

Submission on the General Scheme of the Family Court Bill (2020)

Irish Human Rights and Equality
Commission

July 2021



**Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas**

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Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* (the '2014 Act'). In accordance with its founding legislation, the Commission is mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality and to examine any legislative proposal and report its views on any implications for human rights or equality.¹

Reform of the family justice system

The Commission welcomes the stated aim of the Family Court Bill to provide a more efficient and user-friendly family court system which places families at the centre of its activities.² The enactment of this Bill provides an opportunity to build on existing good practice that has been developed within the Courts Service, such as hearing family law cases on designated family law days, by placing these practices on a statutory footing. Reform of the family court system provides an opportunity to place human rights and equality at the centre of the family justice system through the implementation of national and international human rights standards – including the Public Sector Equality and Human Rights Duty,³ the Council of Europe *Guidelines on child-friendly justice*, the *United Nations Conventions on the Rights of the Child* and the *United Nations Convention on the Rights of Persons with Disabilities* – in the functions and rules of family courts.

The current Irish system of child and family law proceedings are not child, family or disability friendly. In this respect, the current system is marked by chronic delays in court proceedings, repeat adjournments, crowded lists, excessive caseloads, delays in conducting assessments of children and adults, inconsistent approaches to hearing

¹ Section 10(2) of the Irish Human Rights and Equality Commission Act 2014.

² Department of Justice, [Reform of Family Justice System announced by Minister McEntee](#) (30 September 2020) Press release.

³ Section 42 of the 2014 Act introduced the Public Sector Equality and Human Rights Duty, which places a statutory obligation on public bodies to eliminate discrimination, promote equality of opportunity and protect the human rights of those to whom they provide services and staff when carrying out their daily work. See IHREC, [Implementing the Public Sector Equality and Human Rights Duty](#) (March 2019).

views of the child, adversarial approaches to proceedings, inconsistency in decisions, and a lack of specialist training for judges and legal practitioners.⁴ Concern has also been raised about the unsuitability of the physical facilities in a number of courts for children and families due to issues including inadequate separation from other court proceedings, such as criminal proceedings; crowded court areas; a lack of appropriate waiting facilities;⁵ a lack of consultation rooms; poor acoustics; and, an absence of lifts and ramps, which affects access to court buildings for children's buggies and for persons with disabilities.⁶ Inadequate physical conditions and facilities can negatively impact on the conduct of the court proceedings and on both the court officials and the families involved.⁷ Family law proceedings can be a stressful experience; particularly for individuals – many of whom are from diverse ethnic and linguistic backgrounds – who have to represent themselves due to the eligibility thresholds for accessing legal aid and who face difficulty in understanding and navigating the complex process without support services and the provision of accessible information.⁸ It is important for such individuals to have the choice of being accompanied by persons (for example friends, family members and/or advocates) for support during proceedings.

The conduct of court proceedings, and the structure and operation of the family court is critical to fulfilling the rights of court users, in particular marginalised and minority groups – such as lone parent families, persons with disabilities,⁹ persons with psychosocial disabilities, minority ethnic groups, people in the International Protection

⁴ See discussion in Geoffrey Shannon, 11th Report of the Special Rapporteur on Child Protection (2018) pages 72-75, 218; Child Care Law Reporting Project, An Examination of Lengthy, Contested and Complex Child Protection Cases in the District Court (March 2018) pages 99-100; Child Care Law Reporting Project, District Court Child Care Proceedings: A National Overview (March 2019); Houses of the Oireachtas Joint Committee on Justice and Equality, [Report on Reform of the Family Law System](#) (October 2019) page 21.

⁵ There is lack of access to water dispensers and vending machines. See Child Care Law Reporting Project, District Court Child Care Proceedings: A National Overview (March 2019) page 2.

⁶ See Child Care Law Reporting Project, District Court Child Care Proceedings: A National Overview (March 2019) pages 2, 38. See also Conor O'Mahony, Aisling Parkes, Caroline Shore and Kenneth Burns, Child Care Proceedings and Family-Friendly Justice: The Problem with Court Facilities (2016) 19(4) Irish Journal of Family Law 75.

⁷ Conor O'Mahony, Aisling Parkes, Caroline Shore and Kenneth Burns, Child Care Proceedings and Family-Friendly Justice: The Problem with Court Facilities (2016) 19(4) Irish Journal of Family Law 75.

⁸ Houses of the Oireachtas Joint Committee on Justice and Equality, [Report on Reform of the Family Law System](#) (October 2019) pages 32-33. See also FLAC, [FLAC Submission to the Joint Oireachtas Committee on Justice and Equality on Reform of the Family Law System](#) (March 2019) pages 23-27.

