

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER
ON
FAMILY COURTS

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon. Anthony J. Hederman, former Judge of the Supreme Court, President;
John F. Buckley, Esq., B.A., LL.B., Solicitor;
William R. Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Professor of Law and Jurisprudence, University of Dublin, Trinity College;
Ms. Maureen Gaffney, B.A., M.A. (Univ. of Chicago), Senior Lecturer in Psychology, University of Dublin, Trinity College;
Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General forty five Reports containing proposals for the reform of the law. It has also published eleven Working Papers, seven Consultation Papers and Annual Reports. Details will be found on pp.223-227.

Alpha Connelly, B.A., LL.M., D.C.L., is Research Counsellor to the Commission.

Ms. Nuala Egan, B.C.L., LL.M. (Lond.), Mr. Jonathan Newman, LL.B., LL.M. (Cantab.), and Ms. Lia O'Hegarty, B.C.L., LL.M. (Mich.) are Research Assistants.

Further information from:

The Secretary,
The Law Reform Commission,
Ardilaun Centre,
111 St. Stephen's Green,
Dublin 2.
Telephone: 671 5699.
Fax No: 671 5316.

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INTRODUCTION

Background To The Commission's Work

1. In its first programme¹ the Commission undertook to review a number of aspects of family law. The Reports already submitted, which concern or touch upon family law, are as follows:

First Report on Family Law - Criminal Conversation, Enticement and Harbours of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981)

Report on Illegitimacy (LRC 4-1982)

Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983)

Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983)

Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983)

Report on Divorce a Mensa et Thoro and Related Matters
(LRC 8-1983)

Report on Nullity of Marriage (LRC 9-1984)

¹ Law Reform Commission, *First Programme for Examination of Certain Branches of the Law with a View to their Reform* (Pri. 5684, 1976), para. 12.

Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985)

Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985)

Report on Private International Law Aspects of Capacity to Marry and Choice of law in Proceedings for Nullity of Marriage (LRC 19-1985)

Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985)

Report on the Recognition of Foreign Adoption Decrees (LRC 29-1989)

Report on Child Sexual Abuse (LRC 32-1990)

These Reports have addressed for the most part areas of substantive law. This Consultation Paper is concerned with the judicial process and procedures through which the remedies in family law are pursued and delivered. The Commission's first programme stated:

"In examining the various aspects of family law the Commission will consider the question of the best type of judicial or court structure or structures appropriate to deal with the different matters which fall under the general heading of family law."²

The Commission considers that this represents the most important aspect of family law which it has not so far examined.

2. The concept of a "Family Court" embraces a wide range of ideas about how and in what context proceedings which concern family matters should be conducted. The issues go beyond the courtroom itself and concern, for example, ancillary services and procedures for diverting from the courts cases which may be more appropriately handled through alternative channels such as mediation. The Commission decided that, before addressing the broad question of the possible establishment of a new family courts structure, it should try to identify and analyse separately the wide range of issues involved, and indeed to consider whether there are features special to family law cases which justify them being singled out for special treatment within the legal system.

3. The areas which the Commission decided to address were as follows:

² *Id.*

- (a) The organisation of the family law business of the courts (including the issue of a possible unified jurisdiction), and court accommodation.
- (b) Pre-trial and trial procedures, and court atmosphere.
- (c) The selection and training of personnel, including judges and legal practitioners.
- (d) Support services and the linkage between judicial and other mechanisms for resolving family disputes.
- (e) The question of the desirability and feasibility of a specialised family court.

The Working Group

4. In the initial phase of its work the Commission benefited from the advice and observations of a Working Group, chaired by Commissioners Gaffney and Duncan, comprising Judges and practising lawyers with considerable experience in matters of family law, viz.

The Hon. Mr. Justice Francis D. Murphy (High Court)
 His Honour Judge Matthew Deery (Circuit Court)
 Judge Thelma King (District Court)
 Cormac Corrigan Esq., B.L.
 Ms. Catherine McGuinness, S.C.
 Frank Murphy Esq., Solicitor
 Ms. Muriel Walls, Solicitor.

Ms. Una Ni Raifeartaigh attended the meetings and provided research support.

5. The Commission wishes to record its gratitude to the members of the working party for their generosity in giving of their time and for their expert advice. The views of the Working Party are mentioned at various points within the Consultation Paper. However, it would be unfair to attribute the views thus expressed to individual members of the Working Party. There was considerable debate over many of the issues, and what is recorded is the general sense and direction of these debates rather than agreed conclusions. Needless to say the members of the Working Party bear no responsibility for the provisional recommendations.

Previous Proposals On Family Courts

6. Some of the separate issues surrounding the idea of a family court have been discussed in previous official reports. The various proposals for reform made in these reports are mentioned within separate chapters below. These reports include the *Report* (including the Supplementary Report) *of the Task Force on child Care Services* (1980), the *Report of the Review Committee on*

Adoption Services (1984), the Report (*Irish Women: Agenda for Practical Action*) of the Working Party on Women's Affairs and Family Law Reform (1985), and the *Report of the Joint Oireachtas Committee on Marriage Breakdown* (1985). Most recently the Government has, in the Department of Justice paper, *Marital Breakdown, A Review and Proposed Changes* (1992), signalled its intention to consider further the issue of family courts.³

The Need For Reform

7. There has in the last twenty years been a vast increase in family litigation. While this may be a reflection of an underlying problem of greater instability in family relations, its more direct progenitor has been a series of reforming measures. New or improved remedies were introduced during this period in the *Family Law (Maintenance of Spouses and Children) Act, 1976*, the *Family Home Protection Act* of the same year, the *Family Law (Protection of Spouses and Children) Act, 1981*, the *Status of Children Act, 1987*, and the *Judicial Separation and Family Law Reform Act, 1989*. The introduction of a scheme of legal aid in civil cases in 1980, which has since been employed mainly in family law cases, made the new remedies accessible to a wider public. This was followed by a radical restructuring in the jurisdiction of the courts, effected by the *Courts Act, 1980*, which reduced the involvement of the High Court and for the first time gave the Circuit Court a prominent jurisdiction in family matters.

8. Between 1990 and 1992 the total number of applications involving family law business in the District Courts rose from 8,028 to 12,380, an increase of more than 50%.⁴ In the Circuit Court, in 1989/90, there were 1,059 applications in family matters, including applications under the *Married Women's Status Act, 1957* and the *Family Home Protection Act, 1976*. During the first 15 months of the operation of the *Judicial Separation and Family Law Reform Act, 1989*, there were 916 applications made to the Circuit Family Court for decrees of Judicial Separation, together with various ancillary financial and property orders.⁵ In the Dublin Circuit Family Court alone the annual application rate for judicial separation is in excess of 400.

8. The strains to which the increasing volume of business is giving rise within the courts system are referred to in Chapter 7. The intense pressure under which judges are often working in family law cases, together with the delays and other frustrations being experienced by litigants, provide in themselves a compelling case for reform.

9. The introduction of new or improved family law remedies has taken place without sufficient regard for the need to prepare the courts for their additional burdens, to provide them with appropriate physical facilities, and to ensure the availability of essential support services. The issue of judicial studies

3 At para. 9.15.

4 *Ireland. Statistical Abstract 1993* (Pl. 9990), Table 10.16.

5 See Appendix 3.2 & 3 of *Marital Breakdown. A Review and Proposed Changes* (Pl. 9104, 1992).

or training has not been addressed, courtroom facilities in parts of the country remain a disgrace, the probation and welfare service have the resources to provide only a limited service to the courts in child custody cases, mediation facilities remain thin on the ground, and the legal aid and advice service has suffered from chronic under-funding.

An Integrated Approach

10. Not all of these matters are within the Commission's remit, and they raise issues of priorities in funding which are beyond the Commission's competence. However, it is necessary to bear in mind, when considering reform of the judicial system, that it does not operate in a vacuum. The solution to the present crisis cannot be found only in the appointment of additional judges or in the construction of new court rooms, though these are badly needed. The background required for an effective and sensitive family courts system includes, in addition,

- mechanisms for promoting agreement between separating couples (subject to safeguards) on matters of finance, property and child custody, to help to reduce to a minimum the need for recourse to the courts,
- an adequate system of legal aid and advice to help ensure fairness in negotiated and agreed arrangements and to guarantee access to the courts where necessary,
- access by the courts to appropriate social and medical services to obtain, where needed, objective assessments relating to children where their welfare is in issue,
- the availability of appropriate representation for a child where this is necessary to protect the child's rights or interests,
- the provision of facilities to enable judges to familiarise themselves with the special characteristics of family issues, to become aware of the roles played by other professionals, and to keep abreast of relevant advances in knowledge.

While the Commission has remained conscious of the limits of its brief, which is to formulate proposals for "law reform", it has tried to adopt an integrated approach, maintaining an awareness of this broader context within which a system of family courts operates.

Justice And Welfare

11. It is sometimes suggested that our traditional adversary mode of trial is unsuitable for the resolution of family disputes. Two different types of reason are given. Its confrontational character, it is said, may generate further bitterness

between the members of an already disharmonious family, rendering future co-operation, especially over parenting arrangements, more of a problem. Secondly, it is argued that the control which the parties have over the introduction of evidence means that the court may sometimes not have access to all of the facts relevant to the issues which the court is asked to determine; where the case concerns the welfare of a dependent child this may be particularly unfortunate. Among the solutions which have been suggested are the introduction of an inquisitorial procedure in which the court plays a much more active and independent role in the inquiry, or the reshaping of procedures in respect of children to reflect the essentially "welfare" function that the court is asked to perform, or even the adoption of a more "therapeutic" approach geared towards the minimising of courtroom conflict.

12. In its approach to these issues the Commission has tried to avoid an ideological preference for any particular mode of trial. Rather it has attempted to combine pragmatism with respect for the basic requirements of fair procedure. The following considerations, in particular, have influenced the Commission's thinking:

There is an important distinction to be drawn between informality and laxity in procedures. The former is desirable and already pertains in many family proceedings; the latter is unacceptable and may result in the infringement of fundamental rights.

Trial procedures must respect the principles of natural and Constitutional justice. In particular, family members (parents or children) whose fundamental rights may be affected by the outcome of proceedings must be given a full opportunity (subject to considerations of age and understanding) to present their case and to challenge evidence which may be detrimental to them.

Subject to these requirements, there is no objection in principle to vesting in the court powers to initiate specified forms of inquiry and to call upon the assistance of experts to make enquiries and assessments on behalf of the court.

It needs to be recognised that judicial proceedings, even though conducted with informality and sensitivity, are not therapeutic exercises and that it is not possible to exclude from them some element of confrontation. This is one of the reasons why it is so important to avoid judicial proceedings where it is possible to do so without risk of injustice to the persons concerned.

Submissions

13. The Commission welcomes views on its provisional recommendations from members of the public generally and from those with a professional interest in the matters covered. Written observations should be addressed to:

The Secretary,
The Law Reform Commission,
Ardilaun Centre,
111 St. Stephen's Green,
Dublin 2,

and should be submitted not later than 1 July 1994.

**CHAPTER 1: THE ORGANISATION OF FAMILY LAW
BUSINESS, COURT ACCOMMODATION AND
ACCESSIBILITY**

Introduction

1.01 The first chapter of this Consultation Paper comprises an examination of the courts in which proceedings relating to family law matters may be brought in Ireland and in other jurisdictions; as well as consideration of the most appropriate physical facilities that may be provided for the discharge of these matters.

1. FRAGMENTATION OF JURISDICTION IN FAMILY LAW MATTERS

A. Ireland

1.02 In Ireland, proceedings in family law matters may be initiated at the District, Circuit and High Court levels according to the relief claimed. The following is a description of the distribution of original family law jurisdiction in the Irish courts.

Marriage/Separation/Nullity

1.03 (1) Proceedings under the *Family Law (Protection of Spouses & Children) Act, 1981* may be brought in the District Court or Circuit Court.¹ A barring order made by the District Court or Circuit Court on appeal has a maximum limit of 12 months after the date of its making,² although a further barring order may be made on or before its expiration.³ Whether proceedings may be brought in the High Court is discussed below.⁴

1 S.17(1) *Family Law (Protection of Spouses and Children) Act, 1981.*

2 S.2(4) *Family Law (Protection of Spouses and Children) Act, 1981.*

3 S.2(5) *Family Law (Protection of Spouses and Children) Act, 1981.*

4 See below, p.5 *et seq.*

(2) Proceedings under the *Marriages Act, 1972* (seeking exemption from age and parental consent requirements) may be brought before the President of the High Court or a judge of the High Court nominated by the President of the High Court.⁵

(3) Proceedings for nullity may be brought in the High Court.

(4) Proceedings for judicial separation may be brought in the Circuit Court or High Court.⁶ However, where in such proceedings an order could be made in respect of land the rateable valuation of which exceeds £200, proceedings may be transferred from the Circuit Court to the High Court on application.⁷

(5) Proceedings for matrimonial injunctions may be brought in the High Court or Circuit Court.

Maintenance, Property, Financial Matters

(6) Proceedings under ss.5, 5A, 6, 7, 9, & 21A of the *Family Law (Maintenance of Spouses and Children) Act, 1976* may be brought in the Circuit Court or District Court.⁸ The District Court and the Circuit Court on appeal from the District Court do not have jurisdiction to make an order under the Act for the payment of a sum at a rate greater than £200 per week for the support of a spouse or £60 per week for the support of a child. The District Court and Circuit Court do not have jurisdiction to make an order in any matter in relation to which the High Court has made an order. The District Court does not have jurisdiction to make an order in any matter in relation to which the Circuit Court has made an order. However, the District Court or Circuit Court may vary or revoke an order made by the High Court prior to 12 May 1982 provided certain conditions are satisfied.⁹ Whether proceedings may be brought in the High Court is discussed below.¹⁰

(7) Proceedings under the *Family Home Protection Act, 1976* may be brought in the High Court or Circuit Court.¹¹ However, where either spouse is of unsound mind and there is a committee of the spouse's estate, jurisdiction under the Act must be exercised by the Court that appointed the Committee.¹² All of the foregoing is subject to section 10(4)¹³ which provides that where the rateable value of the land exceeds £200 and the proceedings are brought in the Circuit Court, the Circuit Court shall transfer the proceedings to the High Court

5 S.1(2) *Marriages Act, 1972*.
6 S.31(2) *Judicial Separation and Family Law Reform Act, 1989*.
7 S.31(3) *Judicial Separation and Family Law Reform Act, 1989*.
8 S.23 of the *Family Law (Maintenance of Spouses and Children) Act, 1976* as amended by s.11 of the *Courts Act, 1991*.
9 See s.23(2)(d).
10 See below, p.5 *et seq.*
11 S.10 *Family Home Protection Act, 1976*.
12 S.10(3) *Family Home Protection Act, 1976*.
13 As amended by s.13 of the *Courts Act, 1981*.

if the defendant so requires. Also, the District Court has jurisdiction to make orders under s.9 of the *Family Home Protection Act, 1976* (relating to the disposal or removal of household chattels), provided the value of the chattels intended to be disposed of does not exceed £5,000.¹⁴

(8) Proceedings under the *Family Law Act, 1981* may be brought in the Circuit Court or High Court.¹⁵ The District Court has jurisdiction to hear proceedings under s.6 or 7 where the amount claimed does not exceed £2,500.

