

RCNI Submission on Family Law Courts

1. **Specialist Family Law Courts are needed because the nature of the work is specialist and the impact of non-specialist approaches can result in harm to vulnerable court users, especially but not limited to, children.**

Family Law itself demands a **specialist approach** because the issues it deals with are so fundamental to the well-being of children and other vulnerable family members. Family dynamics are complicated even where there is no element of abuse. When sexual or domestic violence is part of the family's case, it is imperative that those offering assessments and opinions to the courts and legal professionals who handle these issues as part of their caseload have an excellent understanding of the impacts and dynamics of these forms of abuse. This means that family law cases should be managed only by professionals with a really good grounding in family dynamics, including abusive behaviours, coercive control and grooming, as well as in the best ways to include children in the process so that they too may be heard. Specialist training for all relevant professionals is the key, for without this no specialist family law court will be able to function.

We recognise that the civil courts are already overburdened and that a specialist family law court requires more specialisation, more court time, more buildings, and more judges. However, it seems to us that much court time could be saved by a robust and proactive approach to **case management** which would refer appropriate cases to mediation speedily in the first instance, so that the focus of the court, and more of its time, could be trained on the most difficult, and necessarily adversarial, cases – including those involving patterns of sexual and/or domestic abuse.

RCNI recommends strongly that a **specialist family law system** is created with the appropriate specialisation of the various actors.

RCNI further recommends that, in recognition that the actors will be working with trauma and domestic and sexual violence perpetrators, that the proven mechanisms to manage vicarious trauma and guard against it become an integral part of the specialist approach to family law. Thus, a professional support structure should be put in place as part of the specialisation to help lawyers and judges to work effectively in a harrowing and wearying area of legal practice.

2. **Child victims of sexual violence need a specialist and co-ordinated approach which operates on similar principles in both family law and criminal proceedings.**

The principles relating to the treatment of children in criminal courts are just as valid in a family law context. Across the common-law world and elsewhere at present, much work is being done to improve the experience of criminal justice systems for child victims and other vulnerable witnesses, so that the risk of further trauma from playing their part in the criminal justice process is minimised (1) and so that they are enabled to give their best evidence (2). This means an expert-led, child-friendly focus which takes account of such things as: children's shorter attention span/difficulty concentrating later in the day, difficulties in understanding complex, repetitive and misleading questions posed in inappropriately adult language, and difficulties in expressing themselves in reply to questioning. It also means reducing, through rigorous case management and pre-trial rulings if necessary, inordinate delays before a case comes to court, so that giving evidence does not become a memory test. It means

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looking at ways to allow children to give their evidence in a calm, expert-led setting away from court and well ahead of a final hearing. It means having a full menu of special measures which can be adapted to the individual child's needs, available in Court (video-link, use of screens where that cannot work, use of intermediaries, prohibitions on personal cross-examination, right to be accompanied by a support worker, and so on). In short, it means that the child is met by a child-friendly, expert-led approach from all justice professionals, who should be specially trained to work with child witnesses (interviewers, intermediaries, judges, lawyers, support persons).

A very good start is about to be made with the new One House (modelled on the Norwegian and Icelandic Barnehus – Child House – example) pilot in Galway. There, it is envisaged that a joint interview will be carried out by specialist Tusla and Garda interviewers, it will be recorded, and the recording will, if the judge allows it, be played in court so that the child does not have to give their evidence in chief directly. At present, there is no provision in law to pre-record cross-examination, but this approach has been piloted successfully in England & Wales (e.g.). The Barnehus approach also provides for on-site support, including specialist supports such as a children's forensic examination unit and specialist counselling.

There is no reason why the same rigorous and expert-led approach should not be applied in our family law courts, which also deal with child victims of sexual and domestic violence. The work of extending the range of special measures available to victims (and sometimes, others) in our criminal courts has already begun with the special measures incorporated into the Domestic Violence Act 2018.

RCNI recommends that the Committee add their voice to others calling for an urgent child sexual violence national strategy.

3. Gathering data on sexual and domestic violence from family law hearings *in camera* is important so that we have a full picture of how both are addressed by our legal system

As noted by the Committee, the family courts are held *in camera*. This means that apart from the very welcome Child Care Law Reporting Project and the work of the Special Rapporteur there is little by way of gathering and collating of data to allow for the joining of dots to discern patterns and outcomes. It should be possible for Courts Service to gather and release statistics. For instance:

- How many cases in front of civil family law courts include allegations of child sexual violence and domestic violence, including coercive control?
- A set of data points around the communications and interactions between the criminal and civil authorities in regard to those cases;
- Data points tracking people's engagement in the system so that the multiplicity and length of these cases can be understood.

