

26 February 2021

Family Justice Oversight Group - Phase 1 Consultation

Introduction

Established in 1973, the National Women’s Council (NWC) is the leading national women’s membership organisation in Ireland. NWC seeks full equality between men and women and we draw our mandate from a membership of over 180 groups and organisations across a diversity of backgrounds, sectors and locations. We also have a growing, committed individual membership. The Irish Observatory on Violence Against Women is chaired by NWC¹.

NWC actively support and work with government to implement the aims of the National Strategy for Women and Girls and to develop an integrated and focused programme of gender aware and gender proofed investment. It is important this vision is also aligned to UN Sustainable Development Goals and the UN Convention for the Elimination of Discrimination against Women recommendations to Ireland, as well as other UN convention recommendations.

The Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence (the Istanbul Convention), ratified in March 2019, is a significant, international legal instrument in combatting domestic and sexual violence. Its purpose is to protect women from all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence. The Second National Strategy on Domestic, Sexual and Gender Based Violence² works to ensure its implementation.

The COVID-19 pandemic has exacerbated and compounded all forms of violence against women³ (VAW) and this will have a long-lasting impact on society as a whole that will challenge the criminal justice and the family law systems like never before. Thus, the impact from the pandemic should be considered fully in any reform of the family justice system.

Unhindered access to justice for women is a critical pathway to the achievement of gender equality. Effective access to justice is an indispensable right enshrined in numerous instruments within the universal human rights protection system to which Ireland holds membership. The obligation not to discriminate against women and to achieve substantive equality between women and men is an essential part of these rights. The UN Committee on the Elimination of Discrimination Against Women has recognised six interconnected key fundamentals necessary for a justice system to be responsive to gender. These are: justiciability; availability; accessibility; good quality; accountability and the provision of remedies for victims⁴. While acknowledging that accessing justice may be difficult for many people, NWC considers that it is especially so for women, due to gender inequality in society and in the justice system.

According to the Council of Europe’s Guaranteeing Equal Access of Women to Justice ‘most cases of sex-based discrimination in which the European Court of Human Rights (ECtHR) has found a violation of Article 14 of the European Convention on Human Rights (Prohibition of discrimination) have been

¹ The organisations in the Observatory are Women’s Aid, Akidwa, Cork Sexual Violence Centre, Dublin Rape Crisis Centre, Galway Rape Crisis Centre, Immigrant Council of Ireland, National Women’s Council of Ireland, Pavee Point Travellers Centre, Ruhama, Sonas, Haven Horizons, Longford Women’s link, Aoibhneas, National Collective of Community-based Women’s Networks, Consortium of Gender Based Violence Ireland, Ascend Domestic Abuse Service, Cairde, Action Aid, YWCA, European Women’s Lobby through NWC Representative, Sisi

² Department of Justice (2016) Second National Strategy on Domestic, Sexual and Gender Based Violence. <http://www.cosc.ie/en/COSC/Pages/WP08000096>

³ In Ireland, leading organisations working on domestic violence such as Women’s Aid report an increase in the number of calls to their helplines and the Gardaí reported a 25% increase in domestic violence calls in April/May 2020 compared to April/May 2019. See Oireachtas Library and Research Service (2020) ‘Domestic Violence and Covid-19 in Ireland’, available at https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2020/2020-06-09_I-rs-note-domestic-violence-andcovid-19-in-ireland_en.pdf

⁴ See CEDAW General Recommendation on Women’s Access to Justice at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_77_67_E.pdf

brought by men, even though gender discrimination disproportionately affects women. Furthermore, a review of ECtHR case law reveals that the cases in which there has been a finding of discrimination on the ground of sex are by and large those in which differential treatment is explicit (e.g. labour contracts stipulating an earlier retirement age for women; parental leave not available for men). The limited jurisprudence on indirect sex-based discrimination presents a significant challenge for women's access to justice⁵

The increasing difficulty in gaining access to our justice system serves to undermine our justice system. In recognition of this, the Irish Human Rights and Equality Commission's Strategy Statement 2019- 2021 has named as one of its four strategic areas 'Protect the rights of individual persons who face the greatest barriers to justice'.