(9) Proceedings under the *Married Women's Status Act, 1957* may be brought in the High Court or the Circuit Court. However, if the rateable valuation of the land exceeds £200 and the application is made to the Circuit Court, and the defendant or respondent requests a transfer, the proceedings must be transferred to the High Court.¹⁶

(10) Proceedings under the *Succession Act, 1965* may be brought in the High Court or, in limited situations, in the Circuit Court.¹⁷

(11) Various ancillary orders may be sought under the *Judicial Separation and Family Law Reform Act, 1989* in the Circuit Court or the High Court.¹⁸ Such orders include preliminary orders in judicial separation proceedings, maintenance pending suit, periodical payments and lump sum orders, property adjustment orders, orders extinguishing succession rights, orders for sale of property, and miscellaneous other ancillary orders.¹⁹ Some of these other orders are also available independent of the 1989 Act.

(12) Proceedings for partition of property under the *Partition Acts, 1868 and 1876* may be brought in the Circuit Court.

Custody And Guardianship Of Children

(13) Proceedings under the *Guardianship of Infants Act, 1964*, Part II may be brought in the Circuit Court or District Court.²⁰ The District Court and the Circuit Court on appeal from the District Court do not have jurisdiction to make an order under the Act for the payment of a periodical sum at a rate greater than £60 per week towards the maintenance of an infant. Whether proceedings may be brought in the High Court is discussed below.²¹

(14) Proceedings under the *Guardianship of Infants Act, 1964*, Part III may be brought in the Circuit Court or District Court.²² Whether

14 S.22(5) *Family Home Protection Act, 1976*, as amended by s.8 of the *Courts Act, 1991*.

15 S.8(1) *Family Law Act, 1981*.

16 S.12(3) *Married Women's Status Act, 1957*, as amended by s.3 of the *Courts Act, 1981*.

17 S.6(2) *Succession Act, 1965*.

18 S.31(2) *Judicial Separation and Family Law Reform Act, 1989*.

19 See Part II of the *Judicial Separation and Family Law Reform Act, 1989*.

20 S.5 of the *Guardianship of Infants Act, 1964*, as amended by s.15 of the *Courts Act, 1981*.

21 See below, p.5 *et seq.*

22 S.13 of the *Guardianship of Infants Act, 1964*, as amended by s.15(1)(b) of the *Courts Act, 1981*.

proceedings may be brought in the High Court is discussed below.²³

(15) Proceedings in respect of Wardship may be brought before the President of the High Court or a Judge of the High Court where the President so directs,²⁴ or the Circuit Court.²⁵ Where the infant possesses property, however, the jurisdiction of the Circuit Court is limited to proceedings in relation to land the rateable valuation of which does not exceed £200.²⁶

(16) The power to make *habeas corpus* orders in a family law context is vested in the High Court.

Other Jurisdictions Affecting Children

(17) Section 28 of the *Child Care Act, 1991* will, when in force, confer jurisdiction on the District Court and the Circuit Court on appeal from the District Court to hear and determine proceedings under Parts III, IV, and VI of the Act relating to the protection of children in emergencies, care proceedings and children in the care of health boards.

(18) Proceedings under the *School Attendance Acts, 1926-27* may be brought in the District Court.

(19) Proceedings under the *Adoption Act, 1974* (s.3) and the *Adoption Act, 1988* (s.3) may be brought in the High Court.

(20) Orders for adoption are, under the *Adoption Act, 1952*, made by the Adoption Board.

Declaration Of Status

(21) Proceedings under the *Legitimacy Declaration (Ireland) Act, 1868* may be brought in the Circuit Court²⁷ or High Court.²⁸

(22) Proceedings under Part VI of the *Status of Children Act, 1987* may be brought in the Circuit Court.²⁹

23 See below.

24 See s.9 of the *Courts (Supplemental Provisions) Act, 1961*.

25 S.22(1) of the *Courts (Supplemental Provisions) Act, 1961*, as amended by s.12 of the *Courts Act, 1991*. See also *State (Bruton) v a Judge of the Circuit Court*, 1 July 1984, unreported, High Court.

26 S.22(1) of the *Courts (Supplemental Provisions) Act, 1961*, as amended by s.2 of the *Courts Act, 1981*.

27 S.2(1) *Legitimacy Act, 1931*.

28 S.1 of the *Legitimacy Declaration (Ireland) Act, 1868* conferred jurisdiction on the Court of Probate in Ireland. This was passed to the High Court of Justice created by the *Courts of Justice Act, 1924*, and subsequently to the present High Court under the *Courts Establishment and Constitution Act, 1961*. Presumably the conferring of jurisdiction under the 1868 Act on the Circuit Court by the *Legitimacy Act, 1931* did not oust the jurisdiction of the High Court.

29 Ss.33 and 34 of the *Status of Children Act, 1987*.

Criminal Matters

(23) Proceedings in respect of juveniles may be brought in the Children's Courts/District Courts.

(24) Criminal actions in a family context are prosecuted in the criminal courts in the same way as other criminal matters.

Torts

(25) Torts in a family context are litigated in the civil courts in the same way as other torts.

The Fragmentation Issue Complicated By Constitutional Factors

1.04 Article 34.3.1 of the Constitution provides that the Courts of First Instance shall include a High Court invested with full original jurisdiction and power to determine all matters and questions whether of law or fact, civil or criminal. In the family law context, this Article raises important issues. Can the Oireachtas confer jurisdiction over certain family law matters on the District Court and Circuit Court to the exclusion of the High Court, despite the fact that the High Court has "full original jurisdiction"? The resolution of this problem determines in a concrete way whether certain proceedings may presently be brought in the High Court as well as in the District Court or Circuit Court. Also to be considered is the impact of Article 34.3.1 on any plan for the creation of a specialist family court.

1.05 The problem was first addressed in the family law context in a case before the High Court, *R. v R.*³⁰ The impact of Article 34.3.1 in another context was considered by the Supreme Court in *Tormey v Ireland*.³¹ While the two decisions are not on precisely the same point, they do represent a divergence of opinion with respect to the basic issue, namely whether the jurisdiction of the High Court may be limited or excluded by statute.

1.06 In *R. v R.*, the plaintiff sought relief under a number of family law statutes: the *Guardianship of Infants Act, 1964*, the *Family Law (Maintenance of Spouses and Children) Act, 1976*, the *Family Law (Protection of Spouses and Children) Act, 1981* and the *Married Women's Status Act, 1957*. A preliminary issue arose as to whether the High Court had jurisdiction under these Acts. Jurisdiction under the *Guardianship of Infants Act, 1964* initially had been conferred on the High Court and Circuit Court. The *Courts Act, 1981* amended the Act so as to confer jurisdiction on the Circuit Court and District Court. Jurisdiction under the *Family Law (Maintenance of Spouses and Children) Act, 1976* had been originally conferred on the High Court, District Court and Circuit Court on appeal from the District Court, but again the *Courts Act, 1981* amended the Act so as to confer jurisdiction on the Circuit Court and District Court. In

30 [1984] I.R. 296.

31 [1985] I.R. 289.

neither case was the previous jurisdiction of the High Court referred to. Jurisdiction under the *Family Law (Protection of Spouses and Children) Act, 1981* was conferred on the District Court and Circuit Court. No mention was made of the High Court. These jurisdictional arrangements reflected the desire of the Oireachtas to reduce the volume of family law work in the High Court and divert it into the lower courts.³² Was this attempt constitutional?

1.07 Because the relevant provisions did not expressly state that the jurisdiction of the High Court was ousted, the judgment of Gannon J in *R. v R.* involved a two-fold enquiry: (a) whether an attempt had been made to oust the jurisdiction of the High Court, and (b) whether such an attempt would be constitutional. In respect of the first enquiry, Gannon J. found that there was nothing in the Acts which affected the original jurisdiction which the High Court had by virtue of the Constitution. He viewed the provision as merely conferring additional jurisdiction on the lower courts, which they could acquire only by statute. This finding has been criticised³³ as being contrary to the intention of the Oireachtas as evidenced by the Dáil Debates and by the wording of the Act which appears in section 1(1) to define "court" exhaustively as the District Court and Circuit Court. Also s.17(3) of the same Act contains a transitory provision with respect to the High Court which suggests that the High Court would not retain its jurisdiction after a certain point.³⁴

1.08 With respect to the second inquiry, Gannon J. was of the view that the Oireachtas could not constitutionally "add to or increase" the jurisdiction of the High Court by legislation, nor could it "create ... a new judicial jurisdiction and withhold it from the High Court" or "reduce, restrict, or terminate any jurisdiction of the High Court". However, he conceded that if the Oireachtas chose to confer additional jurisdiction on the lower courts, the High Court would not, in that event, be compellable to provide any person with recourse to the High Court at his or her choice. In such a situation, the High Court could decline to entertain the application and remit it to the lower courts.

1.09 Subsequent to the decision in *R. v R.*, the President of the High Court issued a Practice Direction.³⁵ This provides that where a summons is issued in the High Court claiming relief under the *Guardianship of Infants Act, 1964*, the

32 In this respect, it should be noted that the Twentieth Interim Report of the Committee on Court Practice and Procedure, which preceded the 1981 legislation, had noted the considerable growth in family law since the enactment of the *Family Law (Maintenance of Spouses and Children) Act, 1976* and that there had been a considerable increase in the number of applications brought under the *Guardianship of Infants Act, 1964*. The Committee recommended that the courts referred to in Part II of the 1964 Act should in the future be the Circuit Court and the District Court, rather than the High Court and the Circuit Court. It was also of the opinion that the exclusive jurisdiction of the High Court conferred by Part III of the Act should be conferred on the District Court in lieu of the High Court. It said that as well as reducing the number of cases in the High Court, an additional advantage of transferring the jurisdiction in this way was that the Circuit Court and the District Court were "better geared to cope with the frequency with which several applications in the same case tend to recur because of changing circumstances", and that they had the "considerable advantage of local venues and the additional advantage of appeals by way of complete rehearing to the appropriate appellate jurisdiction instead of the present costly and time-consuming system of appeal to the Supreme Court".

33 See G.W.Hogan, *Constitutional Aspects of the Distribution and Organisation of Court Business*, (1984) D.U.L.J. 40 at 45-50.

34 I.e. after cases commenced before the Act came into operation were determined.

35 [1984] I.L.R.M. 148.

Family Law (Maintenance of Spouses and Children) Act, 1976 or the *Family Law (Protection of Spouses and Children) Act, 1981*, the summons is returnable before the Master of the High Court in the ordinary way, and should be put into the family law judge's list. At this point, the parties must attend and submit evidence or arguments as to whether the case is one appropriate for the High Court to exercise its jurisdiction, or whether it should be remitted to the Circuit Court or District Court. Subsequently in *O'R. v O'R.*,³⁶ Murphy J. held that where legislation provided that application could be made in the first instance to an inferior court, the High Court would be justified in departing from that procedure only where it was satisfied that in a particular case there was "a serious danger that justice would not be done" if the High Court declined to exercise jurisdiction.

1.10 The decision of the Supreme Court in *Tormey v Ireland* regarding the extent of the jurisdiction of the High Court arose in the criminal law context. The plaintiff was charged with an offence under the *Larceny Act, 1916* and was sent forward for trial on indictment in the Dublin Circuit Court. Formerly, he would have been entitled to apply for a transfer of his trial to the Central Criminal Court under s.6 of the *Courts Act, 1964*. However, s.32(1) of the *Courts Act, 1981* repealed s.6 of the *Courts Act, 1964* and abolished the right of transfer to the Central Criminal Court. The essence of the plaintiff's case in the Supreme Court was that the withholding from him of the right to a trial in the High Court was unconstitutional for being inconsistent with Article 34.3.1.

1.11 Delivering the judgment of the Supreme Court, Henchy J. held that Article 34.3.1 could not be read literally, because other constitutional provisions illustrated that original jurisdiction with respect to certain other justiciable matters could validly be exercised by entities other than the High Court, e.g. the Supreme Court with respect to Bills referred by the President, military tribunals with respect to military law, and the exclusive jurisdiction of the courts of summary jurisdiction to try "minor" offences. Henchy J. considered that a literal reading of Article 34.3.1 could be impractical because the jurisdiction would then be "overlapping and unworkable". Moreover, a literal reading of Article 34.3.1 would dictate that the High Court had jurisdiction over all issues including those in respect of which the High Court was an inappropriate forum.

1.12 Rejecting a literal interpretation of the Constitution, Henchy J. held that the document should instead be read as an interlocking whole - an approach described as the "doctrine of harmonious interpretation".³⁷ Applying this approach, he said that the jurisdiction of the High Court could be exercised in one of two ways. If there had been no statutory devolution of jurisdiction to the District Court or Circuit Court, the High Court would exercise jurisdiction in the area. However, if jurisdiction in a particular area has been delegated to lower courts exclusively, the High Court could not exercise jurisdiction, except in

36

[1985] I.L.R.M. 375.

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For comment on this aspect of the case, see G.W. Hogan, *Reflections on the Supreme Court's Decision in Tormey v Attorney General*, (1986) D.U.L.J. 31 at 37.

proceedings for judicial review. Henchy J. concluded that the abolition of the right of transfer as achieved by the *Courts Act, 1981* was constitutionally valid.

1.13 It is difficult to reconcile the decision of Gannon J. in *R. v R.* with that of the Supreme Court in *Tormey*. The apparent inconsistency between the two decisions leaves in some doubt whether proceedings under the *Guardianship of Infants Act, 1964*, the *Family Law (Maintenance of Spouses and Children) Act, 1976* and the *Family Law (Protection of Spouses and Children) Act, 1981* may properly be instituted in the High Court. However, *R. v R.* has not been expressly overruled. Moreover, in the later case of *McD. v McD.*,³⁸ McKenzie J., following the Practice Direction,³⁹ decided that the case was appropriate for determination by the High Court, and proceeded to make orders under the *Guardianship of Infants Act, 1964*, and the *Family Law (Maintenance of Spouses of Children) Act, 1976*.

1.14 Lastly, it should be pointed out that the decisions in *R. v R.* and *Tormey v Ireland* have implications for future reforms. If a specialised Family Court were to be set up, there are a number of possible forms it might take. For example, it might be at lower court level exclusively, at High Court level exclusively, or it might be three-tiered. It might be an independent entity, or it might be a division within the existing court structure. All of these options have been explored by other jurisdictions. In Ireland, the creation of a Family Court must be conditioned by considerations of what is constitutionally permissible in the light of Article 34.3.1, as understood in *R. v R.* and *Tormey v Ireland*.