⁹ The term 'persons with disabilities' in this submission refers to adults with disabilities, including parents and guardians, and children with disabilities.

system, Travellers and Roma – who are disproportionately represented in child and family care proceedings.¹⁰ Research indicates that many lone parents and members of ethnic minorities facing intersectional disadvantage suffer from social isolation, and economic and social deprivation which makes them particularly vulnerable.¹¹

Relevant human rights and equality standards

The provisions of the General Scheme, in particular the proposed establishment of family courts as divisions within the existing court structures engages a number of fundamental rights protected under the Constitution, European Union law, and international human rights law. The rights engaged under this General Scheme include the right to respect for private¹² and family life,¹³ and the right to fair procedures

¹⁰ Research by the Child Care Law Reporting Project (the 'CCLRP') found that 26.5 per cent of families before the child protection courts had at least one parent from an ethnic minority. This figure includes Travellers, who represented 4.4 per cent of families. The CCLRP noted that this figure was almost certainly an under-estimation, as they did not record settled Travellers where no evidence of their ethnicity was given during the case. African families were seven times more likely to face child protection proceedings than Irish people, and Eastern Europeans were about 1.5 times as likely as Irish people. A high proportion of children, one in four, coming into care had a disability, with many of those having more than one type of disability. 74 per cent of individuals before child care proceedings were parenting alone. The CCLRP also noted a significant number of intersectional identities amongst families such as minority ethnic parents with a disability, and lone parents with a disability. The CCLRP observed that parental disability was spread across various types of family status, in particular parental disability was very common in African families, featuring in 19 cases. The CCLRP noted that many lone parents have disabilities or addictions. See Child Care Law Reporting Project, Final Report (2015) pages 12-13, 16. In 2019, 78% of the 17,997 applications to the Legal Aid Board's law centres concerned family matters (General family law matters, 53%; Divorce/ separation/ nullity, 21%; Cases involving possible State care of children, 4%). The Legal Aid Board handled 11,643 Family Law cases which represented 67% of civil legal aid cases. See Legal Aid Board, Annual Report 2019 (2020). In 2019, 24.1% of the 12,469 callers to FLAC's Telephone Information and Referral Line had a family law query. Of this figure, 41% concerned divorce or separation; 25% concerned custody, access or guardianship; almost 20% concerned maintenance, and 10% concerned domestic violence and the family home. 47.9% of calls from lay litigants – those seeking to represent themselves – concerned family law issues. 34.2% of the 14,526 consultations in the FLAC's Legal Advice clinics concerned family law queries. Of this figure, 51.5% concerned divorce or separation; 24.7% were about custody, access or guardianship; 20.4% concerned maintenance; 14.6% concerned the family home; 9.3% concerned domestic violence; and 7.7% concerned other family matters. See FLAC, Annual Report 2019 (2020) pages 8-13.

¹¹ Child Care Law Reporting Project, Final Report (2015) page 12.

¹² Article 40.3.1° of the Constitution; Article 1 and Article 7 of the Charter of Fundamental Rights of the European Union; Article 8 of the European Convention on Human Rights; Article 16 of the Convention on the Rights of the Child; Article 22 of the Convention on the Rights of Persons with Disabilities; Article 17 of the International Covenant on Civil and Political Rights.

¹³ Articles 40, 41, 42 and 42A of the Constitution; Article 7 of the Charter of Fundamental Rights of the European Union; Article 8 of the European Convention on Human Rights; Article 16 of the Convention on the Rights of the Child; Article 23 of the Convention on the Rights of Persons with Disabilities; Article 17 and Article 23 of the International Covenant on Civil and Political Rights.

(including the right to a fair hearing within reasonable time,¹⁴ and access to legal aid for those who lack sufficient resources).¹⁵ In addition, noting the research above, it engages the principle of equality¹⁶ and non-discrimination¹⁷ specifically with respect to children, lone parents, ethnic minorities, people in the International Protection system, and people with disabilities, including people with psychosocial disabilities. Accordingly, Article 42A of the Constitution,¹⁸ the *UN Convention on the Rights of the Child* (the 'CRC'),¹⁹ the *UN Convention on the Elimination of Racial Discrimination* (the 'CERD')²⁰ and the *UN Convention on Rights of Persons with Disabilities* (the 'CRPD')²¹ are of particular importance.

¹⁴ Article 40.3 of the Constitution; Article 47 of the Charter of Fundamental Rights of the European Union; Article 6 of the European Convention on Human Rights; Article 14(1) of the International Covenant on Civil and Political Rights.

¹⁵ Article 47 of the Charter of Fundamental Rights of the European Union.

¹⁶ Article 40.1 of the Constitution; Article 20 of the Charter of Fundamental Rights of the European Union; Article 5(1) and Article 12 of the Convention on the Rights of Persons with Disabilities; Article 14(1), Article 16 and Article 26 of the International Covenant on Civil and Political Rights.

¹⁷ Article 21 of the Charter of Fundamental Rights of the European Union; Article 14 of the European Convention on Human Rights; Protocol 12 to the European Convention on Human Rights; Article 2 of the Convention on the Rights of the Child; Article 5 of the Convention on the Rights of Persons with Disabilities; Article 2(1), Article 24(1) and Article 26 of the International Covenant on Civil and Political Rights; Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.