We believe that effective access to justice must be at the forefront of our legal system⁶. Excellent laws without an effective ability to invoke them are rendered meaningless. In that respect NWC recommends that any review of the family law system should adopt 'Access to Justice' as a key strategic priority, of which women's access must be specifically named. This would assist in recognising the specific barriers that women face when attempting to access the justice system. Through being aware of how gender creates different roles for women and men, and by taking account of unequal power relations between women and men, the Department of Justice will be better able to address different vulnerabilities experienced by different groups of women. The Department's aim to increase confidence in the family law system must be seen through the experiences of victims of domestic abuse. Failure to adopt this view will inevitably lead to decreased confidence in the system as victim's needs will continue to be neglected.

NWC welcomes the invitation to contribute to the Family Justice Oversight Group Phase 1 Consultation. As family law is one of the most pressing and critical issues for the women we work with, we would like to highlight some of the issues faced by women and women with children going through the family law system when separating from abusive partners, in the context of the questions posed by the Group.

It is self-evident that an outdated, underfunded and inadequate justice system adds to the harms already experienced by victims of domestic and intimate partner abuse. From the outset we sound a cautionary note; any review of the family law system without close consideration of the intertwined but critically disconnected criminal and civil jurisdictions is doomed to fail. Ireland's consistently low prosecution rates, low conviction rates as well as high attrition rates concerning domestic, sexual and gender-based crimes exemplify why the current partitioning of jurisdictions is ineffective to addressing these types of crimes.

⁵ This information was directly provided by the Council of Europe's Guaranteeing Equal Access of Women to Justice (2016) page 2.

⁶ 6 IHREC Strategy Statement 2019 – 2021; <https://www.ihrec.ie/documents/strategy-statement-2019-2021/> (last accessed 13 February 2019)

Optimising the delivery of family justice

(i) The use of modern technology

Improving Access to Justice

Innovative use of modern technologies can bypass obstacles to access to justice and provide additional pathways to courts. The accommodations introduced as a result of Covid-19 – such as remote hearings and ex-parte applications through the use of video conferencing technologies and e-filing of court papers – have demonstrated this options available to the Courts Service to introduce technologies that are more accommodating of court users.

While remote hearings may not be appropriate in adversarial proceedings, they can remove multiple obstacles that increase pressure on individuals – in terms of attending court hearings, facilitating child care and reducing exposure to intimidation in proceedings where a domestic violence order is being, or has previously been, sought. They can significantly reduce the delay and soaring costs that currently characterise the family law system. Case management proceedings would be particularly well-suited to remote hearings.

Nevertheless, this accelerated adoption of technology has highlighted the dangers of increasing access to justice while undermining the quality or experience of justice for court users. An Oireachtas report on the impact of technological change on the legal sector published this week warns that artificial intelligence (AI) software designed to introduce efficiencies in the justice system could “learn” to discriminate in ways that are illegal, focusing on characteristics that are proxies for social class, race or gender⁷.

Video-link witness testimony, already in use in the criminal system could be extended to private family law proceedings, particularly in cases of domestic and sexual violence when court proceedings with their ex-partner may be re-traumatising. It can also streamline the process and reduce the need for people to attend court in person and result in greater witness attendance.

At every stage the Courts Service must be vigilant that any new processes take into consideration all court users and does not marginalise any through lack of access to technologies or ease with their usage.

Data Collection

Significant change on violence against women cannot be achieved without a sustained commitment to data collection and analysis by all agencies working the area of domestic, sexual and gender based violence. Systematic and codified data collection helps to identify gaps that can be addressed by evidence-based service and policy development and resource allocation.

A revised family law structure provides an important opportunity to establish a new data-gathering system with the capacity to collect nationwide information. To reduce violence against women, we first need to understand the scale of the problem. Reliable and comparable statistics will help us to assess the effectiveness of policy measures and services in place, and to estimate the resources needed to tackle the issue, as well as tracking our progress over time.

The Government’s commitment in the Second National Strategy on Domestic, Sexual and Gender-based Violence 2016-2021 holds it to a ‘gold standard’ of data collection with plans to include the disaggregation of data by ethnicity, sex, age, disability and relationship between victim and perpetrator is

⁷ Algorithms, Big Data and Artificial Intelligence in the Irish Legal Services Market No. 2 of 2021 Dr. Rónán Kennedy BL, February 2021
https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2021/2021-02-18_spotlight-algorithms-big-data-and-artificial-intelligence-in-the-irish-legal-services-market_en.pdf

outstanding⁸. The adoption of modern technologies can help to develop a multiagency system to harmonise and share information.