B. Problems Of Fragmented Jurisdiction In Some Other Countries

(a) *Australia*

1.15 Unification of jurisdiction in family law matters in Australia is hindered by constitutional provisions which mandate that jurisdiction in such matters be split between the Federal Courts and the State/Territory Courts. The Australian Constitution vests in the Commonwealth jurisdiction over "marriage" and "divorce and matrimonial causes, and in relation thereto parental rights and the custody and guardianship of infants".⁴⁰ The sum of these two parts does not constitute the whole of family law and the remainder is left to the state and territory courts. Fragmentation of jurisdiction in Australian family law remains a problem despite the existence of a unified Family Court. The federal Family Court was set up by the *Family Law Act, 1975*, but can exercise jurisdiction only with respect to matters falling within the ambit of federal law. Accordingly, jurisdiction over family law matters is exercised by all of the following courts:

1. The Family Court of Australia
2. The Western Australian Family Court

38 April 1986, unreported, High Court.

39 Above, note 35.

40 S.51, placita (xxi) and (xxii).

3. Courts of Summary Jurisdiction
4. Intermediate Courts (to a minor degree)
5. The Supreme Court of the Northern Territory
6. State Courts

1.16 With the enactment of the *Family Law Act, 1975* (Cth.), the Federal Parliament attempted to legislate with respect to family law matters as far as possible within its area of competence. Broadly speaking, these matters include dissolution and annulment of marriage, and maintenance, custody and matrimonial property provided these issues relate to proceedings for principal relief (dissolution or nullity). Areas such as child welfare, parentage (including adoption), legitimacy and family inheritance do not fall within Commonwealth competence. Also, the Commonwealth powers relate only to families formed on the basis of marriage, as a result of which issues of custody, guardianship and maintenance of ex-nuptial children, as well as the rights and duties of persons living in a 'de facto' relationship, are excluded.

1.17 The *Family Law Act, 1975* gave rise to much litigation. Numerous attacks were mounted on it relating to the assumption of jurisdiction in certain areas.⁴¹ Some of these decisions necessitated the narrowing of the federal jurisdiction, while others illustrated the difficult fragmented nature of family law litigation in Australia.⁴² The attacks on the *Family Law Act, 1975* caused great concern and resulted in the appointment of a Joint Select Committee. In its report of July 1980, this Committee concluded that the Act did not exhaust the Commonwealth's Constitutional powers with regard to marriage and matrimonial causes.

1.18 In 1983, the *Family Law (Amendment Act)* was enacted, which Act further widened certain heads of jurisdiction at federal level. Nonetheless, problems continue to arise as a result of the division of jurisdiction caused by the Constitution. Accordingly, fragmentation problems in Australia may be seen as two-fold:

- (a) resulting directly from the division of powers conferred over family law matters by the Constitution; and
- (b) resulting, more indirectly, from uncertainties as to the precise dividing line between the Federal and State powers, leading to a circle of enactments, litigation, enactments, reports, and enactments.

1.19 Various solutions to the fragmentation problem in Australia are a major focus of enquiry in that jurisdiction. The possibility of a constitutional referendum widening the Commonwealth's power in family law has been raised.

41 E.g. *Russell v Russell, Farrelly v Farrelly* (1976) 134 C.L.R. 495, the decision which necessitated the enactment of the *Family Law (Amendment) Act, 1976*, narrowing the definition of 'matrimonial causes'.

42 E.g. *Vitzdamm - Jones: St. Clair v Nicholson* (1981) 33 A.L.R. 537 (third parties and custody), *Ascot Investments v Harper* (1981) 33 A.L.R. 631, *R. v Dowey* (1973) 23 A.L.R. 531, *R. v Ross - Jones* (1979) 23 A.L.R. 179 (third parties and property).

The Final Report of the Constitutional Commission (a body established to inquire into the revision of the Australian Constitution) in 1988 recommended the alteration of s.51 of the Constitution so that the Federal Parliament would have power to make laws with respect to:

- (xxii) divorce and matrimonial causes;
- (xxii A) property and financial rights between persons who are or were living together as if they were husband and wife;
- (xxii B) adoption, legitimacy and the determination of parentage;
- (xxii C) custody & Guardianship of children, and parental rights;
- (xxii D) maintenance of children.

1.20 Another solution is the "referral" of State/Territory powers to the Commonwealth. In essence, this involves the States and Territories abdicating their powers in the family law area to the Federal Parliament. This has been effected by some States in relation to certain powers but as yet is not far-reaching enough to solve all problems of fragmentation.⁴³ Legislative amendments in 1987 and 1988 have resulted in the acceptance of the references of powers with regard to children from the four states, so that all children are governed by the *Family Law Act, 1975* in these States.

1.21 The third solution proposed by some commentators was implemented in 1987 by the *Jurisdiction of Courts (Cross-Vesting) Act* of that year, accompanied by equivalent legislation of the states and the Northern Territory which came into operation on 1 July 1988. This sets up a "cross-vesting" scheme under which all the participating courts, both state and federal, may transfer proceedings to the appropriate court, so that litigants will be spared inconvenience and expense.

1.22 The primary reason for the establishment of the Australian Family Court was to create an entity with procedures, personnel and support services appropriate to deal with family law matters. While these features of the Australian Family Court are worthy of study, it is arguably less valuable as a model for unification of jurisdiction because fragmentation of jurisdiction continues to be a feature of Australian family law.

(b) *Canada*

1.23 Canada is, again, a federal jurisdiction and suffers from problems of fragmentation similar to those seen in Australia. The *British North America Act, 1867* confers legislative power over "marriage and divorce" on the Dominion

⁴³ In 1988, four States referred to the Commonwealth powers to legislate with respect to (a) maintenance of children and payment of certain expenses, (b) the custody and guardianship of access to children. The four States were New South Wales, Tasmania, Victoria and South Australia.

Parliament⁴⁴ and legislative power in relation to the "solemnisation of marriage" on the provinces.⁴⁵ Thus, the Dominion has jurisdiction over the beginning (except formalities) and end of marriage, while the provinces cover that which is in between.⁴⁶ A division in the court structure is also on a federal/provincial basis, because of ss.92(14), 96 and 101 of the British North America Act. Fragmentation of jurisdiction has been identified as a severe problem by the Canadian Law Reform Commission⁴⁷ and the Ontario Law Reform Commission.⁴⁸

1.24 In 1974, the Canadian Law Reform Commission recommended the creation of a unified Family Court which would have jurisdiction over the following matters:

1. Formation of marriage (e.g. judicial dispensation of parental consent to marry).
2. Dissolution of marriage (divorce and nullity).
3. Judicial separation and separation orders.
4. Restitution of conjugal rights.
5. Declarations of status (marriage, legitimacy, legitimation).
6. Change of name.
7. Alimony and maintenance (including enforcement).
8. Maintenance and affiliation agreements.
9. Inter-spousal actions respecting title to and possession of the matrimonial home and other matrimonial assets.
10. Custody, access and upbringing of children.
11. Adoptions.
12. Guardianship of the person (minors).
13. Affiliation.
14. Child neglect.
15. Inter-spousal or intra-familial assaults of a minor nature.

1.25 It listed five other areas over which a difference of opinion existed:

1. Inter-spousal or intra-familial torts and contracts.
2. Tort actions for invasion of matrimonial consortium, for example, actions for damages for adultery or for alienation of affections.
3. Guardianship of the property of minors.
4. Provision for family dependents on death.
5. Inter-spousal or intra-familial offences of a criminal nature.

1.26 With respect to the latter group, the Law Reform Commission recommended that such matters should not fall within the exclusive competence of the Family Court but that proceedings should be heard in the Family Court

44 S.91(28).

45 S.92(12).

46 See S. Fodden, *Canadian Family Law* (1977), pp.1-5.

47 LRC Canada, *The Family Court*, Working Paper No.1 (1974), pp.7-9.

48 Ontario Law Reform Commission, *Report on Family Law, Part V Family Courts. Report on Family Law*, pp.1-3.

where this is deemed appropriate. Legislative provisions regulating transfer and waiver of jurisdiction, therefore, would be required. The Commission came to no firm conclusion as to whether juvenile delinquency should come within the purview of the Family Court proposed.

1.27 The Ontario Law Reform Commission recommended that the following matters should come within the jurisdiction of a unified Family Court:

1. Juvenile delinquency.
2. Criminal charges arising under the *Criminal Code* from family disputes, and quasi-criminal charges arising under provincial statutes.
3. Children in need of care and protection.
4. Custody and access not ancillary to divorce.
5. Guardianship.
6. Adoption.
7. Paternity proceedings including declaratory judgments.
8. Actions for alimony or maintenance not ancillary to divorce, and their enforcement.
9. Support obligations generally.
10. Division of matrimonial property.
11. Divorce and ancillary relief.
12. Nullity of marriage.
13. Declaration of status and some connected with the solemnisation of marriage, such as applications to dispense with parental consent, and applications for a declaration of presumption of death.

(c) *England*

1.28 While there is no unified Family Court in England, calls for the creation of a Family Court have been made since the early 1960's. The leading Report in England is that of the Finer Committee⁴⁹ in 1974, which recommended the creation of a unified court system. The Finer Committee did not list in detail the heads of jurisdiction which it thought the Family Court should absorb, but implied that jurisdiction would encompass matrimonial matters, presently heard in the Magistrates Courts, the County Courts and matters heard in the Family Division of the High Court. The one head of jurisdiction the Finer Committee did discuss was that of crime. It said that the Family Court should deal exclusively with civil matters, considering that "the arguments of principle for an undiluted civil jurisdiction outweigh the advantages (such as they may be) of permitting it to spill over into penal law".⁵⁰ Indeed, the Committee observed that one of its reasons for recommending the removal of magisterial jurisdiction from family law matters was the "distress" of dealing with people in matrimonial dispute in "a court which is almost entirely given over to the trial of criminal offences".⁵¹

49 *Report of the Committee on One Parent Families*, H.M.S.O. Cmnd. 5629 (1974).

50 *Finer Committee Report*, para. 4.362.

51 *Finer Committee Report*, para. 4.360.

1.29 Other suggestions for a unified Family Court in England and its jurisdictions are as follows:

- (1) The Government White Paper (1963) "*The Child, the Family and the Young Offender*"⁵² envisaged a Family Court which would develop out of the juvenile courts and deal primarily with delinquency.
- (2) The Labour Party's Study Group (1964) recommended that the Family Court have jurisdiction in the following areas:
 - (1) care, protection or control cases up to the age of 18;
 - (2) criminal charges against boys and girls aged 15 to 18;
 - (3) cases of parental neglect or cruelty;
 - (4) school attendance cases;
 - (5) adoption proceedings;
 - (6) affiliation proceedings;
 - (7) consent to marry;
 - (8) domestic proceedings between spouses;
 - (9) custody of children;
 - (10) common assault proceedings between spouses;
 - (11) property disputes between husband and wife.
- (3) The Family Law Sub-Committee of the Law Society recommended a two-tier family court which would have jurisdiction over the following.

(both tiers)

- (1) Divorce, nullity and judicial separation;
- (2) financial relief for spouses and children, whether by secured or unsecured payments, lump sum payments, or transfers of property;
- (3) powers relating to protection of spouses, protection of property and occupation of the matrimonial home;
- (4) proceedings relating to custody of, access or guardianship of children;
- (5) adoption proceedings; and
- (6) applications of local authorities in relation to children.

(second tier only)

- (1) wardship;
- (2) proceedings involving questions of status - legitimacy validity of marriages, recognition of foreign decrees;
- (3) cases involving particularly difficult points of law or questions of fact;

- (4) cases of exceptional length;
- (5) cases involving difficult tax and accounting issues;
- (6) any other case which because of exceptional features might be more appropriately heard before the second tier.

(4) The Lord Chancellor's Department Consultation Paper 1983 put forward two suggestions for change (a) a two-court system (b) a combined jurisdiction. In the new court system envisaged, it recommended that the following heads of jurisdiction be included:

- (1) divorce
- (2) wardship
- (3) family provision
- (4) adoption
- (5) guardianship
- (6) custody
- (7) miscellaneous domestic and matrimonial proceedings
- (8) blood tests
- (9) miscellaneous applications of minors and wards of court
- (10) enforcement of maintenance.

It proposed that the jurisdiction could be divided into four heads of business:

- (1) to be heard by a High Court Judge;
- (2) to be heard by a High Court or Circuit Court Judge;
- (3) to be heard by a Circuit Court Judge; and
- (4) to be heard by a Registrar.

1.30 The Government appears to have rejected the idea of setting up a Family Court. Instead, it is committed to the creation of a concurrent family jurisdiction to be applied in all Courts. The intention is to develop a coherent family code and to remove the differences in procedure between the different courts. Therefore, as each area of family law is reformed, a unified concurrent jurisdiction for its operation will be developed. Such concurrent jurisdiction has been provided for in the *Children Act, 1989*. The jurisdiction of the courts under the *Children Act* operates as follows:

- (i) Most private law cases (outside divorce) can commence in magistrates' courts, although more complex private law cases commence in the county courts or even in the High Court.
- (ii) There are now four distinct forms of county court, with varying jurisdictions in family cases. Non-divorce county courts have no family jurisdiction apart from making domestic violence injunctions. Divorce county courts can issue all private law proceedings under the *Children Act*, but contested matters have to be transferred to family hearing centres. The latter are able to hear all private law matters, but have no

public law jurisdiction. Care centres have full jurisdiction in both public and private law.

- (iii) The High Court has jurisdiction to hear all cases relating to children and exercises an exclusive jurisdiction in wardship. Under the Act the right of a local authority to apply to the High Court for the exercise of this inherent jurisdiction has been severely limited. A local authority now requires leave before commencement of proceedings and this will only be granted if the court is satisfied both that the local authority cannot achieve the desired result in any other way and that there is reasonable cause to believe that the child is likely to suffer significant harm if the court's inherent jurisdiction is not exercised.⁵³

1.31 The structure for appeals in Children Act cases is as follows:

Magistrates' courts to High Court Judge
District Judge to Circuit Judge
District Judge of the PRFD to High Court Judge
Circuit Judge to Court of Appeal
High Court to Court of Appeal
Court of Appeal to House of Lords⁵⁴

Thus, if the case is very complex or if the case is very sensitive or involves matters of great public interest, the High Court alone will have jurisdiction. If, on the other hand, the issues involved are not too complex Magistrates can, with a reasonable level of training, deal with the case at local level.

(d) New Zealand

1.32 The New Zealand Family Court was established in 1981 at the same as time other substantive family law reforms were introduced. The Court was constituted by the *Family Law Courts Act, 1980* which came into force on October 1, 1981. The New Zealand Family Court is a division of the District Court and it is an inferior court. However, according to Bill Atkin,⁵⁵ "the Court has developed its own ethos and built up its own reputation which makes the description inferior somewhat inappropriate". The Court has its own accommodation and administrative facilities and has attached an official called the Counselling Coordinator, whose task it is to direct members of the public to the appropriate agencies.

