Oireachtas Committee on Justice and Equality, March 6th 2019

Opening Statement by Dr Carol Coulter
Director, Child Care Law Reporting Project

Thank you very much for the opportunity to address your committee. My colleague, Maria Corbett, and I will be very happy to answer any questions you may have after my presentation.

First of all, my experience of the family courts is two-fold. In 2007/2008, while on leave of absence from The Irish Times, I conducted a pilot project for the Courts Service reporting on family law proceedings, following the modification of the *in camera* rule. This mainly concerned private family law proceedings, that is, disputes between private individuals. Since 2012 I have been running the Child Care Law Reporting Project which reports on public family law, when the State intervenes in a family where it considers a child to be in need of protection. It does so through the Child and Family Agency, previously through the HSE, and the District Court is the court designated by legislation to hear all proceedings involving the taking of children into care. Today I will speak mainly in relation to how public family law is dealt with in our courts.

1. Courts Structure

I fully endorse what previous speakers, in particular Dr Conor O'Mahony of UCC and the Law Society, have said in relation to the courts structure and the urgent need to establish a family court. This need is illustrated by a report we are about to publish on child care hearings in the District Court. We found over-crowding, lack of privacy, over-lengthy lists and over-worked judges in most of the courts attended. In some courts child care cases featured in a lengthy mixed list of criminal, civil, private family law and child care cases. The situation is little better when child care cases are heard along with private family law – there can be over 100 cases on a list of private and public family law, and people can be waiting all day for their case to be heard.

The establishment of a family court division of the existing courts, with specialist judges trained in family law and allocated to these courts for a period of 2-4 years, and with appropriate support facilities to allow for proper management of cases, would address many of the problems in family law. I would suggest between 12 and 15 dedicated regional centres, where there could be easy access for wheelchairs and buggies, adequate consultation rooms, a comfortable waiting area along with a separate room for vulnerable witnesses and children, and basic facilities like drinking water and a vending machine. As stated by others, no constitutional amendment is necessary to do this.

2. Alternative Dispute Resolution

It is clearly desirable to keep family disputes out of court as far as possible and alternative dispute resolution offers a useful alternative. However, a distinction needs to be made between private and public family law. There is a difference between a dispute involving two private individuals and a situation where the State intervenes in a family to remove parents' constitutional rights to raise their children, and a child's constitutional right to be brought up by his or her parents, as happens in child care proceedings. There is a clear imbalance in power between the State and individual parents, and mediation or other forms of alternative dispute resolution may not uphold the individual's right to fair procedures.

When a constitutional right is at stake it is particularly important that an individual's right to fair procedures is upheld, including the right to adequate legal representation and to a hearing before a court. At present that is provided for by the hearing of child care proceedings in the District Court, which normally insists on parents being aware of their right to legal representation, and urging them to exercise it. That is usually provided by the Legal Aid Board. Parents have full rights to appeal or judicially review decisions of the District Court, though their ability to realise these rights may be impaired by lack of resources or their own vulnerability.

This said, there are areas in child protection where alternative dispute resolution may be appropriate, for example, in relation to disputes about access when children are in care, decisions about education or holidays, psychological and medical assessments of the child, and so on.

3. Conduct of family law proceedings

Formality

Because most child care proceedings in the District Court are not conducted in a separate court, or on a separate day, they follow the usual format of proceedings for the District Court – the applicant's (Tusla) and respondent's (parents') lawyers sit at a table in front of the judge, with the witnesses and parents on benches in the body of the court, observing the proceedings until they are called.

In a specialist family court, with dedicated child care days, there should be scope for a greater degree of informality, with parents, lawyers and witnesses sitting around a table with the judge and discussing the issues. This format is used in the Children's (criminal) Court.

Voice of the child

Others have drawn attention to the limitations of the existing provisions for hearing the voice of the child, which we endorse. In addition, I would like to draw attention to a provision in the 1991 Child Care Act, which govern child protection proceedings, for a solicitor to be appointed by the court to represent the child in the proceedings. This is rarely used, and then usually only when the proceedings involve older teenagers. However, it is common in Scotland, for example, for a lawyer to take instructions from and represent a child in such proceedings. Here in criminal proceedings involving children they are represented by their own lawyers. In our view enabling children in child protection proceedings to instruct their own lawyers (appropriately trained to receive such instruction) to represent their views should be part of a suite of measures to represent the voice of the child.