Recommendations

- Implement the data recommendation of the Second National Strategy on Domestic, Sexual and Gender-based Violence 2016-2021 to establish the ‘gold standard’ of data collection as outlined in the Istanbul Convention.
- Relevant data that tracks the District Court family law users could provide a comprehensive picture of the journey and use of courts by vulnerable families in private family law proceedings and to evaluate outcomes.
- Harmonise and share information among relevant stakeholders (the justice system, police, social service, health services) by contributing to the development of a multiagency system (An Garda Síochána, TUSLA, Courts Service).

(ii) The provision of facilities and supports in the family justice locations

The complex array of issues that arise in family law proceedings requires co-ordinated response that aims at improving outcomes for court users.

Physical Infrastructure

A network of dedicated family law locations, with integrated ancillary support and services would substantially increase in the amount of court time and space dedicated to family law. It would also ensure consistency in the service level and processes that are currently characterised by differences in practices in each District and Circuit. A specialist division of family law courts, with members of the judiciary assigned for a fixed term, would ensure greater consistency in judgments and associated efficiencies. Specialised training for members of the judiciary could address the hidden impacts of domestic violence, including coercive control, that are currently overlooked or misunderstood. Further, a dedicated structure for family law could take into consideration vulnerable users, in particular survivors of domestic violence, and a developed integrated response to security concerns.

Substantially increasing the number of consultation rooms available would provide the physical and psychological space necessary to afford court users privacy when discussing their case details with legal practitioners and during mediation, with priority access for the most vulnerable court users. The current arrangements potentially expose women to intimidation by the respondent in proceedings where a domestic violence order is being sought or where such an order has previously featured in the proceedings. The current default of conducting consultations in the corridors of the courts lacks sensitivity to vulnerable users and undermines the requirement for family law proceedings to be held in camera.

Dedicated waiting spaces could be family-friendly and include a range of facilities, such as play areas or changing areas, would be mindful that family life does not stop at the doors of the court. A separate waiting area for vulnerable witnesses and children could help to ensure that the experience of attending court is not retraumatising.

⁸ Ireland ratified the Istanbul Convention in 2019. Article 11 of the Convention requires the collection of data to support the aim of preventing and combating violence against women and domestic violence in Europe. The data to be collected is to take both administrative and survey forms. Research is to be conducted to study the causes of the violence and the methods to prevent it. Data collection is to be co-ordinated by a national body, as defined in Article 10. In Ireland NWCI chair the National Observatory on the Istanbul Convention⁸. Specific categories of data required. The complete text of the Convention is available at <https://www.coe.int/en/web/istanbul-convention/text-of-the-convention>

Courtrooms themselves could be designed to limit the adversarial nature of the proceedings and be sympathetic to the discussion of intimate details of family life, in particular where the voice of the child is concerned. Dedicated family law courts would ensure that special measures, such as video-links, are consistently facilitated.

Notwithstanding the above, any revised structure should be cognisant of the additional challenges posed by the potentially remote location of services that would require longer travel times and the logistical challenges to transport and childcare, as well as costs, that it may pose.

Ancillary Services and Court Welfare Service

Co-locating ancillary supports and services, including a legal aid and integrated court welfare service, would promote engagement with the services by court users. An information hub on the available services would help users of the family law system to understand the court processes and legal framework and to constructively engage with their options. Such a hub would support the obligation for the Courts Service to provide victims of domestic violence with information on, and contact details for, support services for victims⁹.

A Court Welfare System could provide specialist supports in all private family law matters that involve victims of domestic and intimate partner abuse. A high-quality Court Welfare Service should comprise the management and resourcing of necessary court assessments in relation to children and parents; a range of ancillary support services including counselling, mediation and mentoring. A system for the statutory assessment and management of child maintenance payments would replace the need for parents to seek payments through an adversarial and costly court process. It would reduce the scope for further abuse where the abuser uses court processes as a way to delay maintenance payments and utilise processing time to liquidate assets to cause financial hardship. An integrated Statutory Maintenance Agency would reduce conflict and abuse between parents, and spouses and ex-spouses, about ongoing financial obligation while encouraging shared financial responsibility.

A network of Child Contact Centres would offer the courts options when it assesses that perpetrators of abuse should not be unsupervised with the children. For vulnerable court users this needs to be a safe space for child access visits with professionally trained staff to ensure that child access visits are no longer an opportunity to continue to intimidate their former partners or that are a trigger for abuse. These centres should be staffed with trained professionals to facilitate and provide a safe space, with trained professionals in coercive control and security for access arrangements.