1.33 There is considerable emphasis in the Court upon resolution by agreement and for this reason the parties are referred to counsellors. If this fails, a judge can chair a mediation conference. This is not mediation in the pure sense as the judge can play an active role in obtaining a result and can issue and

53 Information received from Lord Chancellor's Department.
54 From the 1991-1992 Annual Report of the Children Act Advisory Committee.
55 (1992) 31 *Journal of Family Law* 397 (University of Louisville).

send orders at the end. According to Bill Atkin, this may well raise questions about the power potentially wielded by the judge and about the propriety of such informal justice mechanisms. Despite these doubts, however, the participants seem content, at least for the present, with a process that tries to avoid formal argument and adjudication and there is no call for a return to the days of the strict adversary system.

1.34 The Family Court began its life with jurisdiction over only traditional family law matters; divorce, maintenance, matrimonial property and child custody were the principal ones. Because of the success of the court, its jurisdiction has gradually widened. The family courts now have jurisdiction in the following areas:

- (1) consent to marriage and related matters (*Marriage Act, 1955*).
- (2) adoption (*Adoption Act, 1955*);
- (3) guardianship and custody (*Guardianship Act, 1968*);
- (4) property disputes arising out of agreements to marry (*Domestic Actions Act, 1968*);
- (5) disputes about matrimony on separation and dissolution of marriage (*Matrimonial Property Act, 1976*);
- (6) separation, dissolution of marriage, paternity and maintenance (*Family Proceedings Act, 1980*);
- (7) matters relating to the liable parents scheme (1981) (amendments to the *Social Security Act, 1964*);
- (8) non-violence orders and non-molestation orders (*Domestic Protection Act, 1982*); and
- (9) matters arising under the *Protection of Personal and Property Rights Act, 1988*.

1.35 More recently the family court has been given jurisdiction to hear family protection claims, testamentary promises claims and wardships, all formerly the preserve of the High Court.⁵⁶ The Court's jurisdiction in relation to child maintenance has changed significantly with the enactment of the Child Support Act passed in 1991 and effective on July 1 1992. This Act follows a pattern set in other countries by developing a formula for the calculation of child maintenance.

⁵⁶ See the *Family Protection Amendment Act, 1991*, the *Law Reform Testamentary (Promises) Act, 1991*, the *Guardianship Amendment Act (No. 2), 1991* and the *Family Courts Amendment Act, 1991*.

1.36 The Family Court's success and the attractiveness of its style has led to suggestions that its jurisdiction be widened. For example, it has been suggested that the family court might be the appropriate forum for granting compulsory treatment orders in mental health cases. It is also proposed to extend the jurisdiction of the family court further in relation to property disputes between *de facto* partners. However, as pointed out by Bill Atkin, wider jurisdiction can bring its own problems. The more issues that are dealt with by the family court, the more its distinctive character is in danger of being lost. Standards of judging, training and ancillary services are consequently placed under greater pressure. An alternative is to create more specialist tribunals but in a nation with a population of just over three million, the proliferation of such tribunals could, as in Ireland, prove too much of a strain on resources and expertise.

Criticisms Of The Present System

1.37 The problems associated with fragmentation of jurisdiction in Ireland have been variously described. The present system has been criticised because it impedes the development of a specialist judiciary; and because the large number of judges and justices hearing family law matters may lead to a disparity in the manner in which cases are heard and orders are made. Delay caused by having to proceed in different courts, as well as the often prohibitive costs involved in multiple proceedings, are also cited as problems inherent in the present system. In particular, the system is criticised for its effects on litigants who are forced to seek distinct legal remedies in separate courts for the resolution of issues arising out of the same family dispute. The demand in this regard for the consolidation of trials in family law proceedings is examined in greater detail in chapter three.

1.38 As we have seen, fragmentation of jurisdiction in family law matters is also a problem encountered in the other jurisdictions examined. In England and Canada, a desire for unification of jurisdiction is the main motivating force behind calls for a unified Family Court. In Canada and Australia, the problems of fragmentation are exacerbated by constitutional provisions dividing family law powers between Federal and State Parliaments and therefore Federal and State Courts.

1.39 In June 1993 the Public Service Executive Union (P.S.E.U.) which represents clerks in the District and Circuits Courts submitted a recommendation to the special Judicial Commission on the Courts, the Law Reform Commission, and the Minister for Justice for the establishment of Family Courts Tribunals. The recommendation is intended to apply to all family law matters and to s.24 and 58 of the *Children's Act, 1908*. The Union pointed out that its recommendation that Family Courts should be established separately from the existing courts structure in each county could be achieved either by the introduction of new legislation or within the existing legislative framework. It considered that new legislation is not necessary and that the existing framework would be sufficient. The central recommendation was that there should be established within each county an office to deal with all family law matters within

that county. The Union pointed out that, at present, 3 different offices, attached to the District Court, the Circuit Court and the High Court, all administer family law matters. It pointed to the disadvantages involved in such a system, particularly if a case moves from one court to another. Work and records are duplicated. Delay arises in transmitting orders. Litigants, referred from one level of court to another, are confused. This would all be eliminated by having one office dealing with family law matters.

1.40 The system proposed by the Union would work as follows:

The office of the Family Court would receive the originating documents and would schedule the case to the appropriate court depending on the reliefs sought. In this way the officer in the Family Law Court would be acting as registrar to the District Court Judge, the Circuit Court Judge and the High Court Judge. It is envisaged that in the larger centres like Dublin, Cork and Limerick, court clerks employed full time on this work at present at different jurisdictional levels, would continue at this work but would be employed in one Family Law Office which would administer the system at all three levels.

1.41 The Union suggests that the following advantages would be expected to follow from the adoption of the proposed system.

1. Office and backup work would be reduced as all files would be available in one office.
2. There would be continuity of contact.
3. There would be no delay in getting information from one court to another.
4. There would be no duplication of services.
5. Staff would acquire an expertise in dealing with sensitive cases.

Technology could also be introduced to streamline the family law system and only one computer per county would be required.

2. THE FORUM

(1) *Accommodation*

1.42 It is felt by many people involved in family law cases that the highly personalised nature of the disputes involved means that traditional court facilities are unsuitable and intimidating. Calls have been made in several countries for the provision of suitable court facilities for family cases, whether such cases are heard within the ordinary court system or in a specialised Family Court.

1.43 In Dublin separate courtrooms are in fact provided for the High Court,

Circuit Court and District Court hearings of family law cases. The High Court and Circuit Court rooms are in Áras Uí Dhálaigh, beside the Four Courts. This facility was opened in 1988. The District Court room is in Dolphin House. These court rooms were specially designed for family law hearings and are recognised to be more modern and familiar reducing the overall intimidatory effect of the adversarial process; thus the situation in the Dublin Courts has clearly improved.

1.44 Outside Dublin family law cases are heard *in camera* in ordinary court rooms, special rooms or judges chambers. In areas outside Dublin the situation has markedly disimproved; Athlone Court no longer sits as a Circuit Court due to the state of disrepair of the building. This represents a problem with regard to accessibility in that litigants must travel to Mullingar. Also Carlow Circuit Court was not sitting for the same reason until recently and now it has only one sitting a term. Clearly this is not sufficient to meet the needs of litigants.

1.45 The main problem with the provision of special family courts is of course the financial cost involved. However, some argue that it is unnecessary to build special court buildings and that use can be made of schools, town halls and community centres.

1.46 The Joint Committee on Marriage Breakdown (1985) felt that existing facilities in Ireland for family law cases were inadequate and unsuitable:

"Hearings take place in the same buildings as ordinary cases, the difference being that the court is cleared of members of the general public. Some judges and justices hear family cases in their chambers, an indication in itself of the unsuitable nature of the accommodation available. Often there are no suitable consultation facilities and parties end up seeing their solicitor in the street or in the foyer of the court. In the Dublin area there is a purpose-built District Court for the hearing of family cases, but no such facility exists in the rest of the country ... Urgent attention should be given to the provision of more suitable facilities".

1.47 The Committee recommended the creation of a Family Tribunal and that accommodation for this entity should have a number of features:

- (a) It should be private.
- (b) It should seek to reduce the hostile and intimidating atmosphere of a normal court-room, by having the judge and the parties sit around the table rather than having the judge in an elevated position and the opposing parties seated behind their respective legal teams.
- (c) There should be adequate facilities for the parties to see their advisers and await the hearing: "It is often upsetting for people to have to wait around outside the court, within sight of their spouse, and in such a

manner that it is obvious to others that they are there in relation to a family law matter.

- (d) Ancillary facilities to facilitate contact with social workers attached to the court should be available.

The Committee suggested that certain types of accommodation could be adapted for use in this regard, such as conference rooms or meeting rooms in community facilities.

1.48 The *Judicial Separation and Family Law Reform Act, 1989* contains a number of provisions relevant to the conduct of family cases in the Irish courts. S.31(1) provides that when the Circuit Court is exercising its jurisdiction to hear and determine "family law proceedings" or when transferring "family law proceedings" to the High Court, it shall be known as the Circuit Family Court. S.32 provides that the Circuit Family Court must hear family law proceedings in a different place, or at different times, or on different days, from those on which the ordinary sittings of the Circuit Court are held.

1.49 The Finer Committee in England (1974) had recommended the creation of a unified Family Court, but during the House of Commons debate upon the Report, the Secretary of State for Social Services, Mrs Barbara Castle, said that the Government saw no prospect of accepting the recommendation for Family Courts because of the cost of the new buildings which would be required. Thus, accommodation has been one of the major stumbling blocks to creation of a Family Court in England. This approach was criticised by the Family Law Sub-Committee of the Law Society in 1979.⁵⁷

"142 ... This approach is based on a fundamental misconception, for it confuses the function of a court, which can very well be exercised under the proverbial palm tree, with the building in which it is now traditional that a court should be housed ...

144 The House of Lords debate on One-Parent Families (Hansard 19 January 1977) revealed the same inability to distinguish between the function and forum of a court. Lord Wells-Pestell, the Government spokesman, said 'I think the Noble and Learned Lord would agree with me that there has to be a special kind of environment. There has to be a special kind of setting if one is to have a family court'. He did not explain what kind of environment or setting but it seems that he envisaged a traditional courtroom as he also observed: 'You cannot take a room in the town hall and make it into a family court and then move it all out the next day'.

147 ... We feel that it is essential that a Family Court should operate

57 A *Better Way Out*, 1979.

informally, avoiding the ritual which characterises the procedure of other English courts with their formal and distant atmosphere. Many of its proceedings would involve private and often painful aspects of the intimate relationships of those involved who would often be in a state of distress and confusion. The Family Court would operate more effectively in a reassuring and accessible atmosphere. It is undesirable that Family Court proceedings should be held in a formal courtroom. Any reasonably sized room could be used, of the kind in which industrial tribunals, the Commissioners or Special Commissioners of Inland Revenue, rent assessment committees and juvenile courts operate. A wide range of such accommodation exists even though a single room would not be sufficient where more than one case was to be heard. A waiting room and one or more interviewing rooms would be needed except perhaps in places where the Court sat only occasionally. Lords Wells-Pestell's town halls and also school buildings, for example, can usually provide these facilities.

148 We believe, therefore, that once the question of the Family Court's accommodation is approached without preconceptions about the setting its title demands, the answer is relatively easy. Simplicity and suitability may well coincide."

1.50 The Consultation Paper on Family and Domestic Jurisdiction published in 1986 by the English Lord Chancellor's Department considered the creation of a unified Family Court and discussed the issue of accommodation. It said that the traditional courtroom with the raised bench, witness box and tiered seating was inappropriate for family cases. The room in which cases were heard should be big enough for all the parties and their advisers, and perhaps different types of room would be necessary, for example, a more formal lay out for domestic violence proceedings, and less formal for care proceedings. It was thought that rooms should be available for consultation with welfare officers and legal advisers, and again it was felt that suitable accommodation might be available in church halls or schools.

1.51 Australian experience, on the other hand, suggests that such solutions may not be successful. Mr Justice Fogarty, writing in 1985,⁵⁸ points out that when the Australian Family Court first came into operation in 1976, the larger registries were placed in commercial buildings and the courts were designed to give an air of informality and smallness. The government in power at that time was not over-enthusiastic about the Family Court and did not wish to lay out capital for the construction of new court buildings. Mr Justice Fogarty observed:

"There is no doubt that these decisions have proved most unsuccessful and have had an influence on the negative image which the court has developed ... People have a concept of what a court is and a good deal

58 *Family Court - Possible Future Directions*, (1985) 8 U.N.S.W.L.J. 204 at 206.

of confusion and disappointment flowed from the circumstances that the Family Court and its adjudications did not conduct its proceedings within that framework. It was seen physically as tatty and second-rate, and its informality was seen as uncaring, and many litigants had difficulty separating the judicial process from the conciliation process and taking the proceedings with the seriousness that is essential. These views I think now are widely accepted".⁵⁹

(2) *Geographical Accessibility*

1.52 Many persons and bodies advocating the creation of Family Courts have laid emphasis on the accessibility of such courts, i.e. that the courts would be geographically widespread and, hence, easily accessible to litigants.⁶⁰ This issue is linked with that of accommodation, since any difficulties of financing suitable central Family Court accommodation will be increased by placing Family Court centres around the country.

1.53 In March 1990 the government decided to transfer financial responsibility for the court accommodation outside Dublin from the Local Authority to the Exchequer. This arrangement was "intended to ensure that court houses in greatest need received priority and that appropriate facilities are provided in each location - for example, through the provision of special facilities for Family Cases where this type of special facility is considered desirable, warranted by the amount of business arising and capable of being accommodated in the space available without undue cost".⁶¹

1.54 The Department of Justice White Paper on Marital Breakdown states at Proposal 16 that a "Special Family Law Court room will be provided in future large scale projects. The more urgent requirement of decent interview facilities for District Court Clerks to meet Family Law Clients will be given priority as schemes come up".

1.55 In some countries, the issue of accessibility is addressed by placing the Family Court at District Court level. In New Zealand, for example, the Family Court is a division of the District Court. In Japan, Family Courts are at a higher level than the lowest court, the Summary Court, but Family Courts are located around the country at the seat of every summary Court. The Canadian Law Reform Commission laid emphasis on the accessibility factor, saying that it was "a prerequisite to the resolution of disputes", because in the changing circumstances of a family situation, the parties should be able to apply without delay to the judge to consider the new circumstances and, where appropriate, to

59 *Ibid*, at 207.

60 In recommending that certain jurisdictions of the High Court be transferred to the Circuit and District Court prior to the *Courts Act, 1981*, the Twentieth Report of the Committee on Court Practice and Procedure specifically referred to the 'considerable advantage of local venues': Twentieth Report of the Committee of Court Practice and Procedure, Increase of Jurisdiction of the District Court and the Circuit Court (Pri. 7459), p.11.

61 Department of Justice, *Marital Breakdown, A Review and Proposed Changes* (PL. 9104, 1992), para. 9.13.

vary the original order.⁶² This Commission favoured the creation of a Family Court at Superior Court level, but said that superior court judges would be resistant in a number of provincial centres.