¹⁸ Article 42A.4.1° provides:

“Provision shall be made by law that in the resolution of all proceedings—

- (i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
- (ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

Article 42A.4.2° sets out that:

“Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.”

¹⁹ The rights and principles, under the CRC, which are engaged by the provisions of the Bill include: in all actions concerning children, including courts of law, the best interests of the child shall be a primary consideration (Article 3); the right of the child to be heard in proceedings affecting them (Article 12); freedom to seek and receive information (Article 13); the right to respect for family life (Article 16); the right to privacy and dignity (Article 16).

²⁰ Article 5(a) CERD the right to equal treatment before the tribunals and all other organs administering justice (Article 5(a)).

²¹ The rights and principles, under the CRPD, which are engaged by the provisions of the Bill include: in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration (Article 7(2)); the right of the child to be heard in proceedings affecting them (Article 7(3)); accessibility (Article 9); equal recognition before the law (Article 12); access to justice (Article 13); freedom to seek and receive information (Article 21); right to privacy (Article 22); respect for home and the family (Article 23).

Observations on the General Scheme

Guiding Principles – Head 5

Head 5 sets out the guiding principles which any court should have regard to when dealing with family law proceedings. Guiding principles are important for ensuring that family law proceedings and the rules of court for family law proceedings reflect a human rights and equality based approach.

Head 5(3)(a) aims to promote alternative dispute resolution and is a welcome approach. However, certain conditions must be satisfied:

“...including the safety of the child, the capacity of parties, voluntary participation and clarity with regard to the purpose of mediation”.²²

Further these processes, which engage the right to respect for private and family life, must be subject to the right to fair procedures and natural justice; which includes an independent and impartial adjudicator, a right to withdraw from the process, continued right to access court, and a right to an effective remedy if the rights of an individual are violated.²³ Also, due to the intersectional disadvantage and discrimination faced by many court users, the principle of encouraging and facilitating a wider use of alternative dispute resolution methods should not be regarded as cost-saving measure or used as means of pressurising families into these processes which could act as an obstacle to access to justice for court users.²⁴ Furthermore, child-appropriate procedures should be established, with guidelines, to ensure the voices of children are heard in alternative dispute resolution proceedings. This will require specialist training, which extends beyond legal training, for all parties involved in the proceedings, including those who act for the child, such as the guardian *ad litem*.

The Commission recommends that Head 5(3)(a) be amended to further define the principles that should underpin alternative dispute resolution under the legislation,

²² Karen Quirk, Mediation —A Useful Intervention in Child Care Proceedings? (2015) 18(3) Irish Journal of Family Law 60, page 68.

²³ See discussion of general principles of mediation and conciliation in Law Reform Commission, [Alternative Dispute Resolution: Mediation and Conciliation](#) (2010) pp. 29-64.

²⁴ Houses of the Oireachtas Joint Committee on Justice and Equality, [Report on Reform of the Family Law System](#) (October 2019) page 47.

including the right to fair procedures, the safety of parties, in particular children and that engaging in any such process must be contingent on informed and voluntary consent of all relevant parties.

Head 5(3)(c)(i) sets out that courts should conduct proceedings in a manner which is as far as possible user-friendly for the parties. This is a welcome provision as court proceedings can be a distressing and intimidating experience for families and children. However, the meaning of user-friendly could be further clarified in terms of the provision of information to court users, access to interpretation and translation services,²⁵ and access to services for persons with disabilities and for those whose first language is not English or Irish. The absence of court supports can be a significant barrier to accessing justice for marginalised groups therefore clear guidelines on the meaning of user-friendly would assist marginalised communities in vindicating their right to access proceedings and to participate in proceedings.²⁶

The Commission recommends that Head 5(3)(c)(i) be amended to clarify the meaning of ‘user-friendly’ as including the provision of information to court users, access to interpretation and translation services, and access to services for persons with disabilities and for families whose first language is not English or Irish.

Head 5(3)(d)(i) requires courts – in any proceedings concerning children – to ensure that the best interest of each child is a primary consideration and Head 5(3)(d)(ii) sets out that in respect of any child who is capable of forming his or her own views 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.

²⁵ In particular, the Commission would draw attention to the commencement of the *Irish Sign Language Act 2017* on 23 December 2020, which provides, under section 4, for the use of Irish Sign Language in legal proceedings. Section 4: (1) A person may use Irish Sign Language in, or in any pleading in, any court.; (2) Every court has, in any proceedings before it, the duty to do all that is reasonable to ensure that any person competent in Irish Sign Language and who cannot hear or understand English or Irish appearing in or giving evidence before it may be heard in that language, if that is his or her choice, and that in being so heard the person will not be placed at any disadvantage; (3) For the purposes of ensuring that no person is placed at a disadvantage as aforesaid, the court may cause such facilities to be made available, as it considers appropriate, for the simultaneous or consecutive interpretation of proceedings into Irish Sign Language.

