



Founded in 1995, the Children's Rights Alliance unites over 100 members 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.

Ag Eisteacht
Alcohol Action Ireland
Amnesty International Ireland
An Cosán
AsIAM
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Barnardos
Barretstown Camp
Bedford Row Family Project
BeLonG To Youth Services
Care Leavers' Network
Catholic Guides of Ireland
Childrens Books Ireland
Child Care Law Reporting Project
Childhood Development Initiative
Childminding Ireland
Children in Hospital Ireland
COPE Galway
Cork Life Centre
Crosscare
CyberSafeKids
Dalkey School Project National School
Daughters of Charity Child and Family Service
Dental Health Foundation of Ireland
Department of Occupational Science and Occupational Therapy, UCC
Disability Federation of Ireland
Doras
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dyslexia Association of Ireland
Dyspraxia/DCD Ireland
Early Childhood Ireland
Educate Together
EPIC
Extern Ireland
Focus Ireland
Foróige
Gaelscoileanna Teo
Good Shepherd Cork
Immigrant Council of Ireland
Inclusion Ireland
Institute of Guidance Counsellors
Irish Aftercare Network
Irish Association for Infant Mental Health
Irish Association of Social Workers
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Primary Principals Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation (IYF)

Jack & Jill Children's Foundation
Jigsaw
Katharine Howard Foundation
Kids' Own Publishing Partnership
Mecpaths
Mental Health Reform
Mercy Law Resource Centre
Migrant Rights Centre Ireland
Mothers' Union
My Project Minding You
Museum of Childhood Project
Music Generation
National Childhood Network
National Forum of Family Resource Centres
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
Novas
One Family
One in Four
Pavee Point
Peter McVerry Trust
Private Hospitals Association
Psychological Society Ireland
Rainbow Club Cork
Rainbows Ireland
Rape Crisis Network Ireland (RCNI)
Realt Beag/Ballyfermot Star
Respond Housing
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
Scouting Ireland
School of Education UCD
Sexual Violence Centre Cork
SIPTU
Simon Communities of Ireland
Social Care Ireland
Society of St. Vincent de Paul
Sonas Domestic Violence Charity
SPHE Network
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Teachers' Association
St. Patrick's Mental Health Services
Teachers' Union of Ireland
Transgender Equality Network Ireland
The Ark, A Cultural Centre for Children
The Prevention and Early Intervention Network
The UNESCO Child and Family Research Centre, NUI Galway
Traveller Visibility Group Ltd
Treoir
UNICEF Ireland
Young Ballymun
Young Knocknaheeny
Young Social Innovators
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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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 Joint Committee on Justice on the General Scheme of the Family Court Bill. Currently Ireland does not have a separate, specialist family court system, and family law proceedings are currently conducted across the existing structures of the District Court, Circuit Court and High Court. In Dublin, there are dedicated family law District Courts and Circuit Courts with High Court sittings allocated to hear such cases, while outside of Dublin allocation of hearings is dependent on each individual District or Circuit Court with cases heard on designated family law days.¹

The family law system and the structure of the family law courts have not been designed with the presence of children and families in mind. 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 system has been subject to criticism and review by stakeholders and experts for over two decades.² The Law Reform Commission as far back as 1996 recommended the establishment of a system of regional family courts at Circuit Court level presided over by a Circuit Court judge nominated for a period of a least one year ‘assigned on the basis of his or her suitability to deal with family law matters’.³ In 2019, the Joint Committee on Justice and Equality published a report on *Reform of the Family Law System* recommending that legislation is brought forward as a priority providing for a ‘more efficient family law courts structure’ and that a dedicated and integrated family court be established within the existing court structures.⁴ Specialised family court systems are commonplace in other jurisdictions in Europe, as well as in common law jurisdictions, though the form can vary from specialist divisions in existing court structures to completely separate specialist courts.⁵

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’.⁶ The Guidelines recommend that all proceedings involving children should be heard in a speedy manner⁷ and that States should establish ‘a system of specialised judges and lawyers for children’ and ‘further develop courts in which both legal and social measures can be taken in favour of children and their families’.⁸ There are a number of welcome provisions in the General Scheme which, if brought into law and resourced effectively, could revolutionise the system for children and families including the establishment of a dedicated family court structure and streamlining of family law proceedings. The General Scheme also makes provision for a Family Law Rules Committee to be established which

¹ Houses of the Oireachtas Joint Committee on Justice and Equality Report on Reform of the Family Law System October 2019, 22.