The legal system itself is often used by perpetrators to repeatedly re-victimise and as a method of exercising coercive control through delaying tactics, disruptions in proceedings, harassment before and after court proceedings. Court facilitates that are victim-witness centred and trauma-informed would recognise that the hearing itself is re-traumatising with women having to face their perpetrators. Structural accommodations and facilities would include, but are not limited to: separate entrances for victim-witnesses; separate waiting areas for victim-witnesses; quiet, private spaces for victim-witnesses; access to supports at courts. These should be provided throughout the country irrespective of location or jurisdiction of the court.

Other supports, such as therapeutic/counselling services for resolving complex emotional and personal issues, parenting services to ensure a child-centred perspective in agreements and facilitated mediation and alternative dispute resolution services.

⁹ Section 28 of the Domestic Violence Act 2018 provides 'The Courts Service shall provide each applicant with information on, and contact details for, support services for victims of domestic violence.'

Recommendations

- Support the establishment of a Court Welfare System
- Support the establishment of a Statutory Maintenance Agency
- Co-locate domestic violence services and other ancillary services in dedicated family law centres
- Ensure that the physical structure of the court is child-friendly and provides for the safety and privacy needs of women and children
- Establish a network of supervised child contact centres to facilitate and provide a safe space with trained professionals in coercive control and security arrangements
- Ensure that all court facilities are victim-witness centred and trauma-informed. This includes, but is not limited to: separate entrances for victim-witnesses; separate waiting areas for victim-witnesses; quiet, private spaces for victim-witnesses; access to supports at courts. The should be provided throughout the country irrespective of location or jurisdiction of the court.
- Judges and professionals in the family law system are trained on domestic violence, including coercive control, post-separation abuse, risk assessment and how children experience domestic abuse.

The place of mediation in family justice

(i) The desirability of using mediation to resolve family law issues

Mediation and the full range of ADR tools, including arbitration, conciliation, and collaborative law, are welcome additions to the range of options for those who are involved in family law proceedings. They represent a welcome shift away from litigation to resolution and have the potential to de-escalate tensions and result in a swift resolution as well as manage costs for the parties.

While we recognise the positive impact that information sessions at the outset with parties may have in terms of setting out their options and the processes involved, it is never appropriate to place mediation on a mandatory footing. Any proposals would require that a legal representative to certify that judicial proceedings are suitable due to a risk of injustice, or that ties the provision of legal aid to its uptake, have the potential to encroach on the personal constitutional right of access to justice.

Article 48.1 of the Istanbul Convention explicitly precludes mediation as an approach to resolution in the context of domestic violence. This provision recognises the potential for further victimisation and subversion of the medication process by the respondent and the difficulties posed by taking the proceedings outside the reach of judicial scrutiny. To give meaningful effect to Article 48.1, mediators should be trained to recognise the signs of domestic violence, including coercive control, and the effects of trauma. Where there is any concern that domestic violence is present it is appropriate to be conservative and direct the suspected victim towards domestic violence support services.

Article 48 – Prohibition of mandatory alternative dispute resolutions processes or sentencing

1. *Parties shall take the necessary legislative or other measures to prohibit mandatory dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention*

(ii) Maximising family court users' understanding of the role of mediation can have in settling family disputes

An integrated family law court structure that facilitates ease of access to information and services, has the potential to dramatically increase engagement with those services. The co-location of services such as information hub, legal aid and advice, private consultation rooms, as well child-friendly faculties would be integral to achieving a cohesive family court structure that goes beyond adversarial proceedings.

The requirement in the Mediation Act 2017 for legal practitioners to provide information on the role of mediation should remain the high water mark in terms of statutory and administrative obligations to engage with mediation services; mediation must be voluntary and should never be a substitute for access to the courts and judicial supervision. The provision of legal aid must never be contingent on engagement with mediation or alternative dispute resolution models if this is not the preference of both parties.

Underpinning the role of mediation in settling family law disputes must be the recognition, consistent with Ireland's obligations under the Istanbul Convention, that mediation is never suitable for resolving family law disputes in the context of domestic violence; when a domestic violence is suspected mediators should adopt a conservative approach, and re-direct the parties away from mediation.

