

**General Scheme of the Family Court Bill
Observations to the Joint Committee on Justice
on behalf of Dr Carol Coulter and Maria Corbett
of the Child Care Law Reporting Project**

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Introduction

1. In September 2020, the Minister for Justice published the General Scheme of the Family Court Bill which proposes to establish a unified Family Court comprising District, Circuit and Family Court divisions. The Child Care Law Reporting Project (CCLRP) warmly welcomes this publication and the objectives set out in the General Scheme. We, along with many others, have long called for the establishment of a unified and specialist family court. We appreciate this opportunity to submit observations to the Joint Committee on Justice on the General Scheme. Our observations are based on the CCLRP's experience of child protection proceedings and related research; we have confined our observations to Heads of relevance to our work.
2. We have also confined our observations to measures which are appropriate for inclusion in a Family Court Bill. There are, however, several other reforms that will be needed to support the operation of the Family Court (once established) and to bring law and practice in relation to child care proceedings into line with international human rights law and best practice. To support such reforms, we are engaged in parallel consultations with the Family Justice Oversight Group of the Department of Justice and with the Department of Children, Equality, Disability, Integration and Youth (DCEDIY). Issues we are discussing in those fora include mechanisms for children to be heard and participate in proceedings, the introduction of more inquisitorial elements to proceedings, alternative dispute resolutions and court support services to assist the court in its decision-making, through commissioning independent assessments and expert reports. Some of these matters were explored in a 2019 report we authored on Irish and international practice <https://bit.ly/2ZASpy2>
3. In 2019, we surveyed how child care hearings are heard in the District Court. The majority of child care proceedings (74 per cent) is not separated from the general and family list – in terms of place, time or day of hearing. We documented the difficulties caused by hearing cases in a non-specialist court. These include scheduling practices leading to long waits for cases to be heard, potentially putting Ireland in breach of Articles 6 and 8 of the European Convention on Human Rights; the lists being overcrowded leading to pressure to hear cases quickly or engage in informal negotiation; lack of privacy; complex cases not being transferred to a higher court; staff not being specialists; lack of case management in many courts; and the lack of a national Practice Directions to promote consistency across the country. See: [District Court Child Care Proceedings: A National Overview](#) on our website, www.childlawproject.ie.
4. We welcome the creation of a unified family division within the court system to hear both private and public law cases. However, in some parts of the General Scheme, a greater focus on child care law is needed to articulate and address the differences between the two types of law. The submission comprises two parts: I. Observations on the General Scheme and II. Observations on Additional Provisions for Inclusion.

I. Observations on General Scheme

Head 2: Interpretation

5. Under Head 2, the phrase ‘family proceedings’ is defined to include proceedings held under specified statutes. The list of statutes include matters heard under private family law and also public child law and adoption. Unlike private family law where the parties are private individuals, public child law proceedings are usually initiated by a statutory body and may involve multiple parties, including, in some circumstances, children. Child law may concern family matters such as admitting a child to care or discharging a care order in order to reunify a family. However, child law also hears matters that concern the child him or herself, not the child’s parents, such as the needs of a child in care, providing care to an unaccompanied minor, detaining a child with emotional or behavioural difficulties (Special Care Orders), as well as hearing adoption orders. Consideration should be given to amending the phrase ‘family proceedings’ to read ‘child and family proceedings’ to reflect more closely the work of the Family Court and highlight the child law element of the new Court.

Head 5: Guiding principles

6. Head 5(3)(d) provides that ‘in any family law proceedings in which a child is involved or likely to be affected by the outcome— (i) ensuring that the best interests of each such child are a primary consideration in those proceedings. Head 5(4) provides that other statutes which provide for the best interests of the child should take precedence over this general principle.
7. The inclusion of a focus on the best interests of the child within the ‘Guiding Principles’, which govern the statute in its entirety, is to be welcomed. We understand the intention is for the principle to govern a broad range of proceedings. However, the current formulation may lead to confusion given that the standard varies between statutes. Consideration should be given to amending the text to a more general statement on the centrality of the best interests of the child in decision-making, which avoids the use of the phrase ‘a primary’ or ‘the paramount’ consideration. Several references are made within the Heads to the ‘best interests of the child’.
8. This best interests principle must be determined on a case-by-case basis. Guidance exists for the court on how to make a best interests of the child determination in the context of private family law (Child and Family Relationship Act 2015, section 63) and adoption proceedings (Adoption Amendment Act 2017, section 9). A parallel provision in relation to public child law does not exist. A proposed amendment was published in 2019 but fell in 2020 with a change of Government. Hence, there is no guidance of the making of a best interests of the child determination in public child law. This will need to be remedied in parallel to the enactment of the Family Court Bill. Consideration should be given to make a reference in the Bill to the relevant statutory guidance, which would then cover new legislation including a revised Child Care Act currently under discussion in the DCEDIY.