² Law Reform Commission, *Report on Family Courts* (LRC 1996) 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 ‘[t]he courts are buckling under the pressure of business. Long family law lists, delays, brief hearings, inadequate facilities, and over-hasty settlements are too often the order of the day’.

³ *ibid* 22.

⁴ Houses of the Oireachtas, Joint Committee on Justice and Equality, *Report on Reform of the Family Law System* (Houses of the Oireachtas 2019) 43.

⁵ Consultative Council of European Judges *Opinion (2012) No. 15 of the Consultative Council of European Judges on the Specialisation of Judges* (Council of Europe 2012) <<https://bit.ly/3pkuihB>> accessed 21 January 2021.

⁶ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 29.

⁷ *ibid* 28.

⁸ *ibid* 33.

would develop a comprehensive set of overarching rules and practice guidelines.⁹ This is a welcome measure to work towards consistency in the new system.

Reform of the family law 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 an oversight group has been established. It is key that this momentum is maintained, and that a timeline for enacting the legislation is published as a matter of urgency. **Summary of**

Recommendations

- Publish a timeline for the publication and commencement of the Bill as a matter of urgency.
- Consider expanding the guiding principle that the best interests of the child is a paramount consideration to reflect and build on Part V of the Children and Family Relationships Act.
- Expand Head 5(3)(a) to include a focus in the guiding principles on interdisciplinary working.
- Consider using this reform 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 introducing the role of child court liaison officers in all regions to provide information and support to children and young people who come into contact with the family law system.
- Consider extending the requirement to undergo training to judges of the High Court who will preside over family law matters.
- 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.
- Consider resourcing as this will be a key driver of success in making family justice more accessible in all regions and across all Districts.
- Begin building the capacity of both the District and Circuit Courts for the increase in caseload that will come from the reforms.
- Provide greater clarity on where cases can be initiated and the operational issues in the transfer of cases.

⁹ Family Court Bill General Scheme (September 2020) Head 18.

Best interest principle (Head 5 (3)(d)(i))

It is welcome that Head 5(3)(d)(i) provides that when dealing with family law proceedings in which a child is involved or likely to be affected by the outcome, a court shall ensure ‘that the best interests of each such child are a primary consideration in those proceedings’. This reflects Ireland’s constitutional and international obligations.

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

A higher standard applies to the best interests principle in relation to parental responsibility, separation from a parent, maintenance of personal relations and contact with parents and adoption.

In relation to issues of custody and access, Article 9 of the UNCRC states that:

(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. [...]

(3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

In relation to parental responsibility, Article 18 states that:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

In relation to adoption decisions, Article 21 states that:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration [...]

In 2013, the UN Committee on the Rights of the Child issued General Comment No.14 to clarify how the best interest principle should be interpreted.¹⁰ The Committee stated that the principle should be determined on a case-by-case basis and ‘should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs’.¹¹

Article 42A(4)(i) of the Constitution provides that provision shall be made by law that in cases of child protection, adoption, guardianship or custody or access, that the ‘best interests of the child shall be the paramount consideration’. This was given effect in law by the Child and Family Relationship Act 2015. Part V of the Child and Family Relationship Act 2015 sets out factors to which a court shall have regard when determining the best interests of a child, which are reflective of key principles of the UN Convention on the Rights of the Child. These include their physical, psychological and emotional needs, views, intellectual and educational upbringing and needs, any

¹⁰ UN Committee on the Rights of the Child (2013) *General Comment No. 14: The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14.

¹¹ *ibid*, para 32.

harm they have suffered or are at risk of suffering, among others. Consideration should be given to expanding on the guiding principle in Head 5 to reflect Part V of the Children and Family Relationships Act.