(iii) Interdisciplinary training in mediation for family justice practitioners

The highest priority for a revised family court system must be to ensure that all those dealing with domestic abuse in legal proceedings have the appropriate training in the dynamics and impacts of domestic violence and abuse.

As already noted, the Istanbul Convention, the Domestic Violence Act 2018 and the Mediation Act 2017 as amended, explicitly preclude the use of mediation as an approach to resolution in proceedings involving domestic violence.

Section 39 of the 2018 Act introduced the offence of coercive control. Coercive control is a persistent pattern of controlling, coercive and threatening behaviour including all or some forms of domestic abuse – emotional, physical, financial, sexual including threats – by a boyfriend, partner, husband or ex-spouse. These behaviours can isolate the victim and leave them feeling powerless to take action. Putting the offence of coercive control on a statutory footing recognises that domestic abuse happens on a continuum.

Courts, advocates and other professionals need to be trained to understand the nature of coercive control, and all other types of domestic abuse, and understand its impact on victims – so that they can address them effectively at every stage of engagement with the family legal system, including when these patterns include attempts by the abuser to use the legal system itself through making multiple applications, for example in access or maintenance proceedings, that are intended only to repeatedly target the victim, or when subtle signals are being used to control or warn the abused party.

(iv) Should mediation be a requisite to initiating or progressing family law proceedings with the court only being required in irresolvable cases or as the last step

Mediation offers significant advantages in terms of re-directing parties away from adversarial processes to resolution, all the while reducing costs and delays that are characteristic of judicial proceedings. Notwithstanding this, alternatives to adversarial proceedings are not a substitute for litigation proceedings which should always remain an option for parties. Legal Aid should never be conditional on the decision of a third party that mediation is inappropriate.

The Mediation Act that mandates legal representatives to provide information sessions on mediation. The decision to engage with mediation over judicial proceedings must always be at the discretion of the parties to the proceedings. Legal aid should never be tied to the engagement with mediation services. Mediation or ADR alternatives should never be recommended or used in domestic violence cases as they are wholly inappropriate and fail to understand the power dynamics of coercive control.

Recommendations

- Mediation and alternative dispute resolution must be voluntary and should never apply in cases of domestic violence
- When there is any concern that domestic abuse is present, mediators should adopt a conservative approach and re-direct parties away from mediation

Recognising the structure of civil legal aid in family justice

- (i) Should a greater focus of the system of civil legal aid be on the promotion and use of non-court based solutions to family issues where these are possible?
- (ii) In addition to mediation, is there scope within a civil legal aid system for utilising other ADR mechanisms including but not exclusively arbitration and collaborative law as a mean of achieving family justice

Proactive case management has the potential to offset the most harmful outcomes for family court users and supports the legal system to direct its limited resources at the most adversarial proceedings, in particular where domestic violence and abusive behaviour is a factor. Such an approach could address many of the current difficulties faced by users of the family legal system such as delays and soaring costs. Further, case management initiatives can lessen the stress associated with judicial proceedings so that the hearing itself does not become a secondary psychological trauma for victims of domestic violence.

A proactive approach by judges, lawyers and court staff would facilitate early intervention and constructive case management to identify and give direction on the key issues in the proceedings. Effective case management can facilitate the parties to engage with mediation or other dispute resolution models as the case progresses if that is an acceptable outcome for the parties. It can assist the court to identify when a party is making multiple applications to the court or delaying proceedings to target and re-victimise a spouse or ex-spouse.

Legal aid should never be tied to the engagement with mediation services. Mediation and other alternative dispute resolution models are never appropriate when proceedings involve domestic violence as even a single incidence of domestic violence results in power imbalances and the mediation process could be subverted to perpetuate further abuse. Where there is any concern about the presence of domestic violence, mediators and advisors should re-direct the parties to more appropriate proceedings and support services.

- (iii) Legal Aid in family justice – more than legal advice and representation

While legal aid is technically available to victims of domestic violence, the requirement to pay financial contributions hampers the accessibility of justice. In 2013, the situation was exacerbated as the minimum contribution for legal services provided by the Legal Aid Board increased from €50 to €130 – a rise of 160%. This is not a once off payment as victims of domestic violence may need to make recurring applications for legal aid and a financial contribution is required for each. Moreover, some women are not eligible for legal aid because of assets held in joint names over which they have no control or financial abuse is part of overall domestic violence, victims may not have the access to means to independently engage and pay for legal advisors.