9. Consideration should be given to including additional factors in the Guiding Principles, such as:

General

- a) Proceedings will be conducted in a manner that respects international human rights law;
- b) Proceedings will be conducted in a manner that reflects the human dignity and ethnicity, cultural, religious and linguistic background of all parties;
- c) Proceedings will be conducted in a manner that promotes judicial continuity;
- d) Proceedings will be conducted in a manner that minimises delay as it is likely to be prejudicial to the best interests of the child and to the interests of the parties;
- e) Proceedings will be conducted in a manner that respects the privacy of the parties but also promotes transparency and accountability.

Child-Specific

- f) Proceedings will be conducted in a manner that respects the rights and needs of children, including their developmental needs and timelines.
10. The proposed Principle F, referred to above, seeks to reflect the principle of ‘child friendly justice’ (or ‘justice for children’). The Court Rules which will accompany the commencement of the Family Court Bill when enacted could include a provision that the scheduling of non-urgent hearings and any application for an adjournment take into account the impact on the child’s needs and timescales. It could require the judge and the parties to pay particular attention to the child’s age and important landmarks in the immediate life of the child. This would include (a) the child’s birthday; (b) the start of pre-school or school; (c) the start/end of a school term/year; (d) any proposed change of school; and/or (e) any significant change in the child’s family, or social, circumstances.

Head 8: Jurisdiction of District Family Court

11. Head 8 provides for the transfer of jurisdiction for a case to another District if it is deemed to be in the ‘best interests of the child or otherwise appropriate’. It would be helpful for the Bill to provide more guidance on the relevant circumstances, which may include if a timelier hearing date can be secured; or so the case can be heard by a judge who has jurisdiction of relevant private family law proceedings concerning the child’s parents. An application for transfer to another District should be open to any party to the proceedings and also to the child (who may not be a party).

Head 9: Sittings of District Family Court

12. Head 9 provides for the sittings of the District Family Court. The Head makes no distinction between hearing private family law and public child care proceedings. Section 29 of the Child Care Act 1991 provides that proceedings shall be heard ‘at a different place or at different times or on different days from those at or on which the ordinary sittings of the Court are held’ and section 31(1) provides that ‘No matter likely to lead members of the public to identify a child who is or has been the subject of proceedings ... shall be published or broadcast’. Consideration should be given to providing in the statute that private family and child law hearings should be listed for hearing at different times or on different days within the District Family Court, with the exception of the hearing of emergency applications. This separation will support the

objective of protecting a child's right to privacy. It will also decrease the experience of parents and children waiting for public child care hearings in the same building as private family law parties where acrimonious disputes may break out in the environs of the court. It is noted that this section does not (and indeed it may not need to) refer to the possibility of the court hearing applications 'elsewhere than at a public sitting of the District Court', such as for an Emergency Care Order under section 13(4)(d) of the Child Care Act 1991.

Heads 10 and 15: Proceedings in District Family Court and Proceedings in Circuit Family Court

13. *Prior to an application:* Heads 10 and 15 exclude applications under the Child Care Act 1991 from a requirement to state whether mediation under the Mediation Act 2017 has been attempted. This is appropriate given that the 1991 Act is not provided for under the 2017 Act. [Note: This issue may be revisited following possible future reform of the Child Care Act 1991 Act].
14. To support compliance with Article 15 of the Council Regulation 2201/2003 (Brussels IIa Regulation) which relates to the transfer of a case to another EU court better placed to hear the case, consideration should be given to including in Heads 10 and 15 a provision 'if applicable, whether or not the applicant has complied with obligations under Council Regulation 2201/2003'. All parties should be legally represented in child care proceedings, with timely access to legal aid where eligible.
15. *During Proceedings:* Heads 10 and 15 allow for both private family and public child care proceedings to be suspended to allow parties to resolve issues by way of mediation or another alternative dispute resolution (ADR) process. This provision is welcome as ADR may be appropriate to address ancillary matters that arise during child care proceedings, for example in relation to access or holiday arrangements for a child in care and their parent. In our view, ADR should not be limited to mediation, and should be defined in the Bill. [Note: There is no agency designated to conduct ADR in child care proceedings; this issue will need to be remedied before these provisions can be commenced].