1.56 The Ontario Law Reform Commission also laid emphasis on accessibility, but came to a different conclusion. It felt that the creation of a Family Division of the Supreme Court would cause problems of delay and would mean that the Judge would not be as familiar with the resources of the community as he should be. This Commission felt that it should be mandatory that the Family Judge reside in the community he serves. It recommended the creation of a separate Family Court and that there be a branch of the court in each country and district in Ontario.

Conclusion

1.57 The absence of research on family law matters in Ireland⁶³ makes it difficult to gauge whether litigants in family law proceedings find traditional courtroom structures too formal and overbearing or whether they would prefer to travel further afield to avail of facilities purpose-built for the resolution of family disputes. There would appear to be general agreement, however, amongst persons involved in family law matters that traditional courtroom facilities are ill-equipped and unsuitable for family law proceedings. Any proposals for the overhaul or replacement of present facilities would need to take into account concerns, on the one hand, that litigants should feel comfortable and uninhibited by their surroundings, and concerns, on the other hand, that proceedings may not be taken seriously enough in an overly casual setting.

62 Working Paper No. 1, *The Family Court*, p.12.

63 See below chapter six.

CHAPTER 2: ALTERNATIVE MEANS OF DISPUTE RESOLUTION

PART 1: MEDIATION

2.01 The last two decades have witnessed a growing interest in the provision of mediation services to parties in a marital dispute in many jurisdictions. We shall be examining the meaning of mediation in more detail shortly, but at this point it suffices to note that mediation is a process in which a third party, a mediator, helps the parties in a dispute to resolve it by agreement. The outcome of a successful mediation is an agreement that is satisfactory to all the disputants and is structured in a way that attempts to maintain the relation of the people involved. Proponents of mediation argue that it is ideally suited to many family disputes.

2.02 Mediation services are not intended to supplant the existing adversarial process, but rather to divert certain cases away from it. Some cases will inevitably end up in court as no agreement will be forthcoming. Equally importantly, there are certain types of case which should generally go to court and may not be appropriately resolved by mediation. Such cases include those where there is serious violence against one of the spouses, or where there are allegations of child sexual or physical abuse, or where a declaration of legal status is sought. Mediation should be viewed only as one of a number of methods employed in the resolution of marital disputes.

2.03 The principal existing methods of resolving marital disputes in Ireland consist of the adversarial court hearing and the settlement negotiated by lawyers. Bearing in mind that a mediation service would co-exist with these methods of resolving disputes, what does mediation offer to the parties?

The following arguments *inter alia* are put forward in support of mediation.

- Adversarial court hearings may exacerbate the friction and hostility inherent in most marital disputes, while the emphasis in mediation is rather on fostering co-operation and establishing workable arrangements for the future.
- Mediation offers the parties an opportunity to take control over their future arrangements, instead of leaving it in the hands of professionals.
- The costs of mediation may be less than the costs of a full hearing and disputes can be resolved more quickly than through the court process.
- Arrangements reached through agreement are more likely to be adhered to than solutions imposed by a court. This is especially so in arrangements relating to child custody and access.
- Mediation is private. Mediation usually limits outside intervention (with the exception of legal advisers) to one professional.

2.04 The movement in favour of mediation services has not been without its critics. Arguments against mediation include the following.

- The process of mediation with its emphasis on the voluntary agreement of the parties tends to mask social and economic imbalance between the parties. The economically dependent spouse, usually the wife, is generally in a weaker contracting position than her partner.
- Mediation designates agreement between the parties as its aim, and it operates without the protection of legal norms and principles.
- Mediation removes control from the parties, even where its intention is to give them greater control. This criticism is associated in particular with schemes where the mediator actively encourages a particular form of settlement rather than letting the parties define their own terms.
- Mediation instead of deregulating proceedings, actually extends regulation,¹ in particular under in-court schemes where experience shows that the professionals may tend to dominate and the affair becomes more adjudicative than conciliatory in nature. Mediation may also extend regulation in that simpler, alternative means of settlement might have been used if mediation were not available, such as settlement through solicitors. "In other words, the rhetoric of 'private control' and 'informal decision making' conceals the reality of a dramatic extension of the coercive regulation of the divorce process".²
- The cost of mediation may be significant, and it is not established that

¹ John Dewar, *Law and the Family* (Butterworths, 1989), p.194.
² *Ibid.*

it is in all cases less than the cost of court proceedings.

Definition Of Terms

2.05 The terms "reconciliation", "conciliation", "counselling" and "mediation" are often used interchangeably. However, we shall use the terms as follows:

Reconciliation involves the resolution of the differences between parties to a marital breakdown or crisis with the result that the marriage continues or resumes.

Counselling is a more general term and involves professional assistance to parties with respect to their psychological and emotional problems. Counselling may be directed towards the individual or it may address the parties' relationship.

In this chapter, we shall be using the terms "*conciliation*" and "*mediation*" synonymously. Although certain commentators prefer to distinguish them, in reality conciliation services in one country often closely resemble mediation services in another. As the term "conciliation" tends to be confused with "reconciliation" we prefer where we have a choice, to use the term "mediation". However, in describing services in other countries it may sometimes be necessary to use the term "conciliation".

2.06 Unlike reconciliation, conciliation/mediation proceeds from the premise that the marriage has broken down and seeks to promote agreement between the parties on specific legal and practical issues, such as child custody, property matters and maintenance. The following are merely a sample of the numerous definitions of mediation/conciliation which have been put forward:

"Mediation in family law matters is a voluntary non-adversarial alternative dispute resolution mechanism in which an impartial mediator assists families to reach a mutually satisfactory agreement on issues affecting the family. In so doing, mediation tries to assist parties to come to an agreement in the hope that it will encourage increased compliance with the agreement and thereby reduce the need to return to the court for enforcement or clarification. Mediation also seeks to provide people with negotiation skills which will allow them to resolve future disagreements about matters affecting the family. It serves to reduce family tension and conflict, reduces the needless wasting of the family's money through unproductive litigation, and may reduce the court's workload in the area of family disputes, thereby arguably saving costs in the administration of justice."³

"Conciliation may be defined as a structured process in which both

3 This definition was contained in material sent by The Honorable Mr. Justice Waish of the Supreme Court of Ontario, but we are unable to locate its source.

parties to a dispute meet voluntarily with one or more impartial third parties (conciliators) who help them to explore possibilities of reaching agreement, without having the power to impose a settlement on them or the responsibility to advise either party individually."⁴

"[Conciliation involves] assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or separation, by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees, and every other matter arising from the breakdown which calls for a decision on future arrangements."⁵

"... Conciliation means some kind of structured scheme or facility for promoting a settlement between parties."⁶

"The essence of conciliation [is] that responsibility remains at all times with the parties themselves to identify and seek agreement on the issues arising from the breakdown of their relationship."⁷

2.07 The extended code of practice of the National Association of Family Mediation and Conciliation Services in England (NAFMCS) states:

"The primary aim of mediation is to help couples involved in the process of separation and divorce to reach agreements or reduce the area or intensity of conflict between them, especially in disputes concerning children."

In the short term, the objective of mediation is to help the parties reach a workable settlement which takes account of the needs of the children and adults involved. The longer term objective is to help both parents:

- (1) maintain their relationship with their children, and
- (2) achieve a co-operative plan for their children's welfare.

NAFMCS defines the process as an intervention in which a third party assists the parties to a dispute to negotiate over the issues that divide them. The mediator has no stake in the dispute and is not identified with any of the competing interests involved. The mediator has no power to impose a settlement on the parties who retain authority for making their own decisions. The mediator is therefore responsible for the conduct of the process (which is held to be discrete

4 Lisa Parkinson, *Conciliation in Separation and Divorce* (1986), p.52.

5 *Report of the Committee on One-Parent Families* (Finer Committee), H.M.S.O. Cmnd. 5629 (1974), para. 4.288.

6 *Report of the Interdepartmental Committee on Conciliation* (The Robinson Committee) (1983), H.M.S.O., para. 1.2.

7 *Report of the Committee on Matrimonial Causes Procedure* (The Booth Committee), (1985), H.M.S.O., para. 3.10.

and unambiguous) but is not responsible for the outcome.

2.08 We may distinguish mediation from other forms of intervention. For example, mediation is not a therapeutic process:

"Participation in mediation may or may not have a therapeutic effect on the parties, but it is not designed as a traditional therapeutic process. It is not focused on insight to personal conflict or in changing historically set personality patterns ... Mediation is task-directed and goal-oriented. It looks at resolution and results between the parties rather than the internalized causes of conflict behaviour."⁸

Mediation is not like arbitration. In arbitration, the parties authorise a third person to decide upon a binding resolution of the issues, and although the proceeding is less formal than in court, the process is adjudicatory. In contrast, the parties to mediation may choose a mediator but do not authorise the mediator to make decisions for them.

Features Of Mediation Schemes

2.09 Several different types of mediation service will be described in the following pages. In compiling these descriptions, the Commission has focused attention on the following components of the mediation services offered in all of the various jurisdictions examined:

- (1) Location of the service: Is it based in court (an in-court scheme), outside the court (an out-of-court scheme), or is it a hybrid of the two, such as where an in-court officer refers parties to an out-of-court service?
- (2) Timing of Intervention: Is mediation offered before the court process is initiated, before the court hearing, or in the course of proceedings?
- (3) Who makes the referral to mediation/conciliation - the parties, solicitors, court officers, or judges?
- (4) Funding of the service: Is it paid for by the parties, is the service free of charge and funded by the State, or is it paid for sometimes by the parties and sometimes by the legal aid fund?
- (5) Coercion: Is use of the service compulsory or voluntary?
- (6) Staffing of the service: Is it staffed by trained mediators, social workers, probation officers, registrars, judges?

8

Folberg, "Divorce Mediation - The Emerging American Model", in Eskelaar and Katz, eds., *The Resolution of Family Conflict*, at p.194.

- (7) Enforceability: What is the end product of the mediation/conciliation - an agreement, a court-backed agreement, a court order?
- (8) Scope of the service: Does it deal with custody and access of children, financial and property issues, unmarried couples?

Ireland

2.10 In June, 1984, the Department of Justice held a Seminar on Conciliation in Family Law Cases, indicating perhaps the first official interest in the subject.⁹ Before the Divorce Referendum in 1986, the Department issued a *Statement on the Government's Intentions with regard to Marriage, Separation and Divorce*¹⁰ which proposed changes in procedures for separation and gave details of the proposed divorce legislation. This Statement included a proposal to set up a Family Court to be presided over by one of a number of Circuit Court Judges specially assigned for the purpose. The Government further proposed that:

The Family Court will enquire into whether mediation services have been or should be availed of by the spouses to assist them in attempting a reconciliation and will have power to adjourn the proceedings so that recourse may be had to these services where it considers it necessary or appropriate to do so. The mediation process will be undertaken by registered counselling agencies¹¹

Where it emerges that no reconciliation of the partners to the existing marriage is possible, a conciliation process, designed to secure agreement between the parties in a non-confrontational manner on the terms of the separation, will then follow, to be undertaken by the existing voluntary bodies, or should these bodies prefer not to undertake this conciliation work on behalf of the Court, through a conciliation service attached to the Court itself.¹²

2.11 In 1985, the Joint Committee on Marriage Breakdown described the essential features of mediation as follows:¹³

- (1) that it accepted that the marriage had broken down and was therefore totally different from reconciliation;
- (2) that it conveyed the idea that the parties should be responsible for resolving their own disputes; and
- (3) that it was designed to deal with specific problems caused by

9 Department of Justice, *Conciliation in Family Law Cases Seminar*, June 1984.

10 *Statement of Government's Intentions with regard to Marriage, Separation and Divorce*, Department of Justice, Dublin (April 1986).

11 *Ibid* at 2, para. 8.

12 *Ibid*, para. 9.

13 Chapter Eight of the *Report of the Joint Committee on Marriage Breakdown*, 27 March 1985, Pl. 3074.

breakdown and provided a basis for continued interaction and co-operation between the spouses.

2.12 The Committee favoured a mediation model in which a third party would be present with the two spouses and would act from a position of neutrality to help the parties towards an agreed outcome, providing assistance by helping to formulate their positions, identifying options and pointing out the consequences of these options. The Committee preferred this model because it allowed the parties to retain control over their case, and because decisions reached in this way would be more likely to be adhered to, because it encouraged the spouses to focus on the interests of the family as a whole, because it would establish a pattern of communication for the future, and because it would reduce expense, delay and costs for spouses and for the State.

2.13 The Committee examined three schemes of mediation: (1) an independent mediation service, (2) mediation through the Court Welfare Service, (3) mediation by a judge or person in a quasi-judicial capacity. It favoured the independent mediation service. It envisaged the use of this service at an early stage of proceedings, preferably before court proceedings had arisen. The Committee recommended that such a service be nationwide so as to avoid difficulties of diverse approaches, staff levels and organisation as had been encountered in England by reason of the existence of separate independent mediation services.

2.14 The Committee did not favour mediation through the Court Welfare Service (or "in-court mediation") for a number of reasons. The first was practical, namely the limited nature of the welfare service attached to the Irish courts. A second reason was that one of the functions of the Welfare Service, if attached to the proposed Family Court, would be the preparation of independent reports to the courts on family circumstances. It was felt that persons would be unlikely to enter mediation if they suspected that what they said would be reported in court proceedings.

2.15 The Committee also rejected the idea of mediation by a judge or person in a quasi-judicial capacity, because the parties would tend to be intimidated by the status of the mediator and the surroundings in which such mediation would take place. In particular, persons would find it difficult to realise that the decision-making power lay in their hands despite the presence of a Judge. Also judges might be inclined to turn mediation into adjudication. Finally, it was unlikely that the court system would have sufficient time to set aside for effective mediation.

2.16 Regarding the scope of the service, the Committee felt that the issues of property and finance should be included within the scope of the service. The mediator would have a good working knowledge of the relevant law and the parties would receive legal advice from their lawyers.

2.17 As for methods of referral, the Committee rejected the idea of

compulsory participation in a mediation scheme as being contrary to the spirit of mediation. It recommended instead that active steps should be taken to inform persons of the existence and nature of the scheme, i.e. that it be widely publicised generally and to those dealing regularly with marital breakdown - lawyers, social workers, doctors, counsellors. It recommended that the originating document in family proceedings contain a paragraph informing the parties about the mediation service - what it is, how it could assist them, and costs. The Committee recommended that the adjournment of cases should be possible if both parties wish to attend mediation and that all communications between spouses during mediation be privileged and, therefore, not available as evidence in subsequent proceedings without the consent of both parties. It recommended a simple and inexpensive procedure whereby the agreement reached through mediation would be noted and accepted by the court.

2.18. Some of the Joint Committee's recommendations have been implemented. The *Judicial Separation and Family Law Reform Act, 1989* contains provisions which *inter alia* place an obligation on lawyers to suggest reconciliation, agreed separation and mediation to clients seeking judicial separation¹⁴, allow the court to adjourn cases to facilitate reconciliation, mediation and agreed separation¹⁵, and provide for privilege in respect of communications made during mediation.¹⁶ The Committee's proposal for a nationwide mediation service has not been implemented. The Family Mediation Service (FMS) was established in Dublin in 1986 as a relatively small pilot scheme and its future expansion is currently under examination by the Department of Equality and Law Reform. In the next section, we examine the scheme presently being administered by the FMS in Dublin.