In a separate but related issue, in recognition of the importance of access to legal advice for victims of sexual crimes, the O'Malley report recommends amending the current law to include the provision of free legal advice to victims of all sexual offences that is not contingent on there being a prosecution¹⁰.

¹⁰ Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (O'Malley) available at http://www.justice.ie/en/JELR/Pages/O'Malley_Report

We concur with the O'Malley report on the need for individual information and advice that is 'tailored to the circumstances of their particular case'.

The importance of free legal advice for victims of sex crimes should be extended to include all forms of violence against women as defined by the Istanbul Convention, including intimate partner abuse, (sexual harassment, stalking, online digital abuse, FGM and forced marriage). The provision of free legal advice acknowledges the gendered nature and gendered constraints that are experienced by victims of all gender-based violent crimes in accessing legal advice. To fulfil a commitment to access to justice by all victims, the requirement for victims of domestic violence to make financial contributions for civil legal aid services where safety, protection or barring orders are sought must be ended.

Frequently Legal Aid representatives are the first encounter that individuals have with the legal system, or of framing their experience in legal concepts or protections. As a gateway to the legal system, legal aid practitioners can direct users to the range of services and supports that are available to individuals, including mediation.

When legal aid practitioners are the first point of contact, they may be uniquely in a position to recognise domestic violence, including coercive control, that has not been directly disclosed by the individual, and help them to connect with the supports that are available to them. It is vital that legal aid practitioners are adequately trained to recognise and understand the impact of domestic abuse on the victim and how it might shape their interactions at every stage of engagement with the family justice system.

Recommendations

- Adopt a proactive approach to case management
- End the requirement for victims domestic violence to make financial contributions for civil legal aid services where safety, protection and barring orders are being sought
- Train legal aid practitioners in the dynamics of domestic abuse and how it informs every stage of proceedings, including abuse of legal processes through repeat applications and delays to target the victim and the heightened risk for abuse of child access arrangements

The Family Courts

(i) What issues should always be prioritised for hearing?

The drastic impact on access to the courts imposed by the global pandemic, has brought into sharp relief what should be the priorities of a family law system that seeks to balance private family law with a public duty to protect vulnerable women and children.

In the period between July and September 2020 the number of protection and interim barring orders granted to victims of domestic violence in Dublin increased by 40% from the same time in 2019¹¹. Safety orders and barring orders, which require a full hearing, have been adjourned in many cases for months leading to an enormous backlog. The uncertainty of the outcomes for an indefinite period leaves victims of domestic abuse in limbo of uncertainty and vulnerability.

The family law system appears to operate in a void where criminal behaviour is not taken into account in the family law courts – even when the abuser has been convicted of serious offences against the mother or a sibling of the child such as an assault or sexual assault – if the offence is not against the child for whom access is sought. This disconnect is dangerous. When determining access and custody, criminal behaviour is not taken into account by the Family Law Court, even when there is a conviction and a sentence. Orders under the Domestic Violence Act are also not taken into account. Domestic violence is considered a 'separate issue' with the result that access is granted in cases where it puts the children and

¹¹ <https://www.rte.ie/news/investigations-unit/2021/0112/1189281-domestic-violence-covid-19-court-orders/>

the mother at risk and exposes them to further abuse¹². Similarly the interaction of An Garda Síochána in the family court system is ad hoc and inconsistent even where vital information can be provided in cases of domestic violence.

There is currently no fast-tracking procedure within the Irish criminal justice system to ensure that gender-based violent crimes are dealt with in an expedient or prioritised fashion. For the most part, such offences are dealt with much like any other offence that comes before the criminal courts in terms of the typical length for proceedings, the public nature of the hearing and the manner in which those proceedings are ultimately determined. The development of a fast-tracking procedure within the Irish courts would ensure that such matters are dealt with in an expedient or prioritised fashion. It is noteworthy that the National Action Plan of the Strategy 2016-2021, contains no proposals for speeding up or prioritising prosecution of gender-based or domestic violence offences.

Fast tracking, better case management and pre-trial hearings of domestic and intimate partner abuse cases are of particular importance where family law matters are also running concurrently. The failure to take into account previous histories of domestic abuse and criminal convictions in family law does not meet the requirements of the Istanbul Convention (article 49) and the constitutional rights of women and children to live free from violence.