²⁶ Research by the CCLRP highlighted the lack of availability and provision of appropriate and targeted services and supports for vulnerable groups in child care proceedings. Child Care Law Reporting Project, Final Report (2015) pages 16, 24.

These provisions give effect to Ireland's Constitutional²⁷ and international obligations²⁸ on the rights of the child. It is therefore critical that any such interpretation of these rights within the legislation and in the conduct of family court proceedings take account of the relevant Constitutional, United Nations and Council of Europe obligations and standards.

In determining the best interest of a child, the United Nations Committee on the Rights of the Child (the 'UNCRC') have stated that the concept of a child's best interests is flexible and adaptable, and should be adjusted and defined on an individual basis according to the specific situation of the child, taking into account the child's personal context, individual characteristics, situation and needs.²⁹ The Council of Europe *Guidelines on child-friendly justice* set out that in assessing the best interests of the child:

"their views and opinions should be given due weight; all other rights of the child, such as the right to dignity, liberty and equal treatment should be respected at all times; a comprehensive approach should be adopted by all relevant authorities so as to take due account of all interests at stake, including psychological and physical well-being and legal, social and economic interests of the child".³⁰

The UNCRC recommend drawing up a non-exhaustive and non-hierarchical list of elements to be included in a best interests assessment; such a list could include elements such as the child's views; the child's identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; and situation of vulnerability.³¹ The UNCRC have said that there is an obligation that all

²⁷ Article 42A.

²⁸ The best interests of the child (article 3) and the views of the child (article 12) are two of the four core principles (alongside non-discrimination and the; the right to life, survival and development) of the United Nations Convention on the Rights of the Child which guide the interpretation and implementation of the Convention.

²⁹ United Nations Committee on the Rights of the Child, General comment No. 14 (2013) on 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 (29 May 2013) paras 32, 48.

³⁰ Council of Europe, [Guidelines on child-friendly justice](#) (2010) page 18.

³¹ United Nations Committee on the Rights of the Child, General comment No. 14 (2013) on 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 (29 May 2013) paras 50-76.

judicial and administrative decisions effectively demonstrate that a child's best interests have been a primary consideration; this includes describing how the best interests of the child have been examined and assessed, and what weight has been ascribed to them in the decision.³²

In clarifying the concept of the best interests of a child, the General Scheme should include provisions setting out the factors and circumstances to which a family court shall have regard when determining the best interests of a child such as the factors set out in section 63 of the *Children and Family Relationships Act 2015*.³³

The Commission is of the view that appropriate procedures need to be in place to ensure that the best-interests of the child are of paramount consideration in proceedings relating to them and that the necessary supports and resources are available for Courts to consult with children in relation to their best interests in a child-appropriate manner.

³² United Nations Committee on the Rights of the Child, General comment No. 14 (2013) on 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 (29 May 2013) para 14(b).

³³ Section 63 amends the *Guardian of Infants Acts 1964* by inserting section 31 which provides: 31. (1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family. (2) The factors and circumstances referred to in subsection (1) include: (a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships; (b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise); (c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances; (d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships; (e) the child's religious, spiritual, cultural and linguistic upbringing and needs; (f) the child's social, intellectual and educational upbringing and needs; (g) the child's age and any special characteristics; (h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being; (i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them; (j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives; (k) the capacity of each person in respect of whom an application is made under this Act —(i) to care for and meet the needs of the child, (ii) to communicate and co-operate on issues relating to the child, and (iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.

The Commission recommends that Head 5(3)(d)(i) be amended to clarify the factors and circumstances, drawing from domestic and international standards, which a court should have regard to in determining the best interests of a child.

The lack of legal capacity often serves as the primary barrier to a child's access to court alongside other legal, social, cultural and economic obstacles.³⁴ In realising the right of the child to express their views in proceedings that affect them, States have a duty to fully assess a child's capacity, as far as practicable, for forming their own views and should presume that a child has capacity to form their own views.³⁵ The means used to hear the voice of the child:

"should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case"

and children

"should be consulted on the manner in which they wish to be heard".³⁶

The State should ensure the child is provided with age-appropriate information and advice on the right to be heard and the means to vindicate this right.³⁷ Specifically, the UNCRC have set out that States parties are under an obligation to implement their right to be heard for children who may face difficulties in making their views heard such as children with disabilities, and children from minority, indigenous and migrant backgrounds.³⁸

The *Guidelines on child-friendly justice* provide that the:

"[p]rocesses for hearing children should be transparent and informative, voluntary, respectful, relevant, child friendly, inclusive, carried out by trained staff, safe and sensitive to risk and, finally, accountable".³⁹

³⁴ Council of Europe, [Guidelines on child-friendly justice](#) (2010) page 45.

³⁵ Council of Europe, [Guidelines on child-friendly justice](#) (2010) page 51.

