

April 2021

# NWC Submission on the General Scheme of the Family Courts Bill

## Introduction

Founded in 1973, the National Women's Council (NWC) is the leading national women's membership organisation in Ireland. We represent and derive our mandate from our membership, which includes over 190 groups and organisations from a diversity of backgrounds, sectors and locations across Ireland. Our mission is to lead and to be a catalyst for change in the achievement of equality for women. Our vision is of an Ireland and of a world where women can achieve their full potential and there is full equality for women.

NWC welcomes the invitation to make a submission on the General Scheme of the Family Court Bill. In February this year we made a submission to the Family Justice Oversight Group<sup>1</sup> that addressed some of the reforms that we consider essential to a family law system that put users at its centre. Family law is one of the most pressing and critical issues for the women we work with. It is self-evident that an outdated, underfunded and inadequate justice system adds to the harms already experienced by victims of domestic and intimate partner abuse. We urge the Joint Committee on Justice to consider the recommendations made in that submission in tandem with our observations and recommendations on the General Scheme of the Family Court Bill.

We are concerned that domestic violence has only been a marginal consideration within the scope of reform of the delivery of the family justice system. Not a single organisation that deals with domestic violence was invited to give evidence to the Joint Committee on Justice and Equality and the subsequent Report on Reform of the Family Law System<sup>2</sup> addressed it in a very limited capacity.

Violence against women goes to the heart of women's equality in our society. One in four women will experience domestic and/or sexual violence in Ireland. Women and girls with disabilities face greater risk of violence, with disability being the second most common risk factor for rape, after gender.<sup>3</sup>

Domestic violence is extremely prevalent in Ireland, yet the courts and other state apparatus has been slow to respond and have failed to grasp the impact and seriousness of these offences. Women's Aid Femicide watch has reported that since 1996, 230 women have died violently in the Republic of Ireland – 61% were killed in their own homes<sup>4</sup>.

In the 2014 European Union Fundamental Rights Agency (FRA) study 'Violence Against Women: An EU-wide survey', it was reported that 14% of women in Ireland have experienced physical violence by a partner since age 15. 6% of Irish women have experienced sexual violence by a current or former partner and 31% of women have experienced psychological violence by a partner. 12% of Irish respondents in the FRA study had experienced stalking (including cyber stalking).

The Domestic Abuse of Women and Men in Ireland: Report on the National Study of Domestic Abuse, National Crime Council and ERSI, 2005 found that one woman in eleven has experienced severe physical abuse in a relationship, one in twelve has experienced sexual abuse and one in thirteen has experienced severe emotional abuse. Those who have ever had children face over three times the odds of severe abuse compared to those without children. This greater vulnerability associated with parenthood could be due to a number of factors, including the greater difficulty in leaving a relationship when there are children

---

<sup>1</sup> NWC submission to Family Justice Oversight Group - Phase 1 Consultation

[https://www.nwci.ie/learn/publication/family\\_justice\\_oversight\\_group\\_phase\\_1\\_consultation](https://www.nwci.ie/learn/publication/family_justice_oversight_group_phase_1_consultation)

<sup>2</sup> Joint Committee on Justice and Equality Report on Reform of the Family Law System October 2019. Available at

[https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint\\_committee\\_on\\_justice\\_and\\_equality/reports/2019/2019-10-24\\_report-on-reform-of-the-family-law-system\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf)

<sup>3</sup> Rape & Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape 2009

<sup>4</sup> Women's Aid Femicide Watch November 2019

involved. While there is no relationship between the risk of severe abuse and household income, it matters a great deal who makes decisions about money. Among people living with a partner, the odds of severe abuse are increased dramatically (seven times for women and two and half times for men) where the partner controls decisions about money. While this research provides an overview of the domestic violence experienced by women, a detailed analysis is not possible currently as cases cannot be tracked through either the criminal or family justice system.

The lack of available data on the number of family law cases where domestic violence is an issue, including in relation to separation, divorce, custody, access and maintenance, is a serious impediment to developing a system that responds to the needs of its users and is fit for purpose now and in the future. Data from other countries indicates that domestic violence victims and survivors are key users of the family justice system<sup>55</sup>, not only in relation to domestic violence orders, but also on an ongoing basis for matters relating to children such as custody, access and maintenance.

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. The Heads of Family Court Bill indicate that all jurisdictions will be courts of record; as such, there is a significant opportunity to introduce a mechanism for data collection that would provide valuable insights into family court users that could inform court rules and procedures from the bottom up. This should be done in co-ordination with other stakeholders to ensure the best quality and most comprehensive available data is collected.