RCNI recommends that the Courts Service, with expert assistance from the CSO and with input from external experts if necessary, is asked to gather and publish this information regularly as an imperative matter of justice and public interest.

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RCNI further recommends that the Courts Services **coordinate data and statistics with An Garda Síochána and Tusla** to improve our understanding of how the roles and duties of these agencies intersect with family law matters.

4. A thorough review of how the *in camera* rule impacts transparency and accountability, should be a priority.

The exact ambit of the *in camera* rule seems to be very uncertain in practice. There can be little doubt that it can sometimes operate to ensure that there is little or no transparency about the contents of important documents, such as Section 47¹ reports (as an example). Parties who ask for copies of these reports are very often told that they cannot have them because of the *in camera* rule, apparently for fear that they will share them with third parties who are entirely extraneous to the family law proceedings, in breach of that rule. This kind of injunction flies in the face of the *statutory right* to have a copy of the report in Section 47(3). It also makes it extremely difficult to challenge the conclusions of the report, on which the judge will base life-changing decisions affecting every member of a family, and which will be relied upon in future applications. This can lead swiftly to grave and sometimes, virtually irremediable injustice to one party or another and worse, to avoidable harm to dependent children and others.

There is surely no difficulty about the judge ordering each party to keep the contents secret from anyone else (other than certain named third parties who may be involved in its creation, such as grandparents, where appropriate), on pain of committal proceedings.

RCNI recommends that Government convenes an expert inter-agency group to examine the operation of the *in camera* rule, including its potential to be the cause of far-reaching injustice and even harm, to children and their parent(s), as well as its exact ambit and the issue of appropriate and effective sanctions for breach of the rule. This group should make practicable recommendations for improvement as soon as possible.

5. There should be transparency about the number of confidentiality and non-disclosure clauses imposed on parties in the family courts

In addition to the restrictions of the *in camera* rule, **confidentiality and non-disclosure clauses imposed on parties in the family courts** appear to exist – whereby the court rules that a child’s disclosures of rape and sexual violence must not be reported to the State’s investigative authorities, An Garda Síochána, directly but must instead be mediated through appointed individuals or Tusla who will act as a filter, deciding when a child’s voice can be heard by our criminal justice investigative authorities and when it will be contained. We say ‘appears to be’ as our data here is necessarily anecdotal, these documents are not public. There is no data or analysis generated by the Courts Services or Tusla to make publicly transparent how many children and their guardians are bound by civil court-ordered, non-disclosure clauses, with respect to criminal matters, in family law proceedings.

¹ Refers to reports under Section 47 of the Family Law Act 1995 “on any question affecting the welfare of a party to the proceedings or any other person to whom they relate”, in Circuit Court and High Court. See this web-link: <http://www.irishstatutebook.ie/eli/1995/act/26/section/47/enacted/en/html#sec47>



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RCNI recommends that the Courts Service data collection system tracks the number of children bound by (directly, through their guardians or both) **'non-disclosure' or 'confidentiality' clauses** on direction of the family courts with regard to potential future disclosures of criminal matters of sexual violence, with a view to informing consideration of measures, if any, of the oversight or management appropriate to ensure the harmony of these **intersecting civil and criminal areas** of the independent legal system.

6. Mediation should be precluded wherever there is sexual and/or domestic violence allegations

It is the RCNI position that any form of mediation or Alternative Dispute Resolution (ADR) has the potential to be inappropriate and/or unsafe in cases involving allegations of child sexual abuse and domestic violence. Those who have suffered or are at risk of suffering, sexual or domestic violence should not be encouraged, much less required, to consider any form of mediation as a resolution of their predicament. The potential for subversion of the mediation process, leading to further victimisation of the victim and/or any dependent children, is always present where there is evidence that one partner has already subjected the other to abuse, and any victim of such abuse needs the protection of a court order which may be enforced against the perpetrator.

Mediation is precluded as a proposed solution in Domestic Violence Act 2018 applications, but is not in any other kind of family law dispute, such as one over custody/access, guardianship or divorce or separation, where there is an allegation of sexual or domestic violence.

Accordingly, **RCNI recommends** that the Mediation Act 2017² Section 3(1) be amended to include "any family law proceedings, other than proceedings under the Domestic Violence Act 2018, in which the judge is satisfied that one party and/or their dependent has suffered, or is at risk of suffering, family violence at the hands of the other party" in the list of types of legal proceedings which may not be determined by mediation.

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² Available through this web-link: <http://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/print>