³⁶ Council of Europe, [Guidelines on child-friendly justice](#) (2010) page 28.

³⁷ Committee on the Rights of the Child, General Comment no. 12 (2009) The right of the child to be heard, CRC/C/GC/12 (20 July 2009) para 16.

³⁸ Committee on the Rights of the Child, General Comment no. 12 (2009) The right of the child to be heard, CRC/C/GC/12 (20 July 2009) para 21.

³⁹ Council of Europe, [Guidelines on child-friendly justice](#) (2010) page 82.

The UNCRC have stated that:

“[a] child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms”.⁴⁰

The Commission is of the view that clear procedures and processes, which align with domestic and international standards, for listening to children need to be established so that there is a clear mechanism for hearing children's voices in proceedings. This means ensuring that appropriate procedures and expertise is in place to listen to the voice of the child in a child-appropriate format.

The Commission recommends that consideration of the provisions of the General Scheme ensure that the right of a child to be heard is adequately protected and given effect within the legislation.

As this legislation is all-encompassing for the system of family justice and has significant implication for human rights, consideration should be given to the inclusion of an explicit provision recognising that family courts and their rules should respect the dignity and fundamental rights, including those listed above, of children⁴¹ and individuals. The Commission would particularly stress the importance of ensuring that the provisions of this legislation and the operation and rules of the family court recognise and respect the principle of fair procedures.

Acknowledging the barriers faced by persons with disabilities including people with psychosocial disabilities, lone parent families, minority ethnic groups, Travellers and Roma in accessing family courts, consideration should be given to including a principle

⁴⁰ Committee on the Rights of the Child, General Comment no. 12 (2009) The right of the child to be heard, CRC/C/GC/12 (20 July 2009) para 34.

⁴¹ The *Guidelines on child-friendly justice* set out that “[c]hildren should be treated with care, sensitivity, fairness and respect throughout any procedure or case, with special attention for their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity.” See Council of Europe, [Guidelines on child-friendly justice](#) (2010) page 18.

ensuring effective access to justice for all persons on an equal basis with others. Moreover, due to concerns around the disproportionate representation of members of marginalised and vulnerable groups in court proceedings, consideration should be given to the inclusion of a non-discrimination principle. Such a principle should recognise that court users from marginalised groups may need additional assistance in accessing the court and participating in proceedings.⁴² In terms of protecting and realising the rights of marginalised court users, a key element of this is the provision of information to assist individuals and children make informed decisions around vindicating their rights and participating effectively in proceedings. Any such principle guaranteeing the right to receive information should set out that information should be provided in a language understandable to the person or child and tailored to their age, maturity, cultural background, ethnicity, and abilities.⁴³

In addition the guiding principles should explicitly recognise the rights of persons with disabilities. It is of some concern that there is no provision within the General Scheme to recognise the rights of persons with disabilities, despite the evidence that persons, including children, with disabilities are disproportionately representing in child and family law proceedings and the barriers they can face in accessing justice due to their disability and other factors including age, gender, nationality, ethnicity, socioeconomic status, and membership of the Traveller community.⁴⁴

⁴² The *Guidelines on child-friendly justice* provide that specific protection and assistance, including in terms of determining capacity before proceedings, may need to be granted to more vulnerable children, such as migrant children, refugee and asylum-seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children, and children in residential institutions. Council of Europe, [Guidelines on child-friendly justice](#) (2010) page 19.

⁴³ Council of Europe, [Guidelines on child-friendly justice](#) (2010) page 59.

⁴⁴ In Ireland, research concerning access to justice, primarily within the criminal justice system, has highlighted the barriers faced by persons with disability to meaningfully participate in proceedings and to vindicate their rights within the court system. These barriers include infrastructural barriers such as lack of physical access to buildings and procedural barriers such as a lack of support systems, lack of access to information in accessible formats, lack of specialised training, lack of awareness of the rights of persons and children with disabilities, and negative attitudes towards the inclusion of persons with disabilities with disabilities in proceedings. See Claire Edwards, Gillian Harold, and Shane Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (2012); Jennifer Kline and Eilíonóir Flynn, *Access to justice for children with cognitive disabilities: Ireland country report* (NUI Galway Centre for Disability Law & Policy, 2015); National Disability Authority, *NDA Independent Advice Paper on the use of intermediaries in the Irish justice system* (June 2020).

Internationally, the United Nations Office of the High Commissioner for Human Rights (the 'OHCHR') has recognised a range of barriers prevent persons with disabilities from accessing justice on an equal basis with others, including: restrictions on the exercise of legal capacity; lack of physical access to justice

Article 13 of the CRPD specifically includes a stand-alone right to access to justice, setting out that States Parties should:

“ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages”.

With regard to children with disabilities, Article 7(3) of the CRPD provides that “States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right”.