The robust commitment in the Heads of Bill to dedicated family court judges, as well as judicial training and active case management are very welcome initiatives. This recognition in the Bill of the specific needs and issues of the Family Law Courts will contribute positively to the culture of the courts and how they deliver justice. To ensure that these provisions truly serve their intended objectives, the Family Law Rules Committee proposed under Head 18, or an equivalent oversight body, should monitor the effectiveness of these provisions on an ongoing basis, amending and finetuning them as necessary.

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. It is essential that further work on family law reform, including the Family Court Bill, addresses the needs of its most vulnerable users and is designed with the safety and well-being of victims of domestic violence at its core.

## Recommendations

- The Guiding Principles should promote the safety and welfare of victims of domestic violence in accessing the courts for any family law proceedings.
- Training should be extended to all members of the judiciary and examine the many ways in which domestic, sexual and gender-based violence manifests and the direct and indirect impact of trauma on victims, including coercive control.

---

<sup>55</sup> UK Ministry of Justice, 202, Assessing Risk of Harm to Children and Parents in Private Law Children Cases. Available at <https://www.gov.uk/government/consultations/assessing-risk-of-harm-to-children-and-parents-in-private-law-children-cases>  
Australian Law Reform Commission, March 2019, Family Law for the Future – An Inquiry into the Family Law System, Final Report. Available at <https://www.alrc.gov.au/publication/family-law-report/>

- Relevant, disaggregated data that tracks all Family Court family law users could provide a comprehensive picture of the journey and use of the courts by vulnerable families in private family law proceedings and to evaluate outcomes.
- When a party to proceedings declines to engage mediation or ADR due to domestic violence, a statement to this effect should suffice.
- The composition of the Family Law Rules Committee must include a requirement to engage with domestic violence services, either as a member of the Committee or external advisors.

## Head 5 – Guiding Principles

(3) the principles referred to in (1) and (2) are –

(a) encouraging and facilitating as far as possible the resolution of issues in dispute by means of alternative resolution methods, such as mediation, unless resolution by such means would not be appropriate due to the nature of the proceedings

1. Mediation and alternative dispute resolutions are explicitly prohibited by the Istanbul Convention as an approach to resolution in family law proceedings where domestic, sexual or gender-based violence is a concern<sup>[1]</sup>. Notwithstanding this, mediation is included in Head 5(3)(a) as the *first* guiding principle of the Family Law Court, without any statement recognizing its unsuitability for cases in relation to which an application has been made under the Domestic Violence Act 2018 or in any instance where abuse is a concern.
2. A significant percentage of family law proceedings occur in the context of domestic, sexual and gender-based violence. In spite of this, no reference is made to the safety and welfare of the parties in the context of proceedings before the family law courts. The safety and wellbeing of children involved in family law proceedings are equally overlooked in spite of their vulnerability as either direct target of domestic abuse, or as witnesses to the abuse against other family members.
3. While the General Scheme does not go as far as to make mediation mandatory, we are concerned that the strong emphasis on mediation and Alternative Dispute Resolution (ADR) without recognition of their limitations, may compel vulnerable parties in the proceedings to participate in it regardless of the risk to their safety.

### Recommendations

- Insert as a guiding principle in Head 5(3) the promotion of the safety and welfare of victims of domestic violence in accessing the courts for any family law proceedings (including separation, divorce, custody, access and maintenance, as well as for orders under the Domestic Violence Act 2018).
- Insert as a paramount guiding principle in Head 5(3) the protection of children involved in relevant proceedings in the family law court from any form of domestic violence.
- Insert as a guiding principle in Head 5(3) a recognition that having to witness domestic abuse against a family member is a form of emotional abuse that the Court should protect the child from.
- Members of the judiciary should undertake training on mediation and ADR, to include an understanding of the scope and limitations of mediation.

(b) promoting and engaging in active case management practices, including time limits and maximum word counts for submissions,

4. Early and active case management to identify the real issues in dispute and to set a timetable for all the steps preceding the trial is welcome. Expediting proceedings and providing clarity and predictability for survivors of domestic violence is especially important for managing the effects of trauma. In addition, case management can prevent the court proceedings themselves from being abused to psychologically harass a former partner.
5. An approach to case management that is responsive to domestic, sexual or gender-based violence where this forms part of the background of proceedings and should ensure that proceedings are diverted away from ADR and mediation when this is the case. It is also an opportunity for the court to

identify whether special measures are relevant or any expert advice is required, for example with respect to the effects of trauma on survivor of domestic violence.

## Recommendations

- Case management should be mindful of whether domestic, sexual or gender-based violence forms part of the background of proceedings and ensure that proceedings are diverted away from ADR and mediation when this is the case
- Where domestic, sexual or gender-based violence have been identified as an issue in the proceedings the necessity of special measures or expert advice should be considered
- A comprehensive case management system is required to facilitate consistency across family courts, integration of all issues to be considered and reduction insofar as is possible of conflict in the conduct of the case.