14 Section 5(1) provides that a solicitor acting for an applicant for a decree of judicial separation shall, prior to the making of the application:

- (a) discuss with the applicant the possibility of reconciliation and give to him the names and addresses of persons qualified to help effect a reconciliation between spouses who have become estranged;
- (b) discuss with the applicant the possibility of engaging in mediation to help effect a separation on an agreed basis with an estranged spouse and give to him the names and addresses of persons and organisations qualified to provide a mediation service and,
- (c) discuss with the applicant the possibility of effecting a separation by the negotiation and conclusion of a separation deed or written separation agreement.

Section 5(2) provides that an application for judicial separation must then be accompanied by a certificate by the solicitor stating that the above provision has been complied with. Where a solicitor does not so certify, the court may adjourn the proceedings for such period as it deems reasonable for the applicant's solicitor to discuss this matter with the applicant. Section 8 places the same obligation on the solicitor acting for the respondent in an action for judicial separation as soon as possible after receiving instructions from the respondent.

15 Section 7(1) provides that where an application is made under the Act for a decree of judicial separation, the court must give consideration to the possibility of a reconciliation of the spouses concerned and may adjourn the proceedings at any time for the purpose of affording the spouses an opportunity to consider a reconciliation with or without the assistance of a third party. Subsection (2) provides that where it appears to the court that no reconciliation is possible, it may adjourn or further adjourn the proceedings for the purpose of affording the spouses an opportunity to establish agreement, with or without the assistance of a third party, on the terms of the separation. Subsection (6) provides that where the court adjourns proceedings, it may at its discretion advise the spouses concerned to seek the assistance of a third party for the appropriate purpose.

16 Section 7(7) provides that any oral or written communication between either spouse or any third party, whether or not made in the presence of the other spouse, and any record of such communication caused to be made by such third party, shall not be admissible as evidence in any court.

The Family Mediation Service

2.19 On the 1st September, 1986, the Family Mediation Service opened its doors to the public. It was set up as a three year pilot scheme under the auspices of the Department of Justice and has continued in operation despite the lapsing of its time limit. The scheme closely identified with that proposed by the Joint Committee of Marriage Breakdown. As we have already noted, it is an out-of-court, voluntary and free service. It is located at the Irish Life Centre, Lower Abbey Street, Dublin 1. It is staffed by a full-time co-ordinator who is a trained mediator, a secretary, and four part-time professionally trained mediators.

2.20 The Family Mediation Service was set up following the recommendations of a voluntary steering committee, which adopted the following definition of mediation:

Mediation is the means or process whereby a couple whose marriage has broken down and who have a specific intention to separate may reduce any areas of conflict, by discussing with each other together with a mediator, voluntarily and confidentially, such matters which need to be dealt with as a result of their separation and reach such agreements with each other as are in the balanced interest and long term benefit of themselves and their family.

The service is available to couples who have decided to separate or who are already separated. It is not a marriage counselling service. If couples enter into mediation and subsequently decide that they wish to continue the marriage, they are referred to a counselling agency.

2.21 The mediation process in the Family Mediation Service has been described as follows.¹⁷ The whole process takes anything from 2 to 6 working sessions and covers an introduction, exploration of the issues and options, negotiation and decision-making, writing up the agreement and review. In the introduction, the mediator clarifies the process to the couple, his or her role, and the issues. The couples are informed that mediation is a co-operative process and that the mediator is there to guide and structure their discussions so that they can make their own agreements. The separation is then explored, as well as the issues on which agreement will be required. In the next few sessions, each issue is taken one at a time - finance, property, children. All the options are explored and the couple is asked to mull them over until the session on negotiation and decision-making. Once all the options are explored, the parties go through a negotiation and decision-making session. Once decisions are made, the mediator goes through a rough draft of the agreement with the couple. Finally, the agreement is written up in a document in a clear and simple way. Each spouse then takes an unsigned copy to his or her solicitor to draw up a legal agreement, if required. Having made the agreement, the couple is invited to bring in the children and include them in a joint session in which the

¹⁷ A. Connolly, *Stages in the Mediation Process*, in *Mediation: A Positive Approach to Marital Separation* (published by the Family Mediation Service) (1989).

separation and the future plans will be explained to them. A review session is set for 6 months after the last session to give the couple a chance to implement the arrangements. The review session allows the spouses to air feelings, and enables the mediator to assess the effectiveness of various options. If there are major conflicts, a further session may be arranged.

2.22 The Family Mediation Service observes the following Rules of Family Mediation:

1. Mediation is a process where parties in dispute, with the aid of a mediator, negotiate their own agreement.
2. Mediation offers an alternative to the adversarial legal system. It differs from arbitration, marriage counselling and therapy in important ways. Mediation is not a legal advice service. The principle underlying mediation is that couples take responsibility for resolving their own disputes as opposed to decisions being made for them by a third party as in arbitration.
3. Mediation can only work if it is entered into freely and with the participation of both parties.
4. All issues arising from the dispute are open for negotiation. In marital separation these include parenting, living arrangements, family home, financial support, property, education, health and welfare of children.
5. All discussions arising out of mediation are confidential and the mediator will not voluntarily disclose any information obtained through the mediation process, with the exception of non-identifying information for research or education or where consent has been given to disclose information by all affected parties.
6. The mediator does not take sides or testify voluntarily in court on behalf of either party.
7. The mediator promotes the balanced interests of the whole family.
8. To ensure that participants make decisions based upon sufficient information, it is important that a full and frank disclosure is made of all financial and other relevant information.
9. It is advisable for each party to:
 - (a) take the agreement prepared in mediation to their respective solicitors to have it formalised before signing; and
 - (b) where appropriate, seek outside consultation on long-term acts and legal consequences of different proposals.

10. In the event of a breakdown in the agreement or of any change in circumstances affecting the agreement the parties will return to mediation to renegotiate the issues in question.
11. Either party or the mediator has the right to suspend or withdraw from mediation at any time.

2.23 According to the latest statistics submitted by the Family Mediation Service to the Department of Equality and Law Reform, between 1st September, 1986 and 31st December, 1992 there were 5,531 requests for initial appointments. Of these 3,525 received advice and information only, because the request was unsupported by the other spouse. The remaining 2,006 were given appointments. Of these 1,437 couples attended mediation, 774 reached a mediated agreement on all disputed issues and in 102 cases, the couples were reconciled. The demand for mediation is increasing. In September 1991 there were 80 couples undergoing mediation, while 70 couples were on the waiting list. By July 1993, there were 120 couples on the waiting list, an increase of over 70% in just over a year and a half.

2.24 On April 25 1990, Mr. S. Barrett, T.D. asked the Minister for Justice in the Dáil¹⁸ if he would make a decision regarding the future of the FMS following the report which he received from the Committee in September 1989 containing recommendations for setting up a permanent structure. The Minister for Justice, Ray Burke, said that in light of the report on the pilot scheme, he considered that a number of wider issues needed to be examined before decisions were reached on the long-term future of the service. The Minister proposed to appoint a committee to examine all the various options, having regard, among other things, to such matters as mediation services provided privately, quality of service, geographical distribution, cost-effectiveness. The Minister would then put a proposal to the Government on the matter.

2.25 To date, no committee has been appointed. In its White Paper on Marital Breakdown (1993), the Government recognised the success of mediation services and proposed to determine the nature of appropriate long-term mediation services. There have since been three important developments. First, there has been a heightened awareness of the potential of mediation in the media, in social service organisations and in educational establishments. Second, responsibility for mediation has been moved from the Department of Labour to the new Department of Equality and Law Reform. Third, the Minister for Equality and Law Reform, Mr. Mervyn Taylor, T.D., in a recent press release (Wednesday, 10th March, 1993), paid tribute to the work done by the Family Mediation Service since its establishment in 1985. He said "it would be all the more important in the future to have a strong Family Mediation Service particularly in the context of the proposed referendum for the removal of the ban on divorce from our Constitution". The Minister said that the best way this could

be achieved was by putting the service on a statutory basis.

Training And Selection Of Mediators In Ireland

2.26 The Family Mediation Service is conscious of the importance of laying down standards in the selection, training and accreditation of mediators. Up to now, the Family Mediation Service has used the United States system of accreditation and qualified mediators are associated to the American Academy of Family Mediators; indeed most mediation trainers used in Ireland are from the United States.

2.27 The requirements set down by the Family Mediation Service for the practice of mediation are in line with international standards of the Academy of Family Mediators. These include:

30 hours core mediation skills and 30 hours of specialist training in marital separation,

100 hours of face to face supervised practice and completion of at least 15 cases together with submission of six mediated agreements with notes,

continuing education, minimum 20 hours every two years.

In total this is equivalent to approximately three and a half months of immersion training. Those who seek training in mediation in Ireland normally obtain their training at the Family Mediation Service or attend an introductory sixty hour programme given by a small number of qualified mediators. This intensive training is complemented by private supervision. Some introductory training in mediation, though not as comprehensive as the above, is also provided by groups of psycho-therapists and counsellors. However, there is some debate with regard to the different models of mediation that are used by psycho-therapists and counsellors.

2.28 Despite the comprehensive training and accreditation process operating in the Family Mediation Service, there is real concern at the increasing number of people who are practising mediation around the country, who are not subject to any control or ongoing supervision and may have had little or no training. It has been suggested by the Family Mediation Centre that training should be centralised with Government approval and financing at a designated training centre.

2.29 The Mediators Institute of Ireland, a professional body of mediators has prepared a document examining the possibility of setting up an Irish accreditation system. At the time of writing, this document has not been published. The criteria for selection for training by the Family Mediation Service include:

A degree in Social Science, Psychology, Law, or a recognised diploma in Counselling.

- A minimum of three years practice in one's primary profession.
- And general suitability for training in mediation. Candidates have to have a reference from a university lecturer or tutor stating their suitability for training and they have to provide a personal statement setting out their reasons for wanting training. Candidates are also interviewed by the Co-ordinator of the Family Mediation Service.

2.30 In England any person with a relevant degree or professional qualification or with five years work experience in Human Relations or Management is eligible for selection or training by the NAFMCS. A new pilot selection procedure was introduced by NAFMCS in Spring 1993, which widens the entry base by selecting trainees on the basis of their *aptitude* for mediation, mainly assessed at the level of interpersonal skills, supplemented by an educational or professional qualification. Trainees on the programme tend to come from a wide range of professional backgrounds and they include teachers, family lawyers, nurses and administrators. However, reservations have been expressed about any system of selection which looks primarily at aptitude at the expense of academic qualification. For a comparative analysis of mediation services in other jurisdictions, see Appendix 1.

MISCELLANEOUS ISSUES PERTINENT TO MEDIATION

A. Power Imbalance In Mediation

2.31 Perhaps the most important criticism of the mediation process is that, in emphasising the importance of reaching agreement between the parties, mediation pays insufficient attention to the power imbalances inherent in many marital relationships. The wife is usually seen as the more vulnerable partner as she is more often economically dependent on her husband.

"Women are usually the financially dependent spouse and often the victims of a sexist dynamic which has involved giving in to their spouses on a regular basis. This dynamic, combined with financial dependence, can easily leave the woman very vulnerable to pressures which might be inappropriately applied to her in mediation. As a result, she might agree to something which is not in her best interests".¹⁹

2.32 However, a power imbalance may arise for many reasons. A 1989 report by the Ontario Advisory Committee on Family Mediation²⁰ listed some of those reasons including domestic violence; one spouse having greater earning capacity or being more experienced in business and financial matters than the other, and one spouse being more confident than the other. The report noted that the disadvantaged spouse tends to be the wife and that such disadvantage may be

¹⁹ Sachs, 'The Dejudicialisation of Family Law: Mediation and Assessments', in B. Hovius, *Family Law, Cases, Notes and Materials*, 2nd ed., p.33.

²⁰ A 'Summary of Women's Concerns about Mediation' was included in the Report.

compounded by women's tendency to be self-sacrificing, to make do, and to negotiate for their children rather than for themselves.

2.33 Some commentators take the view that such sexist imbalances are so pervasive that it means that many couples - in one study cited by the Ontario Advisory Committee, up to 25% of couples - are found to be "unsuitable for mediation". Power imbalance may also arise for psychological reasons. For example, one spouse may be desperate to maintain the relationship or to obtain custody or access to the children, or may feel so burdened by guilt about behaviour in the marriage or about initiating the separation, that she/he is unable to assume an equal bargaining position. Some of these issues can be addressed by proper screening procedures. For example, there can be a policy of not mediating in cases of domestic violence or where one spouse has not accepted that the marriage is over. Other issues can and are normally addressed during the process of a properly conducted mediation. For example, mediation may be terminated when it becomes clear that one partner is consistently intransigent, domineering or unwilling to disclose information.

2.34 Another concern raised by the Ontario Advisory Committee was that a mediator would bring to the process his or her own values about the role of women. However, it could be argued that such bias, or gender stereotyping, applies equally if not more so to litigation, where judges are predominantly male. It may also be said that the risk of bias or gender stereotyping may work equally to the disadvantage of men if, for example, the mediator assumes that women are necessarily better at child rearing. However, just as the judge's bias is constrained by legal norms and rules, the mediator's bias is constrained by the ethos and process of mediation. The agreement is negotiated by the parties themselves and is not imposed by a third party. If the mediator is pushing a stereotyped solution not agreeable to one of the clients, that client is free to refuse it.

B. Legal Protection

2.35 Mediation is a means of settling family law disputes outside the adversarial court forum. Yet the very fact that it is conducted outside court means that the procedural and substantive rules that would be employed in a court are absent. This is an advantage in that the informality tends to be more conducive to agreement. However, there is a fear that the absence of such safeguards leaves a party exposed to the risk of agreeing to unfair arrangements. For example, a spouse may agree to a specific amount of maintenance in order to obtain custody of the children, when that spouse might have obtained a higher rate of maintenance as well as custody in court. Full disclosure in respect of financial means may not be forthcoming. The view has been taken throughout this chapter that mediation is intended to complement, rather than supplant, the adversarial court process. Thus, parties may choose to participate in mediation because of the benefits that it offers. In this sense, the parties can choose to waive their strict legal rights and to negotiate instead on the basis of their mutual needs and interests. However, it is felt that such choice must somehow be an

informed choice, and that mediation should not become a means of depriving parties of their rights. In light of such considerations, it is generally felt that certain legal safeguards should be built into the mediation system. These safeguards tend to take any or all of the following forms:

2.36 *The parties should be encouraged to seek independent legal advice before and during the hearing.*

In this respect, it should be observed that the 1989 Report of the Ontario Advisory Committee on Family Mediation recommended as follows:

Conclusion 33: Mediators should not provide legal advice to their clients and should so advise clients at the outset. They should encourage clients to obtain legal advice before negotiations begin and before concluding any agreement

Conclusion 34: Clients should be placed in a position to make informed decisions during mediation. Independent legal advice should be available and strongly encouraged by mediators at every stage of mediation but particularly early in the process, before negotiations begin, and before concluding any agreement.