The Commission recommends that consideration be given to amending Head 5 of the General Scheme to include an explicit guiding principle to ensure that family courts and the rules governing the operation of family courts sufficiently protect the dignity and fundamental rights of court users. In particular, the right to fair procedures should be recognised as one of the fundamental rights of court users.

The Commission recommends that consideration be given to amending Head 5 to include additional guiding principles ensuring access to justice for all persons on an equal basis with others and the non-discrimination principle so as to strengthening the protection for marginalised groups who are disproportionately represented within child and family law proceedings.

facilities, such as courts and police stations; lack of accessible transportation to and from these facilities; obstacles in accessing legal assistance and representation; lack of information in accessible formats; paternalistic or negative attitudes questioning the abilities of persons with disabilities to participate during all phases of the administration of justice; and lack of training for professionals working in the field of justice. See OHCHR, [International Principles and Guidelines on Access to Justice for Persons with Disabilities](#) (August 2020) page 6. See also OHCHR, Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities, A/HRC/37/25 (27 December 2017) para 4; Eilionóir Flynn, Catriona Moloney, Janos Fiala-Butora, and Irene Vicente Echevarria, Access to Justice of Persons with Disabilities (NUI Galway Centre for Disability Law & Policy, December 2019).

The Commission further recommends that consideration be given to amending Head 5 to include an explicit guiding principle recognising the rights of persons with disabilities, including access to justice and accessibility.⁴⁵

Geographic locations (Heads 7 and 12)

The General Scheme provides that the Courts Service may after consulting with the Principal Judge and President of the relevant Court divide the circuits into “convenient geographic areas” to create districts for the District and Circuit Family Courts.⁴⁶

Apart from the requirement to consult with the judiciary there is no requirement on the Courts Service to consult with court users, including marginalised groups or their representative groups to inform how to best divide the districts into accessible geographical locations.⁴⁷ In addition, the term “convenient geographical areas” lacks clarity. Therefore to ensure that the division of geographical locations is informed by human rights and equality principles, Head 7 and Head 12 should be amended to require the Courts Service to have regard to the need to ensure that the geographical locations are accessible to all services users on an equal basis.⁴⁸

The Commission recommends that Heads 7 and 12 be amended to require the Courts Service to consult with relevant stakeholders, including court users from marginalised groups, namely lone parents, people with disabilities and people from diverse ethnic and linguistic backgrounds.

⁴⁵ Any such guiding principles should align with the International Principles and Guidelines on Access to Justice for Persons with Disabilities developed by the UN Office of the High Commissioner for Human Rights (OHCHR). See OHCHR, [International Principles and Guidelines on Access to Justice for Persons with Disabilities](#) (August 2020).

⁴⁶ See Heads 7 and 12.

⁴⁷ From an access to justice perspective, the geographic location of family courts should ensure accessibility, in terms of the court facilities and public transport, for court users, in particular marginalised groups and persons with disabilities. See European Commission for the Efficiency of Justice (CEPEJ), Revised Guidelines on the Creation of Judicial Maps to Support Access to Justice within a Quality Judicial System, CEPEJ(2013)7Rev1 (06 December 2013); European Commission for the Efficiency of Justice (CEPEJ), Guidelines on the organisation and accessibility of court premises, CEPEJ(2014)15 (12 December 2014).

⁴⁸ The UN Committee on the Elimination of Discrimination against Women recommend that States parties “[e]nsure the creation, maintenance and development of courts, tribunals and other entities, as needed, that guarantee women’s right to access to justice without discrimination throughout the entire territory of the State party, including in remote, rural and isolated areas”. See UN Committee on the Elimination of Discrimination against Women, General recommendation No. 33 (2015) on women’s access to justice, para 16(a).

The Commission further recommends that Heads 7 and 12 be amended to expressly require the Courts Service to have regard to the need to ensure that geographical locations are accessible to all courts users on an equal basis.

Training and specialisation of judges – Heads 6, 11 and 16

Head 6(4)(b), Head 11(4)(b), and Head 16(4)(b) respectively set out that:

“[a] person shall not be assigned to be a judge”

of the District Family Court, Circuit Family Court or Family High Court:

“unless he or she is, by reason of his or her training or experience and temperament, a suitable person to deal with matters of family law”.

Head 6(8) and Head 11(8) respectively set out that a judge of the District Family Court or Circuit Family Court “shall take such course or courses of training or education, or both, as may be required by the Judicial Studies Committee established by the Judicial Council”. There is no provision under the General Scheme for judges of the Family High Court to take any course or courses of training or education.