(c) conducting proceedings in a manner which –  
(i) is as far as possible user-friendly for the parties.

6. The Family Law Court should be accessible and its proceedings clear and comprehensible to all users, including those with a disability, minorities, users for whom English is not their first language or those experiencing additional barriers or disadvantages. This should be managed in a proactive way, including in the adoption of new technologies that may inadvertently serve to exclude court attendees or other unintended consequences.

## Recommendations

- Insert as a guiding principle in Head 5(3) that proceedings should be accessible to all users, including those with disabilities and those experiencing additional barriers or disadvantages
- The adoption of new technologies must facilitate access to justice and not serve as an additional barrier for family court users

(iv) is just, expeditious and likely to minimise costs of those proceedings,

7. Active case management would help to avoid unnecessary delays as well as substantially minimizing the costs of proceedings. This is relevant for all users of the family law courts and in particular for those who may not meet the eligibility threshold for legal aid but are nonetheless experiencing financial abuse by their former partner and may have limited capacity to fund legal proceedings.

## Recommendations

- Active case management is essential to expediting proceedings and minimising costs.

(d) in any family law proceedings in which a child is involved or likely to be affected by the outcome –  
(i) ensuring that the best interests of each child are a primary consideration in those proceedings,  
(ii) in respect of any such child who is capable of forming his or her own views, ensuring as far as practicable that the view of the child are ascertained and given due weight having regard to the age and maturity of the child.



8. 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 courts<sup>[2]</sup>. 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 manipulate the mother/protecting parent who must comply with the order made.
9. 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/protective parent either by witnessing it directly or by observing the aftermath of assaults.
10. 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.

## 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

## Head 6 – Establishment of District Family Court

(8) A judge of the District 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

11. NWCI welcomes the recognition in the Bill of the need for specialist training on complex issues relating to family law. The administration of justice in the family law courts requires an understanding of the complicated dynamics of family life; nowhere is this more explicit than in the dynamics of domestic, sexual and gender-based violence. A failure to understand this can lead to decisions that leave vulnerable family members more exposed to the threat of violence and in the worst cases can itself become a form of abuse.
12. The Domestic Violence Act 2018 introduced the offence of coercive control<sup>1</sup>. 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. Putting the offence of coercive control on a statutory footing recognises that domestic abuse happens on a continuum. This knowledge needs to be reflected not simply in the criminal courts but also understood within family court proceedings.
13. Courts, advocates and other professionals need to be trained to understand the nuanced nature of coercive control, and all other types of domestic abuse, as well as the impact of trauma on victims, so that they can address them effectively at every stage of engagement with the family legal system. This includes when patterns of abuse 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 to repeatedly target the victim, or when subtle signs are used to control or intimidate the abused party.
14. Training should be required for all members of the judiciary who will be working on family law cases and should make reference to the full range of support services available from NGOs and from State agencies for victims of domestic, sexual and gender-based violence, including those relevant to court proceedings such as the full array of special measures. The additional vulnerability of women and children belonging to marginalised groups should also be addressed as part of the training.
15. All domestic abuse victims should be categorised as being eligible for ‘special measures’ when participating or giving evidence in family proceedings. This could enable them, for example, to give their evidence from behind a screen or via a video link.

## Recommendations

- Training should examine the many ways in which domestic, sexual and gender-based violence manifests and the impact of trauma on victims with particular reference to the offence of coercive control
- The direct and indirect impact of domestic violence on children must be considered including how children can be used by the abuser to target a victim
- The additional vulnerability of marginalised women and children should be addressed in any training
- All victims of domestic, sexual and gender-based violence (or suspected victims) should be afforded the automatic presumption of protection needs. The special measures outlined in the Criminal Law (Victims of Crime) Act 2017 should also be extended to all victims of domestic, sexual or gender-based violence in family law proceedings. This would honour, in statute, the expanded understanding of what constitutes a ‘vulnerable witness’.



## Head 10 – Proceedings in the District Court

(1) The District Court shall be a court of record.

16. 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.
17. 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.
18. 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 outstanding<sup>2</sup>. The adoption of modern technologies can help to develop a multiagency system to harmonise and share information. As a court of record, the District Court can provide essential data that can help to achieve this important goal.

### Recommendations

- Relevant, disaggregated 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 and courts' service, An Garda Síochána, TUSLA etc.) by contributing to the development of a multiagency system.