Head 19: Jurisdiction of Circuit Family Court

16. Under Head 19, jurisdiction can be transferred between the District and Circuit Family Courts. This is most welcome. In addition, consideration should be given to provide, as far as is practicable, for judicial continuity, where the case is heard from start to finish by the same judge and court staff. To facilitate this principle, provision should be made for the transfer of a hearing to the court with jurisdiction of another case involving the same parties. This would allow the same judge to hear an application relating to access between a child in care and his or her parents and an application for protection under domestic violence statutes involving the same parents. Where the second application is to a higher court than the existing application, consideration should be given to transferring the first case to the higher court.

Head 29: Amendment of Family Law (Divorce) Act 1996

17. Head 29 gives concurrent jurisdiction to the District and Circuit courts of proceedings under the Divorce Act, which is to be welcomed as an efficient use of court resources. While private family proceedings are outside the remit of the CCLRP, our director, Carol Coulter, also has extensive experience of attending and reporting on such proceedings and has noted that divorce proceedings are often on consent and occupy no more than minutes of the court's time, as all contentious matters in such cases have been previously dealt with under separation agreements or judicial separations.

Head 36: Proceedings heard otherwise than in public

18. The CCLRP welcomes this provision, which replicates existing provisions permitting the reporting of family law proceedings by research bodies and by the media, subject to certain conditions. In particular we welcome subhead (11) which defines "relevant court documents" in relation to all family law proceedings, as this will permit deeper research into child protection proceedings.

II. Observations on Additional Provisions for Inclusion

Court Support Services

19. To ensure access to justice, parties must understand the proceedings and be able to instruct their solicitor. Our research has identified that many respondents in child care proceedings face personal difficulties which impair their capacity to understand and engage in judicial proceedings, including literacy difficulties, intellectual disability, mental health difficulties, English not being their first language or they are unfamiliar with the Irish legal system and state agencies. Consideration should be given to establishing a Court Support Office, which would oversee the appointment and regulation of independent advocates for persons with impaired capacity, interpreters, translation services and cultural mediators.

Family Drug and Alcohol Programme

20. Parental addiction is the cause of a significant proportion of children coming into and remaining in care. Many of these parents have the potential with support to overcome their addiction, to be able to parent safely and to be reunited with their children. Ireland has a legal duty to work towards family reunification where this is safe and in the child's best interest. Consideration should be given to follow international best practice and put in place a family drug and alcohol programme within the Family Court, which in the UK has been shown to reduce significantly the likelihood of children remaining in care. The existing Drug Court only deals with matters falling under criminal law, and a drug and alcohol programme within the Family Court would enable parents who participate on a voluntary basis to have access to addiction and other support services, with oversight of their progress communicated to the court for consideration during the child care proceedings.

The Child Care Law Reporting Project

Who We Are

Established in November 2012, the Child Care Law Reporting Project (CCLRP) supports better outcomes for children and their families by bringing transparency through reporting and research to child law in Ireland. We provide information to the public on the operation of the child care system in the courts with the aim of promoting transparency and accountability. We conduct research on these proceedings to promote debate and inform policymakers. We operate under a protocol to protect the anonymity of the children and their families subject to proceedings. Through our work we seek to promote confidence in the child care system.

The remit of the CCLRP is set and limited by law, the Child Care (Amendment) Act 2007. We can only report on what happens and is said in court about such proceedings. We can also use the information given in court for broader analysis of trends emerging from the selection of cases we attend. Currently, we report on District Court child care hearings and High Court special care hearings and some wardship cases involving children and young adults emerging from other forms of care.

The CCLRP is a company limited by guarantee (CLG) and is governed by a Board of Directors. We are funded by the Department of Children, Equality, Disability, Integration and Youth; our operational independence is guaranteed in the agreement between the CCLRP and the department. We employ a Director (Dr Carol Coulter) and Deputy Director (Maria Corbett) and engage a number of reporters, all on a part-time basis.

Our Work

To date, we have published over 650 case reports from our attendance at child care proceedings. We have also published seven analytical reports drawing on the information in these reports. All our case reports and analytical reports are available on our website <www.childlawproject.ie>

Latest case report: <https://www.childlawproject.ie/publications/> (published bi-annually summer/winter)

Observations on response to Covid19 pandemic and related case reports <https://www.childlawproject.ie/covid-19/>

[CCLRP Observations on Child Care Amendment Bill 2019](#)

[District Court Child Care Proceedings: A National Overview](#)

[An Examination of Lengthy, Contested And Complex Child Protection Cases In the District Court, By Carol Coulter, March 2018](#)

[Final Report, Child Care Law Reporting Project by Dr Carol Coulter November 2015](#)

Child Care Proceedings: A Thematic Review of Irish and International Practice (Maria Corbett and Carol Coulter, commissioned by DCYA) <https://bit.ly/2ZASpy2>

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