It has been a consistent recommendation that judges who are likely to handle child and/or family law matters, have a specialist knowledge of this area and be required to continually undergo specialist training which takes accounts of developments in domestic and international practice on child and family law matters.⁴⁹ In particular, the Commission is of the view that it is essential that judges before being assigned to the Family High Court have the necessary training and expertise in family law and child care law. The Commission is of the opinion that the legislation should include a provision outlining a non-exhaustive list of areas relevant to family law and child care law that a judge shall have expertise and training in before being assigned to the District Family Court, Circuit Family Court or Family High Court. Furthermore, the legislation should include a provision outlining a non-exhaustive list of areas in which family court judges shall take course or courses of training or education in after being assigned to a family court rather than leaving considerable discretion to the Judicial Studies Committee

⁴⁹ Geoffrey Shannon, 11th Report of the Special Rapporteur on Child Protection (2018) page 73; Houses of the Oireachtas Joint Committee on Justice and Equality, [Report on Reform of the Family Law System](#) (October 2019) pages 44-45.

who only *may* require family court judges to take such course or courses of training or education.

Specifically in outlining areas of expertise and training necessary for family court judges, a core competency of family court judges should be knowledge and experience in the rights of the child as judges often lack the training to vindicate the rights of the child to participate in proceedings and have their voice heard.⁵⁰ In terms of guidance, the UNCRC set out that information and training on the best interests of the child and the right of the child to be heard should be provided to all those that make decisions affecting children.⁵¹ The *Guidelines on child-friendly justice* provide that judges, alongside other professionals working with children, should receive interdisciplinary training on the rights and needs of the child; adapting the proceedings to reflect the age, capacity and maturity of the child; communication skills with children of all ages and stages of development, and with children in situations of particular vulnerability; interviewing children; using child-friendly language; and child psychology and development.⁵² The current Special Rapporteur on Child Protection has recommended that judges should undergo interdisciplinary training in skills including communicating with children, best international practical in judicial interviews of children, and all other elements of child and adolescent development and welfare.⁵³

Training should also be provided to judges on fundamental human rights of court users, including relevant European and international principles and standards. Due to the marginalised or minority backgrounds of many court users – such as lone parent families, persons with disabilities⁵⁴ including persons with psychosocial disabilities, Travellers and Roma and persons from diverse ethnic and linguistic backgrounds – it is essential that judges are informed on the diversity of society. In terms of access to

⁵⁰ Council of Europe, [Guidelines on child-friendly justice](#) (2010) page 81.

⁵¹ Committee on the Rights of the Child, General Comment no. 12 (2009) The right of the child to be heard, CRC/C/GC/12 (20 July 2009) para 49; United Nations Committee on the Rights of the Child, General comment No. 14 (2013) on 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 (29 May 2013) para 15(f).

⁵² Council of Europe, [Guidelines on child-friendly justice](#) (2010) pages 23, 65.

⁵³ Conor O'Mahony, Annual Report of the Special Rapporteur on Child Protection 2020 (June 2020) page 115.

⁵⁴ The term 'persons with disabilities' in this submission refers to adults with disabilities, including parents and guardians, and children with disabilities.

justice and the disadvantage and discrimination faced by many court users due to their background or circumstances, judicial training should specifically focus on the methods and mechanisms for supporting the engagement and participation of marginalised and vulnerable groups in court proceedings.⁵⁵ Such training could focus on areas such as non-discrimination, bias, cultural sensitivity, and accessibility. This approach would help foster an inclusive and rights-based family justice system that supports individuals in vindicating their rights.

The Commission recommends that Head 16 be amended to require Family High Court judges to undergo continual training or education in family and child care law.

The Commission recommends that the General Scheme be amended to include a provision outlining a non-exhaustive list of content and areas that judges are required to have specialised knowledge of and to undertake courses in. This list should include areas such as the fundamental rights of the individual; rights of the child, including listening to children and reading their concerns and wishes in a child-appropriate manner; non-discrimination; accessibility and alternative dispute resolution mechanisms.

Family Law Rules Committee – Head 18

Head 18 provides for the establishment of the Family Law Rules Committee consisting of 3 ex-officio members (the Principal Judges of the District, Circuit and High Family Courts) and 7 nominated members.⁵⁶ Head 18(5) sets out that the Committee shall, with the concurrence of the Minister of Justice, make rules in relation to the court

⁵⁵ For example, Maria Corbett and Carol Coulter recommend that judges undergo disability awareness, anti-bias and cultural competency training to support the engagement of parents with an intellectual disability and/or mental health difficulties with the child care legal system. Maria Corbett and Carol Coulter, *Child Care Proceedings: A Thematic Review of Irish and International Practice* – Submitted to the Department of Children and Youth Affairs (June 2019) page 136.

⁵⁶ Head 18(4): The nominated members shall be (a) a barrister with experience and relevant expertise in the area of family law nominated by the Bar Council of Ireland; (b) a solicitor with experience and relevant expertise in the area of family law nominated by the Law Society of Ireland; (c) a County Registrar, (d) a Clerk of the District Court, (e) a Clerk of the Circuit Court, (f) the Chief Executive of the Courts Service, or a member of the staff of the Courts Service to whom the Chief Executive has delegated his or her membership in writing and any such delegation may be revoked at any time by the Chief Executive; (g) a representative of the Attorney General.

proceedings. Under Head 18(6) such rules shall have regard for the guiding principles under Head 5 and the proper and efficient administration of justice.