Recommendation:

- Consider expanding the guiding principle that the best interests of the child is a paramount consideration to reflect and build on Part V of the Children and Family Relationships Act.

Interdisciplinary approach (Head 5(3)(a))

It is welcome that Head 5(3)(a) provides that one of the guiding principles would be to ‘encourag[e] and facilitat[e] as far as possible the resolution of issues in dispute by means of alternative resolution methods, such as mediation, unless resolution by such means would not be appropriate due to the nature of the proceedings’. While Alternative Dispute Resolution (ADR) will not be suitable for every case, in particular those involving child protection and domestic violence, consideration should be given to referring to dispute resolution methods beyond mediation to include arbitration and other methods. 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.

To give real meaning and effect to this guiding principle, the next iteration of the Bill could address some important challenges. This reform presents an opportunity to house key services and agencies under the one roof to develop a new model that will promote an interdisciplinary system to ensure effective communication between all disciplines. Alternative means of dispute resolution are key drivers in facilitating and encouraging less acrimonious ways of resolving family law matters. This could include services that would enable family law judges to refer parties to skilled personnel to draw up parenting plans, carry out assessments such as parenting capacity assessments; implement supervised access orders; and monitor custody and access orders and facilitate their restoration if they breakdown.

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. According to the Council of Europe’s *Guidelines on Child-Friendly Justice*, 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.¹² The proposed legislation could 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.¹³ 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.¹⁴ Digital technology could help to make information more easily accessible to children, families and organisations who support and work with them. Legislators could also consider making provision to

¹² Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (Council of Europe 2010) 20-21.

¹³ *ibid.*

¹⁴ *ibid.*

employ a specialist child court liaison officer in all regions to provide information and support to children and young people who come into contact with the family law system.

Recommendations:

- Expand Head 5(3)(a) to include a focus in the guiding principles on interdisciplinary working.
- Consider using this reform as an opportunity to house key services and agencies under the one roof to develop a new model that will promote an interdisciplinary system to ensure effective communication between all disciplines.
- Consider introducing the role of child court liaison officers in all regions to provide information and support to children and young people who come into contact with the family law system.

Specialisation and training (Heads 6, 11 and 16)

The Heads of Bill provide for the establishment of a District Family Court (Head 6), a Circuit Family Court (Head 11) and a Family High Court (Head 16) within existing court structures. Each court level will have a principal Judge with a number of other specialist Judges.¹⁵ 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 suitable person to deal with matters of family law’ by reason of their ‘training or experience and temperament’.¹⁶ 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.¹⁷

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.¹⁸ 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 ‘judges dealing with family disputes do not always have the necessary experience or aptitude’ and it recommended that judicial training should incorporate an interdisciplinary element.¹⁹

In examining Ireland’s progress under 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’.²⁰ 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’.²¹

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

¹⁵ Family Court Bill General Scheme (September 2020) Heads 6(2), 11(2) and 16(2).

¹⁶ *ibid* Heads 6(4), 11(4) and 16(4).

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

¹⁸ Prof. G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (DCYA 2018) 7.

¹⁹ Law Reform Commission, *Report on Family Courts* (LRC 1996) 117.

²⁰ 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.

²¹ *ibid*, para 48.

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'.²² 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.²³ 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.

Head 5(3)(d)(ii) which provides that where a child is capable of forming their own views there is an obligation to ensure 'as far as practicable that the views of the child are ascertained and given due weight having regard to the age and maturity of the child'. This is reflective of Article 12 of the CUNCRC which provides that every child has the right to have their views heard in any judicial proceedings that affect them and the views of the child should be given due weight in accordance with the age of the child and the child's maturity.²⁴ The UN Committee on the Rights of the Child has noted that, in order to give effect to a child's right to be heard, training on Article 12, and its application in practice, should be required for all professionals working with, and for children, including lawyers and judges.²⁵