***In camera* rule**

The *in camera* rule has been significantly amended twice in the past 15 years, and has given rise to two parallel regimes for reporting on family law proceedings. The first change, introduced in 2004 by then Minister for Justice, Michael McDowell, was designed to permit reporting of private family law proceedings without allowing the media attend. This was extended in 2007 to cover public family law, with the Child Care (Amendment) Act. This legislation names the Courts Service, the ESRI, the Law Reform Commission and all the major academic institutions as bodies that can nominate people to attend proceedings and write reports, subject to protecting the anonymity of the parties. I was asked by the Courts Service to conduct the Family Law Reporting Project under the 2004 legislation and the Child Care Law Reporting Project operates under the 2007 Act, and is now nominated by NUIG.

The second major change came in 2013, and was introduced by then Minister for Justice, Alan Shatter. It allows *bona fide* members of the press attend and report, but subjects the media to a large number of restrictions on what may be reported. This legislation gives the court extensive powers to limit reporting, and provides for severe penalties for breaching the terms of the legislation – up to €50,000 in a fine and three years in jail for both journalists and media executives who publish prohibited material.

Thus the earlier regime for reporting family law is restrictive in who can attend proceedings and report on them, while not being prescriptive about what can and cannot be reported, subject to protecting a family's anonymity; the later law allows the media free access to the family courts, but is highly restrictive as to what can be reported, with heavy sanctions. Since its enactment five years ago there has, understandably, been little media attendance

at family law proceedings. In any case, no media organisation has the resources to provide comprehensive coverage.

Given the heavy workload of the judiciary, it is difficult to see how they could provide written judgments in most family law cases, and no resources exist in the Courts Service to provide for the redaction of the judgments in order to remove all possibly identifying information. A limited number of written judgments on child care from the District Court is published on the Courts Service website.

In my opinion, the only way to ensure balanced and systematic reporting of all family law proceedings is by way of a dedicated reporting body that can attend a representative sample of cases, staying with complex cases through repeated adjournments and publishing the exchanges between the parties' lawyers, judges and witnesses, as well as the court's conclusions. Such a body should apply a Protocol that ensures the protection of the anonymity of the parties, and therefore filters out any identifying information before it reaches the public domain. The Child Care Law Reporting Project operates in this way, and its Protocol can be seen on our website, www.childlawproject.ie

Rights of fathers

This issue mainly arises in private family law proceedings. In child care proceedings fathers, where they are identified, are respondents in the case along with the mothers and are entitled to legal representation. However, data collected by the Child Care Law Reporting Project has shown that the majority of child protection cases involve one parent, usually the mother, parenting alone, with limited or no involvement of the father in the child's life. Some judges have made rulings requiring the Child and Family Agency to prove that both the father and mother are unable to parent a child safely before making a care order, and have directed he CFA to support a father in caring for a child. In other cases, however, the proceedings have tended to focus on the mother with little involvement from the father.

Others have already made observations to your committee on how fathers are dealt with in private family law proceedings, which varies greatly depending on the court where the case is heard and the resources available to the family.

In relation to such proceedings, in my 2008 report for the Courts Service I observed that there was a specific inequity towards certain fathers due to the operation of the civil legal aid scheme. As it is strictly means-tested, a situation often arose where a working father earning a modest wage was above the means threshold while his wife, if a mother, would typically not be working or working part-time, and would fall under the means threshold. Therefore, when the marriage broke down she would be eligible for legal aid and he would not, giving rise to an inequality of arms in any subsequent proceedings.

A solution to this would be to remove or significantly increase the means threshold while asking for means-related contributions from litigants, so a person on an average income could avail of the civil legal aid scheme and contribute according to their means.

My colleague, Maria Corbett, and I will be happy to answer any questions the committee may have. In particular, Maria can address specific issues relating to the impact of Brexit on child protection proceedings.