(2) (a) subject to paragraph (b), an application to the District Family Court to commence family law proceedings shall state –  
(iii) whether or not mediation under the Mediation Act 2017 has been attempted,

19. NWCI acknowledges that mediation offers significant advantages in terms of re-directing parties away from adversarial processes to resolution, while reducing costs and delays that are characteristic of judicial proceedings. However, the current approach in the Bill of not requiring an application to the court to state whether mediation has been attempted by the parties for the commencement of proceedings under the Domestic Violence Act 2018, is too narrowly construed. It should equally apply to custody, access and maintenance, separation and divorce proceedings when domestic violence is a factor.
20. Mediation depends on constructive engagement with the process by the parties. In its current form the Bill suggests that an adverse inference could be drawn by parties refusing mediation, where they have not demonstrated that an order under the 2018 Act was necessitated. Domestic violence takes many forms, and a victim may not feel empowered to make an application for an Order under the Act, for example where coercive control is an issue. Equally a victim's overriding objective may be simply to escape an abusive relationship, or to avoid the 'shame'

of seeking an Order; alternately, domestic violence may have previously been an issue with the parties now be separated and seeking a divorce. There are any number of scenarios that are not captured by a provision that limits the court's discretion to set aside the need for a statement that mediation has been attempted. In its current form, victims of domestic violence could feel obliged to participate in mediation and other Alternative Dispute Resolution models when it is not safe for them, or where they are being coerced by their partner.

## Recommendations

- In Head 10(2)(b) (and Head 15(2)(b)) extend the mediation exceptions already provided for in proceedings under the Child Care Act and Domestic Violence Act 2018 to proceedings involving custody, access and maintenance, separation and divorce where domestic violence is alleged or suspected.

(3) Upon his or her own motion or upon the request of a party to the proceedings, a judge of the District Family Court may at any stage during the proceedings, if he or she considers that mediation or another alternative dispute resolution process would assist in resolving some or all issues in dispute, suspend the proceedings to allow the parties to resolve issues by such means.

21. 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 for family court users to engage with mediation services. As stated above, successful outcomes through mediation depend on constructive engagement with the process by the parties. It follows that mediation must be voluntary and should never be a substitute for access to the courts and judicial supervision.
22. 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. This provision is very broadly drafted and does not anticipate exceptions or safeguards for victims of domestic violence who may find themselves coerced into mediation by their abuser.

## Recommendations

- In Head 10(3) (and Head 15(3)) include adequate safeguards for victims of domestic violence accessing the Family Law Courts in relation to separation, divorce, custody, access or maintenance as well as in relation to orders under the Domestic Violence Act 2018 so that victims are not compelled to participate in mediation by either their abuser or the court. When a party declines mediation or ADR due to domestic violence, a statement to this effect should suffice.

## Head 11 – Establishment of Circuit Family Court

23. Our substantive comments made in connection with Head 6 – 'Establishment of a District Family Court' apply equally to Head 15 – 'Establishment of a Circuit Family Court'.

## Head 15 – Proceedings in Circuit Family Court

24. Our substantive comments made in connection with Head 10 – ‘Proceedings in the District Court’ apply equally to Head 15 – ‘Proceedings in the Circuit Family Court’.

## Head 16 – Establishment and constitution of Family High Court

25. We note that there is no reference under Head 16 to any training requirement for judges of the Family High Court. We consider that ongoing training on the dynamics of domestic, sexual and gender-based violence in the context of family law proceedings is necessary to ensure that decisions made by the court do not inadvertently lead to vulnerable family members being exposed to the threat of further violence. The Judicial Studies Committee Council should remain engaged with the ongoing training requirements of the Family High Court.

## Recommendations

- Training should be extended to all members of the judiciary who will be working on family law cases

## Head 18 – Family Law Rules Committee

26. The proposed composition of the Family Law Rules Committee, specifically the nominated members under Head 18 (4), does not include any representative from domestic, sexual and gender-based violence services, nor is there any other proposed mechanism to engage such services.
27. Domestic violence is highly prevalent and impacts greatly on all aspects of family law. Its typically covert nature and the far-reaching effects of associated trauma on all family members necessitates an informed approach to how the rules and procedures of court should respond, for example, when the abuser is using court proceeding to continue intimidating and abusing the victim and by extension all family members.

## Recommendations

- The composition of the Family Law Rules Committee must include a requirement to engage with domestic violence services, either through membership of the Rules Committee or through as external expert referral mechanism.

## Conclusion

Echoing the words of Alex Chalk, it must always be remembered that some of the most vulnerable in our society come before the family courts. We must ensure that the justice system offers them every protection. We must ensure that victims of domestic abuse are not intimidated by their abuser in court.<sup>6</sup>

---

<sup>6</sup> Alex Chalk, Parliamentary Under Secretary of State, UK Ministry of Justice

The proposed nuts and bolts overhaul of the family justice system as envisaged will go a long way to meet the needs of its most vulnerable users; however, this transformation depends on the Government, the Department of Justice and all relevant stakeholders not only to introduce changes, but also to monitor their effectiveness and an ongoing commitment to be responsive to the needs of court users.