2.37 *Legal advisers should be present during the hearing.*

One difficulty with this type of safeguard is that the presence of legal advisers may render the atmosphere of mediation somewhat more formal and adversarial, thus diluting the atmosphere which is said to foster agreement. Substantial extra costs may also result.

2.38 *The mediated agreement should be reviewed by the court.*

Such a legal safeguard is also somewhat problematic. If review is to have any teeth, the judge would have to be able to vary or reject the agreement, which may be at odds with the process of mediation. The view has also been expressed that judges are not well placed to detect and remedy unequal bargaining power.²¹

"The requirement of judicial approval of post-marital agreements might be justified on the ground that the state has an interest to ensure that the results of the bargaining process are fair as between the spouses. A judicial proceeding might protect people from their own ignorance and might also be thought to prevent unfair results arising from the unequal bargaining capacity of the spouses. These arguments are sensible in the abstract, but the reality of the current system suggests that they mean very little in practice. Courts typically rubber stamp an agreement

21 Mnookin and Kornhauser, *Bargaining in the Shadow of the Law*, (1979) 99 *Yale L.J.* 950. In the following quotation, the authors are discussing judicial review of negotiated agreements in general, rather than judicial review of mediated agreements specifically.

reached by the parties. Moreover, there are reasons to doubt the necessity of judicial review of private agreements for the purpose of preventing unfairness. There may well be cases in which one spouse (stereotypically the husband) is highly sophisticated in business matters, while the other spouse is an innocent lamb being led to the slaughter. But married couples more typically have similar educational and cultural backgrounds, and most individuals perceive very well their own financial interests and needs at the time of divorce.

... The problem with the current system is that all cases must pass through the judicial net and that there are no standards or procedural mechanisms specifically designed to bring cases of unequal bargaining to the judge's attention; the sheer quantity of cases that a judge must oversee probably decreases the chances that he can pick out and give appropriate attention to the right cases."

Mnookin and Kornhauser suggest two further possible advantages of judicial review of negotiated agreements. The first is that the spectre of court review means that the parties may deal with each other in a fairer way and "may be more likely to reach an agreement reflecting appropriate social norms".²² The second is that the prospect of judicial review might improve the quality of negotiations from the child's perspective:

"Some parents might otherwise engage in divorce bargaining on the basis of preferences that narrowly reflect selfish interests, rather than concern for the child. The spectre of review might serve as an important reminder to the parents of the social concern for their children, and might somehow constrain selfish behaviour."²³

Mnookin and Kornhauser again question the reality of these arguments, in light of the fact that courts rarely overturn parental agreements and the minimal time devoted to scrutinising agreements.

2.39 *Review of mediated agreements by legal advisers following mediation.*

This is the most common safeguard, and is the practice following mediation in the Irish Family Mediation Service. Folberg suggests that given the high rate of settlement of family cases within the existing system, review of mediated agreements by legal advisers affords at least as much protection as judicial review:

"Given that the initial mediated agreement is formed with the assistance of a neutral person rather than someone ethically bound to advance the interest of one party, independent legal review by an attorney for one spouse pursuant to a 'fair enough' standard should assure at least as

22 *Ibid.*, at p.994.

23 *Ibid.*

great a fairness safeguard as the common reality of our present adversary system. When both parties to the mediation obtain independent legal review, as they are encouraged to do, then there is a double check of what is fair enough."

If there is to be review of mediated agreements by legal advisers, there must be some adjustment on the part of legal advisers. Solicitors are accustomed to obtaining the maximum possible for their clients, whereas the notion underlying mediation is the reaching of agreement, without, as it were, exacting one's pound of flesh. It is pointless to undergo the process of mediation if the agreement reached is going to be ripped apart by legal advisers informing their clients that they could bargain for more. Considerable understanding of the process and advantages of mediation on the part of legal advisers is required if legal review of mediated agreements is to be a satisfactory and workable safeguard.

In this context, it is to be noted that the absence of independent legal advice would probably not, under the present law, be a ground for setting a mediated agreement aside. This is the position with regard to separation agreements in respect of which no independent legal advice was sought.²⁴

It might also be noted that the Advisory Committee on Family Mediation in Ontario (1989) felt that mediators should *not* draft the mediated agreement and then send it to independent lawyers for execution, but rather that the mediator should simply provide clients at the conclusion of mediation with a memorandum summarising their points of agreement and disagreement. The clients would then determine whose lawyer would take responsibility for the drafting of the final agreement. The Committee accepted that this might increase costs and perhaps even jeopardise the agreement, but preferred this to the risks inherent in mediator drafting which it saw as being dangerously close to providing legal advice.

The Code of Practice of the English National Family Conciliation Council also provides that "both parties should be encouraged to seek legal advice" and "both parties should be warned not to enter into an agreement without first seeking legal advice on its terms". The conciliation service should send, as soon as possible after a referral from solicitors, a written acknowledgement to each solicitor, indicating the date of the first appointment and how long the conciliation process is expected to last. Where circumstances require and especially where the process is prolonged, the conciliator should send each solicitor an interim summary in terms agreed by both parties. At the end of conciliation, the conciliator should prepare for each party and their solicitors a summary of the outcome, marked "without prejudice". This should recommend proposed arrangements, stating that these are subject to legal advice.

24 V.W. v J.W., 10 April 1978, unreported, High Court.

C. Financial Implications

2.40 It is anticipated that the most vociferous objections to the provision of a nationwide state-funded mediation service in Ireland will be on the basis of cost. Indeed, when this issue was raised in the discussions of the Working Group on Family Courts, it was generally agreed that the financial costs involved in the setting up of a comprehensive, cost-free, nation-wide mediation service in Ireland were prohibitive. Several of the participants suggested that a two-tiered system might be the best solution to this problem, i.e. a mediation service should be established nation-wide which would be means-tested and free for those who could not afford it, while alternative services could also be set up by a network of private mediators.

2.41 It should be noted that this issue has produced divergent views in England, despite the establishment of a committee to examine precisely the issue of cost-savings. The Robinson Committee focused on the financial implications of providing a nationwide conciliation service, and concluded that an out-of-court service would not be cost-efficient and that the most practical course was to attempt to base conciliation around an in-court model. The Newcastle Project also found that conciliation, whether court-based or independent, involves a significant addition to the cost of settling disputes.²⁵

2.42 Eekelaar and Dingwall have recorded three main objections voiced against the Robinson Committee's conclusions:

"The *First* was the *choice of outcome measure*. The Robinson Committee measured success solely in terms of pre-court settlement achieved at the time of the meeting. The independent sector complained that this underestimated its contributions. In England, its members do not claim to tackle finance and property disputes, so that a low rate of achievements in these areas is not a sign of failure. Reconciliations were excluded from the Committee's calculations, although these should also be regarded as successes. Moreover, the independents argued, their work could also lay the foundation for agreements between conciliation and trial or for more durable settlements by creating a climate of co-operation which would allow custody and access arrangements to evolve with changes in the lives of the parties and their children and avoid re-litigation.

The *second* criticism was the failure to allow for the slow build up of *case loads in the independent schemes*. Many of those studied by the Robinson Committee were relatively new and their fixed costs were averaged over a very small number of cases. *Finally*, the critics noted, the lack of information about the *fixed overhead costs of the courts* meant that no share of these were attributed to in-court conciliation. If the sectors were treated alike and compared only on variable costs,

independent schemes appeared to come out 30-40 per cent cheaper, on the Report's own figures."²⁸

2.43 Financial concerns continued to be reflected in the Lord Chancellor's Department's statements on conciliation. In 1984, an invitation to tender was issued for a project unit to carry out the detailed studies recommended by the Robinson Committee. Its task was defined as comparing modes "*primarily* with a view to assessing and comparing their costs and benefits ... but with a view to attempting to access and compare the non-financial benefits of different schemes particularly for the parties and their families". (emphasis added) This project was undertaken at the University of Newcastle-Upon-Tyne.

However, the Annual Report 1983-84 of the Lord Chancellor's Legal Aid Advisory Committee argued that there were grounds for supporting voluntary conciliation services from public funds:

- (1) divorcing spouses should not be allowed to conduct their emotional battles at public expense;
- (2) the cost of divorce should be measured in terms of the subsequent cost of other services which may be used in the future;
- (3) there is a public financial interest in ensuring that arrangements made in the context of a divorce should continue in operation.

Therefore, while costs are but one aspect of the complex equation involved in evaluating mediation, the calculation of costs may itself be a controversial matter.

D. Confusion And Overlap Between Mediation And Reporting

2.44 This issue has again been the focus of attention primarily in Britain because conciliation services based in the courts have tended to be provided by the probation service welfare officers. This issue has also been a matter of controversy in Michigan where the counsellor in charge of unsuccessful custody mediation may report to the court and submit his or her opinion as regards the appropriate outcome for the case.

2.45 There has been controversy in England and Wales as to whether conciliation can be combined with reporting to the court. Some County Courts have allowed welfare officers to undertake conciliation and then make recommendations to the court if no agreement is reached. The Booth Committee emphasised the difference between conciliation and welfare in their Consultation Paper in 1983.

"Conciliation encourages the parties to take the responsibility of making

²⁸ Eekelaar and Dingwall, *Divorce Mediation and the Legal Process*, 1988, p.18-19. Italics have been added.

decisions themselves; the preparation of a report recognises that such decision must instead be taken by the court and for this purpose it is the task of the welfare officer to investigate and assess the proposals of the respective parties." (para 4.10)

2.46 It is certainly arguable that the principles of conciliation are violated if admissions or other information derived from conciliation are used subsequently to assist the court's decisions. In its Final Report, the Booth Committee recommended that the same welfare officer should not perform both tasks.²⁷ It has been argued that this raised problems in certain rural areas where there may be only one welfare officer to perform both functions. Nonetheless, a Practice Direction was issued in 1986 prohibiting a divorce court welfare officer who acts as conciliator under an in-court scheme from reporting to the court with respect to the same case.²⁸

E. Scope Of Mediation

Family violence

2.47 We have seen that the various mediation schemes differ in scope. Some deal only with custody and access issues, others include financial and property issues. One type of case, however, is usually rejected as unsuitable for mediation in any form. It is generally accepted that where a family dispute involves violence on the part of one spouse, mediation is not appropriate. This is because it is felt that the right to bodily integrity should not be compromised. Furthermore, it seems more appropriate that violent behaviour should be dealt with promptly and coercively, as through a court order, rather than through prolonged discussion. Thirdly, the imbalance between spouses where one is in fear of the violence of another may well render mediated agreement unsafe.

"In situations involving women who have been battered by their partners, mediation is effectively impossible and potentially dangerous. Such women come to the process burdened not only with an inequality of bargaining power resulting from economic disparity, but also a tremendous fear of violence. A battered woman will probably be intimidated into a settlement. For her the focus cannot and should not be on reasonable discourse, but on protection - protection which is available only through the effective use of the court system."²⁹

In June 1990, an Interdepartmental Committee on Family Law Violence in the province of New Brunswick published "Woman Abuse Guidelines". That part of the report dealing with abuse in the context of mediation says at the outset:

"Court Counsellors/Mediators privy to the details and causes of the

27 *Report of the Committee on Matrimonial Causes Procedure, op cit*, para. 4.63.

28 Practice Direction [1986] F.L.R. 171.

29 Sachs, *The Dejudicialisation of Family Law: Mediation and Assessments*, in Hovius, *op cit*, p.33 at 36.

marital failure ... have a duty to be alert to the possibility of abuse in the relationship. While the problem of woman abuse is estimated to occur in as many as one in ten marriages, the ratio is much higher in separated families; some studies have shown that it can be as high as fifty per cent In most cases, however, the problem and its disclosure are not always apparent. It is with respect to these cases that the skills and knowledge of the Court Counsellors/Mediators become important as tools to bring about fuller disclosure and provide appropriate assistance."

2.49 The Report emphasises that *court counsellors and mediators should not engage in any formal mediation proceedings with couples where there has been a disclosure of domestic violence*. It follows this statement with the following remarks:

"The lack of specialised training and facilities, and the high risk factors suggest that such mediation would be inappropriate. However it is necessary to acknowledge that Court Counsellors/Mediators do not always conduct mediation in a formal way, and many clients who have been abused are no longer living with the abuser. In such cases, which are numerous, Court Counsellors/Mediators can serve useful functions as contact persons, messengers, clarifiers, go-betweens, and advocates, where most discussions are by telephone or mail, where no meetings between clients take place, and where the formerly abused woman is either the initiator of, or does not object to, the mediator's involvement. *In these cases, such issues as custody and access, support, and division of marital assets and debts should be resolved through bargaining between lawyers or through formal legal proceedings in the Courts.*"

Comprehensive mediation

2.50 Another important question that arises as regards the scope of mediation is whether it should be confined to child custody issues or whether questions of finance and property should also be mediated. The findings of the Research Project Unit of the University of Newcastle-Upon-Tyne (1989) strongly supported the view that conciliation should not be restricted to child issues:

"Our study shows that it was unusual for couples to be in dispute about a single issue; those who could not agree about the custody of, and/or access to, children were likely to be in dispute about other matters. As one dispute was apparently 'settled', other disagreements might emerge, thus undermining the effectiveness of the settlement of the single issues The lastingness of agreements in services which focused on settling one dispute was problematic Agreements reached in other independent services were, however, more likely to be complied with than those reached in court-based services. It seems clear that couples in dispute about future arrangements for children are typically not able

to segregate those disputes from others.³⁰

However the Unit went on to say;³¹

"An obvious inference is that conciliation should be capable of addressing a wide range of such disputes But ... there would be serious *difficulties* in extending the process to cover all financial and property disputes. The difficulties arise not merely because of the *potential legal complexities* of the issues but also because *relevant information might not be available at the conciliation appointment - the duties of disclosure* which may be invoked in relation to court proceedings would have no application in this context. Although the matter obviously requires more detailed consideration, our tentative view is that finance and property *should not in principle be excluded* from the scope of a national conciliation service. Thus, where the parties and their legal advisers mutually envisage ... that the financial or property dispute, or aspects of it, might be usefully explored at a conciliation appointment, an appropriate referral could take place." (emphasis added)

2.51 The Family Mediation Service in Dublin has been providing comprehensive mediation, that is mediation dealing with property and finance matters as well as child issues, almost from the outset. In their view this has never been a problem. A study comparing the advantages and disadvantages of comprehensive mediation with mediation on child issues alone has been carried out by the National Association of Family Mediation and Conciliation Services in Britain. (See Appendix 1, Mediation Services in Other Jurisdictions), and that study generally supported the value of comprehensive mediation.