Article 49 – General Obligations (Investigation, prosecution, procedural law and protective measures)

1. *Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.*
2. *Parties shall take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention.*

(ii) In addition to mediation, is there scope within a civil legal aid system for utilising other ADR mechanisms including but not exclusively arbitration and collaborative law as a means of achieving family justice

The value of the use of advocates, intermediaries and specialist support services has long been recognised in reducing the re-traumatisation of victims who have experienced all forms of gender-based violent crimes within the criminal justice process. Similarly, in regard to domestic and intimate partner abuse, co-ordinated community responses including information services, are considered by many to be the ‘gold standard’ in the field of intimate partner violence¹³. These include, but are not limited to, specialist police and prosecution units, victim advocates, and a separate Domestic Violence Docket system at court.

The ability to use video-link evidence is currently confined to sexual offences and offences involving violence. Arguably this does not cover the full ambit of violence against women dealt with by the Istanbul Convention, and an expansion of the video link provisions could result in greater witness attendance in family law proceedings. The Courts Service puts the success rate for safety orders at a low 35 per cent. The research finds that many applications for safety orders are struck out because the applicant does not

¹² Women’s Aid submission to the Joint Oireachtas Committee on Justice and Equality on reform of the Family Law Courts, available at <https://www.womensaid.ie/about/policy/publications/womens-aid-submission-on-reform-of-the-family-law-courts-march-2019/>

¹³ Dr. Deirdre Healy (2029), ‘Exploring Victims’ Interactions with the Criminal Justice System: A Literature Review’ University College Dublin, page 61

proceed. Withdrawal from proceedings has been attributed to intimidation . and the applicant’s fear that their evidence may not stand up to in-court cross-examination and scrutiny¹⁴.

Recommendations

- Commission an independent review into how victims of domestic abuse and interpersonal abuse are treated within the criminal justice system
- Investigate the most appropriate specialised domestic, sexual and gender-based violence court systems – moving towards a modern model
- Introduce a fast-tracking procedure within the Irish courts that would ensure that such matters are dealt with in an expedient or prioritised fashion
- Domestic and intimate partner abuse cases in the criminal courts should be fast-tracked so that family law cases can make informed decisions as to the safety and appropriateness of contact/access arrangements between an abused parent and their children; interim orders should be stayed until allegations of domestic violence are resolved
- Expand video link provisions to support witness attendance in family law proceedings
- Support the establishment of a co-ordinated community response for victims of domestic abuse

Voice of the Child

(i) How best to incorporate the voice of the child

The provision to give effect to the voice of child in the context of proceedings, including guardianship, custody and access, aims to ascertain the views of the child and give them due weight. In practice, it is beset by difficulties: there is no comprehensive guidance, backed by appropriate training, to ensure that the voice of the child is always heard in a meaningful way in court.

In the context of domestic violence, children are often torn between reflecting their experience and a reluctance to be responsible for escalating tensions between the parties, aware of the consequences for the vulnerable parent of a refusal to comply with an access or custody order.

The presumption that the child’s best interest is served by having a relationship with both parents can have a cascade of negative effects; it may disregard the safety of the child and the non-abusive member of the family and overlook the impact of violence on them while ignoring the risk posed to the child by the perpetrator and his ability to care for the child. Access arrangements themselves are frequently identified as the exclusive or primary trigger for abuse and reflect the patchy understanding of the dynamics of domestic violence by the courts¹⁵. A refusal to comply may result in the other party being pursued through the courts as far as possible with the legal system being used to further abuse and manipulation of the mother who must comply with the order made. This insight reinforces the need for dedicated and supervised child contact centres.

Domestic violence is also a context in which child abuse occurs, and it has been found that the more severe the domestic violence, the more severe the abuse of children. Moreover, exposure to domestic violence is itself recognised as a form of emotional abuse even when the child is not directly targeted by the perpetrators of violence: children are often affected by the violence perpetrated against their mother either by witnessing it directly or by observing the aftermath of assaults¹⁶.