Article 42A.4.2 of the Constitution enshrined the right of children to have their views heard in adoption, guardianship, custody and access proceedings. The Children and Family Relationships Act 2015 introduced an obligation for judges to consider the views of children as one of the factors when determining the best interests of the child.²⁶ The Act is not prescriptive about the way in which the voice of the child is to be heard in proceedings.²⁷ Different methods vary from the child being heard directly in the Court, being heard in chambers by the Judge or the use of an expert to hear the views of the child and report back to the court. The UN Committee on the Rights of the Child noted 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'.²⁸ The Council of Europe's *Guidelines on Child-Friendly Justice* also recommend that children should be provided with all necessary information on how to effectively access or assert their right to be heard.²⁹ The introduction of formal training and specialisation of the judiciary, as provided for in Head 6(8) and Head 11(8) of the General Scheme of the Bill, could be expanded in the next iteration of the Bill to incorporate training on the mechanisms for meeting with and hearing from children and young people.

Recommendation:

- Consider extending the requirement to undergo training 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.

²² Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (Council of Europe 2010) 33.

²³ *ibid* 14.

²⁴ UN Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (UNCRC) Art 12

²⁵ UN Committee on the Rights of the Child (2009) *General Comment No. 12: The right of the child to be heard* (para. 49), CRC/C/GC/12

²⁶ Part V of the Guardianship of Infants Act 1964, as amended by the Children and Family Relationships Act 2015, s63.

²⁷ *ibid*.

²⁸ 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

²⁹ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 48.

Jurisdiction (Heads 19, 28, 29 and 32)

Head 18 provides for a Family Law Rules Committee to be established which would develop a comprehensive set of overarching rules and practice guidelines to be established. This is a welcome measure to work towards consistency in the new system.

Under the new system, the District Court would have concurrent jurisdiction in cases of divorce (Head 29) and civil partnership dissolution (Head 32) along with the Circuit and High Courts. Head 19(2) provides that a District Family Court judge may decide to transfer proceedings to the Circuit Family Court having regard to (a) the number of issues that remain in dispute between the parties, (b) the complexity of these issues, (c) where applicable, the value of any land or other assets to which the proceedings relate, and (d) the likely duration of the proceedings. Head 19(4) makes similar provision to the Circuit Family Court to remit proceedings to the District Family Court where appropriate.

In announcing the proposed legislation, the Department of Justice stated:

[I]f straightforward and non-contentious cases which require court orders can be successfully resolved through mediation, the District Family Court could exercise jurisdiction in such cases. It is intended that the Circuit Family Court would deal with complex or contested family law cases.³⁰

The changes in jurisdiction and the move to resolving more matters in the District Court is to be welcomed. However, greater clarity is needed on where cases are to be initiated and the operational issues in the transfer of cases. Further, a clear definition is needed as to what will constitute a non-contentious case.

It was noted in the Joint Oireachtas Committee on Justice and Equality *Report on Reform of the Family Law System* that the family justice system must be efficient to ensure that issues can be resolved quickly and matters do not escalate.³¹ ³² The Council of Europe's *Guidelines on Child-Friendly Justice* have recommended that ³³ Adding another type of proceedings to the District Court lists must be properly resourced to ensure that cases involving children can be heard in a quick manner. Work should begin to build the capacity of both the newly constituted Family District and Circuit Courts to deal with the increase in caseload that will come from the reforms.

Recommendation

- Consider resourcing as it will be a key driver of success in making family justice more accessible in all regions and across all Districts.
- Begin building the capacity of both the District and Circuit Courts for the increase in caseload that will come from the reforms.
- Provide greater clarity on where cases are to be initiated and the operational issues in the transfer of cases.

³⁰ Department of Justice, 'Reform of Family Justice System announced by Minister McEntee' (30 September 2020) <<https://www.gov.ie/en/press-release/75571-reform-of-family-justice-system-announced-by-minister-mcentee/>> accessed 5 January 2021.

³¹ Joint Committee on Justice and Equality, *Report on Reform of the Family Law System* (2019), 33.

³² Courts Service, *Annual Report - 2019* (2020) 24.

³³ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 28.

Conclusion



Reform of the family law 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 an oversight group has been established. It is key that this momentum is maintained and that the legislation moved through the Houses of the Oireachtas as a matter of urgency with a clear timeline set out for completion of the legislative process and establishment of the new system. These reforms, if implemented in line with children's rights principles will transform the system for children and young people and their families.