The Family Law Rules Committee will have a central role in the functioning of the Family Courts and in the administration of justice, and in ensuring there is consistency in the conduct of proceedings in the different courts across Ireland. As the proposed powers granted to members of the Committee under this legislation will have significant implications for human rights and equality, the Commission is of the view that further consideration should be given to the membership of the Committee. In particular, the Commission would emphasise the importance of ensuring human rights and equality expertise and knowledge is reflected in the membership of the Committee.

As outlined above, certain groups in society are disproportionately represented in court proceedings so it is critical that any such rules protect and vindicate the rights of individuals within these groups. If representatives of such groups are included in the decision-making process for the rules to guide the family court process, it may contribute to a more inclusive, accessible and responsive system. Therefore, consideration should be given to expanding the membership of the Committee to include court users, including marginalised groups such as people with disabilities; children's rights advocates; and people from different ethnic backgrounds, including members of the Traveller community. Other representatives of bodies involved in the family justice system, such as the Legal Aid Board; representatives of other court services and supports, such as alternative dispute resolution services; and civil society representatives may also play a valuable role on this Committee. Alternatively, if such groups are not included in the membership of the Family Law Rules Committee, consideration should be given to including a provision requiring the Rules Committee to consult with such groups in the drafting and reviewing of the rules.

The Commission recommends that Head 18 be amended to expand the membership of the Family Law Rules Committee to include a person or persons with expertise and/or knowledge of human rights and equality; court users, in particular from marginalised and vulnerable communities overrepresented in family law

proceedings; representatives of court services and supports; and civil society organisations.

Collecting and reporting of statistical data

There is no provision under the General Scheme which provides for the collection and public reporting of statistical data on family court proceedings and/or family court users. The Commission has consistently recommended that the State develop a system of data collection that can be disaggregated to allow a regular and adequate assessment of the extent to which it is meeting its obligations under domestic, regional and international law.⁵⁷ Data collected should be disaggregated along the grounds set out under equality law.⁵⁸ The collection of disaggregated data is critical from an access to justice perspective, as disaggregated data helps capture the experiences of minority and marginalised groups within the justice system in Ireland. Previous research by individuals and groups, such as the Child Care Law Reporting Project, have identified the disproportionate representation of minority and marginalised within child law proceedings. This overrepresentation is significant in terms of ensuring the State puts in place adequate supports and procedures to assist groups in accessing justice. Therefore it will be critical, while mindful of the right to privacy and restrictions on the publication of court proceedings, to monitor and publically report statistical data of the impact of the implementation of this legislation and the operation of the new family law court system on court users.⁵⁹ Any such gathering and reporting of data should inform

⁵⁷ See for example: IHREC, Submission to the UN Committee against Torture on the List of Issues for the Third Examination of Ireland (2020) page 7; IHREC, Ireland and the Convention on the Elimination of Racial Discrimination (October 2019) pages 22-23; IHREC, Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women (January 2017) page 30; IHREC, Ireland and the United Nations Convention on the Rights of the Child (December 2015) page 33.

⁵⁸ The Equal Status Acts 2000-2018 prohibit discrimination along nine grounds: gender, marital status, family status, age disability, sexual orientation, race, religion, and membership of the Traveller community. Housing assistance discrimination is also prohibited in respect of accommodation services.

⁵⁹ The system of data collection should be informed by the guidelines on improving the collection and use of equality data developed by the European Commission Subgroup on Equality Data. The guidelines are divided into two groups: A) Institutional and structural guidelines which provide guidance to EU Member States in setting up structures that enable a systematic, long-term and cooperative approach to collection and use of equality data; B) Operational guidelines which provide guidance to Member States in ensuring comprehensiveness, timeliness, validity, reliability and representativeness of equality data and in enhancing their comparability. See European Commission Subgroup on Equality Data, Guidelines on improving the collection and use of equality data (2018).

the work of the Family Law Rules Committee in making, adapting or withdrawing rules to improve the family court system.

The Commission recommends that the State collect and publish disaggregated data on family court proceedings and family court users. This data must be compiled in manner that is research accessible so that patterns and trends in the Family Law Courts can be analysed systematically over time.

Review of the legislation

The General Scheme does not include a provision to review the adequacy and effectiveness of the legislation after a defined period, and to lay a report of the review before the Houses of the Oireachtas. As this General Scheme proposes a significant part of the reform of the family justice system, and the provisions of the General Scheme establish the family courts system, provide for the role of family court judges and makes a number of amendments to existing legislation it would be beneficial to scrutinise the impact of the legislation after set period of years to monitor and assess its effectiveness in ensuring that families are placed at the centre of the activities of the Court.

The Commission recommends that consideration be given to including a provision that the Act will be reviewed after a set number of years to monitor the effectiveness of the legislation. Any such review should require the relevant Minister to place a report before the Houses of the Oireachtas on the operation of the Act.



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