¹⁴ ‘Domestic Violence in the District Court’, Irish Journal of Family Law (2019) 22(4) pages 79-86, available at <http://irlii.org/irish-journal-of-family-law/>

¹⁵ In 23.3 per cent of the applications observed, applicants cited child access issues as the exclusive or primary trigger for abuse alleged. Most of these cases (72 per cent) involved an allegation of emotional abuse. ‘Domestic Violence in the District Court’, Irish Journal of Family Law (2019) 22(4) pgs 79-86, available at <http://irlii.org/irish-journal-of-family-law/>

¹⁶ Children First: National Guidance for the Protection and Welfare of Children

To ensure that the voice of the child reflects their true feelings and experience of what is happening to them it is necessary to embrace the best possible judicial training, and training of legal and psychological professionals, in particular S.32 assessors to support the children to tell the court what they are really thinking, and to understand domestic violence and its impact on children and to be aware of manipulation by the abuser.

Article 31 – Custody, visitation rights and safety

1. Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account.
2. Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or child.

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

An understanding of the impact of domestic violence on child, both as a form of emotional abuse in itself and the trigger points for furthering abuse – such as access arrangements and multiple applications to the court as a way to target the partner or ex-partner – should inform how a revised family justice system could be made more child friendly.

A dedicated family court structure with child-friendly waiting areas and facilities would reduce stress and anxiety to children currently experienced where they come into contact with criminal and civil matter outside of designated family law faculties.

The establishment of a network of child contact centres, with staff trained on the dynamics of domestic violence could mend the most harmful aspects associated with access arrangements and provide a safe, stress-free environment for access, while enabling relationships with parents to be maintained. Further, it would support our compliance with our obligations under S.31 of the Istanbul Convention on custody, visitation and safety.

Clear consistent guidance and training for members of the judiciary and S.32 reporters would recognise the impact of domestic violence on children and their vulnerability to manipulation by the abuser. Practical measures, that place a positive experience for the child at their centre, could include the design of child-friendly courtrooms that are sympathetic to the intimacy of the proceedings, the vulnerability of court users and the stressful effect on children of being placed in a witness box. The Judicial Council should draft guidance addressing less formal ways of interacting with children.

(iii) How can we keep children in the family court system?

The 11th Report of the Special Rapporteur on Child Protection recognising the devastating impact of domestic violence on children and the long-term effects of witnessing domestic violence¹⁷.

Looking beyond the desired objectives of the provisions that give effect to the voice of the child, the report considers that children, having regard to their age and maturity, should be given the power and authority to make applications for protection and safety orders in their own right – without having to rely on a parent or the Child and Family Agency (CFA) to make an application on their behalf. Such measures would empower a child to control his/her exposure to the abusive parent and neutralise the role of the

¹⁷ Eleventh Report of the Special Rapporteur on Child Protection (2018), submitted by Prof Geoffrey Shannon, available at <https://assets.gov.ie/27444/92175b78d19a47abb4d500f8da2d90b7.pdf>

mother (or non-abusing parent) to an abuser and through removing the mother (non-abusing parent) from the proceedings

The provision of a network of Child Contact Centres would stop access arrangements from being triggers for perpetrating abuse.

Where domestic violence is a factor in the proceedings, or is suspected, the default should be no contact with the perpetrator until the physical and emotional well-being of the child has been addressed by the court. The current default puts the onus on the victim or child to prove it is not safe and access continues throughout.

An integrated court system, like that proposed in the recently published UK report, recommends the Child Arrangements Programme in private law children's cases. The reformed programme 'would implement the design principles of being safety-focused and trauma-aware; taking an investigative, problem-solving approach based on open enquiry; having sufficient resources and using them efficiently; and co-ordinating with connected systems, procedures and services'¹⁸.

Recommendations

- Where domestic violence is a factor in the proceedings or is suspected, the default should be no contact with the perpetrator until the physical and emotional well-being of the child have been addressed by the court
- Evaluate the impact of S.32 for families separating in the context of domestic violence with reference to the requirements of Article 31 of the Istanbul Convention
- Develop guidelines for judges in Family Law to provide that custody and unsupervised access with a child should not be granted to a parent who is a perpetrator of domestic violence unless the Court is wholly satisfied that the child is safe from abuse while in the custody of or unsupervised access with such parent, including safe from emotional abuse caused by exposure to domestic violence
- Give children of suitable age and maturity the power and authority to make applications for protection and safety orders in their own right
- Establish a network of Child Contact Centres that would allow for supervised access and staffed with trained professionals to facilitate and provide a safe space, with trained professionals in coercive control and security for access arrangements
- Examine options for an integrated court system

¹⁸ UK Ministry of Justice, (2020), 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases Final Report available at <https://www.gov.uk/government/consultations/assessing-risk-of-harm-to-children-and-parents-in-private-law-children-cases>