The advantages of comprehensive mediation are as follows. The development of comprehensive mediation may result in mediation being taken more seriously by the public, the government and the legal community. Comprehensive mediation has the advantage that all issues arising on the breakdown of a marriage can be dealt with without the need for recourse to litigation. This avoids the argument that mediation constitutes an added cost in addition to the expense of litigation. Even where the sole issues in mediation appear to be custody or access, the agreements reached may be based on implicit expectations of specific property arrangements. For example, it may be agreed that one party will obtain custody of the children, on the implicit basis that this party will remain in the matrimonial home. When the property matter comes to court, however, the expectations may not be fulfilled. There is a danger that mediation which deals with one aspect of the dispute may result in defective agreements.

2.52 The Ontario Advisory Committee on Family Mediation noted:

30 Para 20.18(b).
31 Para 20.34

"Proponents of comprehensive mediation point out that it makes little sense to separate issues of custody and access from other financial considerations such as support and division of family property. This, it is said, creates artificiality and distortion since informed decisions about issues affecting a family cannot be made in isolation from the decision about which parent is best able to take financial responsibility for the child....As mediation is a form of negotiating, by limiting the range of issues being discussed, one automatically limits the possibility of 'integrative bargaining'. Integrative bargaining has been described as the opportunity to select from the full range of issues so that trade-offs can be made".³²

2.53 An obvious difficulty with comprehensive mediation is that it involves the mediator in dealing with potentially complex financial matters which would require full financial disclosure and knowledge of property law. According to the Family Mediation Service this factor has not caused undue difficulty. If the legal issues become too complex the couples can refer to a solicitor as they arise. This involvement of lawyers provides an in-built legal protection. According to the NAFMACS, lawyers will almost inevitably become involved in comprehensive mediation but the cost will still be a third to a quarter of the expected cost of a fully litigated case.

2.54 The members of the Commission's Working Group on Family Courts were in favour of comprehensive mediation. Their view was that financial and property matters are inextricably linked with questions concerning children.

F. Coercion And Mediation

2.55 In our section on the Japanese mediation system,³³ we note that coercion in relation to mediation can take forms other than simply obliging the parties to participate in mediation. Here, however, coercion refers to whether parties should be obliged to attempt resolution of their dispute through mediation before they proceed to a court hearing.

2.56 A New Zealand commentator³⁴ suggests three reasons why coercion in relation to counselling and reconciliation procedures would be desirable:

- A spouse's pride may make him or her reluctant to co-operate or friends or parents may be urging him or her not to attend; here the element of coercion allows him or her to save face - "many apparently reluctant spouses have turned out in fact to have been secretly very concerned about their marital status and anxious to explore the possibilities of conciliation".

32 (1989).

33 See Appendix 1.

34 B.D. Inglis, *Family Law* (2nd ed., 1970), pp.315-316, reproduced in Bates and Turner, *The Family Law Casebook* (1985), pp.183-4.

- The fact that compulsion is possible makes it unnecessary to use it in most instances.
- The public interest demands that any such procedure be provided with an effective sanction:

"The law ought to support a spouse who wants conciliation - not necessarily in regard to saving the marriage, but also in regard to the ancillary matters which have to be dealt with if the marriage cannot be saved. The law should be able to insist that the reluctant party on the other side should at least make an attempt to co-operate. Quite apart from this, the stability of marriages, and the dignified and amicable disposal of outstanding questions which arise once the continuation of a particular marriage has been shown to be impossible, are matters which no spouse, because of false pride or the urgings of his relatives or friends, should be allowed to take lightly."

2.57 However, there are strong arguments against the use of coercion in relation to mediation.

- Mandatory mediation is ineffective because if a party is reluctant to participate he or she will be unwilling to reach agreement. The essence of mediation is agreement, and coercion is at odds with this concept.
- Mandatory participation involves a violation of the personal dignity of parties.³⁵
- Mandatory participation involves an unwarranted invasion of privacy.³⁶

2.58 The issue of coercion is also linked with whether the service should be in-court or out-of-court. In-court services tend to be more coercive than out-of-court services. Referring to in-court conciliation in England, Lisa Parkinson has said:

"There are important differences between an entirely voluntary process of conciliation initiated by the parties or their solicitors and a semi-mandatory form of conciliation initiated by the court. Although the courts have no power to order conciliation, the parties can be directed to attend a preliminary court appointment at which conciliation may take place and they may fear some penalty or disadvantage if they decline a recommendation of conciliation made by a registrar or judge. The parties may therefore participate under duress, without necessarily

³⁵ M. Rheinstein, *The Law of Divorce and the Problem of Marriage Stability* (1958) 9 Vanderbilt L.R. 633.

³⁶ D.E. Seidelson, *Systematic Marriage Investigation and Counselling In Divorce Cases; Some Reflections on its Constitutional Propriety and General Desirability*, (1967) George Washington L.R. 60: "... the effect of compulsory marriage investigation and counselling, whether the compulsion be express or implicit, is the unwilling revelation to a third party of the most intimate aspects of a human relationship".

wanting conciliation or believing that it is likely to benefit their position. Moreover, research findings suggest that the location of conciliation in the court itself in the context of a formal hearing may confuse the process with adjudication, as far as the parties themselves are concerned."³⁷

On the other hand, she also makes the point:

"Courts have a legitimate interest in promoting settlement and the success of the Bristol in-court conciliation scheme in settling a high proportion of contested cases without a full judicial hearing led to similar in-court schemes being introduced at other county courts and at the Principal Divorce Registry in London."

She points out that while the aim of the latter scheme is to help the parties to settle matters, the court decides who may be present and the amount of time allowed. The process is under the court's control.

2.59 In Ireland, under section 5 of the *Judicial Separation and Family Law Reform Act, 1989*, there is an obligation on the applicant's and respondent's solicitor to advise them as to the possibility of resolving their difficulties by mediation. There is no *obligation* on parties to seek mediation and if they are unrepresented they will possibly not be aware of its existence or its advantages. In the High Court, some judges have begun enquiring in family law cases whether the parties have had recourse to mediation. This is perhaps due to a conviction that many of the cases reaching the courts should in fact have been settled.

2.60 The ethos of mediation under the Family Mediation Service is that it is voluntary, independent, separate from the court structure and even quasi-therapeutic. In this respect, there was general agreement among members of the Working Group on Family Courts that there should be a slightly changed emphasis to this approach, although views differed as to the extent of such change. Some members felt that mandatory mediation was appropriate to overcome the issue of pride in the refusal by some persons to participate in mediation; others were of the view that a judge should have discretion to order mediation.

G. Mediators

2.61 We have seen that a wide range of persons perform the task of a mediator in different schemes, and that the function of the mediator varies from scheme to scheme in different countries. For example, there is quite a difference between the role of a mediator in the Family Mediation Service in Ireland, and the Family Court Judge who chairs a mediation conference in New Zealand. We have seen that sometimes financial and property disputes are mediated by lawyers

or court registrars while the child related issues in the same case may be mediated by counsellors. Other solutions allow for lawyers to attend mediation sessions where property and financial issues are involved, as under the Order 24 conference in Australia.

2.62 In the case of lawyers acting as mediators, the Rules of Professional Conduct of the Law Society of Upper Canada provide:

"Rule 25 - The lawyer who functions as a mediator must ensure that the parties to the mediation process must understand fully that the function being discharged is not part of the traditional practice of law and that the lawyer is not acting as a lawyer for either party. The lawyer as mediator acts to assist the parties to resolve the matters in issue."

2.63 One writer at least has put forward the view that some of the problems associated with the suitability of mediation to deal with financial and property disputes might be solved by having an interdisciplinary mediation team.

"While the lawyer's intervention focuses on the factual aspect of the settlement issues, the therapist focuses on the interpersonal and emotional aspects. The therapist manages the therapeutic milieu and in that regard is attentive to issues of trust, fear and safety. The lawyer provides information about the legal system and establishes legal parameters and guidelines for the mediation."³⁸

Folberg draws attention to a number of advantages that such an interdisciplinary team might have:

- The interdisciplinary presence "makes an important statement to the couple that recognises the complex fusion of legal, emotional and economic issues".
- The interdisciplinary presence also "provides a sense of safety to a party who might be fearful of an emotional disadvantage or to a party who is fearful of a disadvantage due to a lack of information about finances or the law".
- If the interdisciplinary team consists of one male and one female, this "provides an opportunity to be understood validated or challenged by persons of both sexes, thereby minimising sexual stereotyping and triangling".

H. *Privilege In Mediation*

2.64 Mediation is an alternative to litigation and adjudication but may occur,

38 Folberg, pp.208-9.

nonetheless, within a legal framework; legal proceedings may follow mediation or take place concurrently. The question arises of the use which may be made in such legal proceedings of statements made in the course of mediation.

2.65 In the context of marriage counselling it has been decided³⁹ that communications between spouses and a priest attract privilege. This arises from the public interest in supporting marriage and the family as expressed in Article 41 of the Constitution. The privilege is that of the spouses and may be waived by them.

2.66 Section 7 of the *Judicial Separation and Family Law Reform Act, 1989*, renders inadmissible in evidence in any court communications (written or oral) between a spouse and a third party who is assisting towards a reconciliation or agreement on the terms of separation, where proceedings under the Act have been adjourned for that purpose.

2.67 It is possible that the courts will extend privilege to statements made in the course of mediation in other contexts.⁴⁰ There is a strong public interest in fostering mediation. However, it is doubtful whether such a privilege could be regarded as absolute. There may, for example, be cases where the protection of a child from a serious threat of injury would justify a court in setting aside the privilege.

2.68 In England, the Court of Appeal in *Re D (Minors)*⁴¹ has decided that discussions in mediation in relation to disputes involving children are privileged to the extent that statements made by either party cannot be disclosed in proceedings under the *Children Act, 1989*. An exception arises in the rare case where a statement indicates that its maker caused or was likely to cause serious harm to the well being of a child. Within that narrow exception, the trial judge should admit the statement only if the public interest in protecting the child outweighed the public interest in preserving confidentiality. The Court of Appeal made it clear that the privilege exists as an independent head based on the *public interest* both in sparing children unnecessary suffering while encouraging the settlement of issues concerning them, and in reducing the burden of the cost and delay of litigation.

Views Of Working Group

2.69 Amongst members of the Working Group on Family Courts, there was general agreement that mediators should be professionals with expertise in human relations and law. A priority in setting up a mediation service on a nation-wide basis should be the training of personnel. It was also suggested that a team of mediators, both legal and psychological, to cover each case might be appropriate. The mediators would not necessarily have to work with the parties

39 *E.R. v J.R.* [1981] I.L.R.M. 125, per Carroll J. relying on the principle in *Cook v Carroll* [1945] I.R. 515.

40 See Duncan and Scully, *Marriage Breakdown in Ireland: Law and Practice* (1990), para. 18.043.

41 *The Times*, 12 February 1993.

at the same time; the parties could see each of them separately. Although it was acknowledged that such a system would be very costly, it was felt that these costs would be offset by a reduction in court cases and related costs.

PART 2: ARBITRATION

2.70 In March 1988, the Family Law Council of Australia published a detailed Report entitled *Arbitration in Family Law*, in which the Council recommended the establishment of a scheme of arbitration (as distinct from conciliation/mediation) in family law matters. This report was based on the Council's support for alternative dispute mechanisms which would "provide disputing parties with more control over the processes to be used in settling their own disputes and to avoid and minimise the legalism and formality of the traditional common law adjudicative process" (para 3.3). The Council noted significant developments in arbitration in civil cases in several jurisdictions and said that these should be applied to family law disputes.

At the outset, therefore, we must understand what the Council means by arbitration. The Council distinguished between arbitration and conciliation/mediation on the basis that arbitration results in a determination ("award") which is legally binding on the parties, either because they agreed to be bound or did not exercise their right to a curial re-hearing. In this respect, arbitration is similar to court adjudication. The Council said that the major feature which distinguishes arbitration from other forms of alternative dispute resolution and brings it closer to traditional curial litigation is the greater degree to which the disputing parties relinquish their decision-making power than in those other forms. Like a Judge, the arbitrator's role is to make a decision which is imposed on the parties (para. 4.2).

2.71 However, arbitration was said to differ from court adjudication in several ways:

- (a) the authority of the arbitrator arises by consent of the parties or by the operation of a court order referring the matter to arbitration;
- (b) arbitration proceedings are less formal, including the fact that the traditional rules of evidence do not necessarily apply;
- (c) arbitrators are often selected because of their specialist knowledge; and
- (d) in some versions; the arbitrator is not to apply the general law but to adopt a more flexible approach to the matter.

2.72 The Council distinguished between consensual and mandated arbitration. The terms refer to the basis of the arbitrator's authority. *Consensual* arbitration involves reference of the dispute by the parties themselves to an arbitrator for

resolution. It is consensual because the parties themselves decide that the dispute should be resolved by arbitration. Usually, the agreement to submit to arbitration involves agreement to be bound by the arbitrator's decision. *Mandated* arbitration is arbitration arising independently of the agreement of the disputing parties. It may arise from the operation of legislation or a rule of law, or the law may give judicial authorities a discretionary power to order or mandate arbitration in particular cases.

2.73 It was envisaged that arbitration and the conciliation processes would co-exist, rather than that arbitration would replace conciliation. The co-existence of conciliation, litigation and arbitration reflected the Council's view that "the best overall system for dispute resolution is one that offers a number of viable alternatives" (page 10).

2.74 The Council listed the advantages and disadvantages of arbitration as follows:

Advantages

- (1) It affords the parties the opportunity promptly, privately, and less expensively to resolve their differences.
- (2) It provides courts with relief from overcrowded lists.
- (3) Arbitration hearings are less susceptible to delay than hearings within the curial system.
- (4) The formality of the curial hearing is avoided.
- (5) It allows spouses to choose their own arbitrator, which facilitates acceptance of the terms of the resolution.⁴²
- (6) It looks forward to co-operation and takes into account ongoing relationships.

Disadvantages

- (1) It may be perceived as second rate justice.
- (2) There is a traditional view that the court should be involved in family cases.
- (3) There are reasons why the parties might wish a case to be heard by a court.

42 Although this appears to be inconsistent with the concept of mandatory arbitration.

- (4) Reservations as to the qualifications of arbitrators to decide family law disputes.

2.75 To these might be added the argument that while arbitration saves public money, it increases the costs for the disputing parties, because they have to cover the costs of the arbitrator and accommodation as well as lawyer's fees. However, the system recommended by the council would be paid for out of State money. As to the relationship between arbitration and conciliation, the Council envisaged that mediation and conciliation would be the first stages in the dispute resolution process and that the parties would resort to arbitration if these failed to produce agreement (because mediation/conciliation are aids to negotiation while arbitration is ultimately an adjudicatory process).

2.76 It must be noted that the Council envisaged that certain types of case would continue to be appropriate for litigation only:

"[T]he issues in some cases are inappropriate for arbitration, either because of the role of the State and the Court as *parens patriae* (for example, child abuse cases) or because some cases require formalised litigation with its heavy emphasis on process (for example, complex questions of law, or hotly contested disputes as to facts or as to issues of credit). The Council recognises that a very significant number of cases are thus best resolved within the existing curial system."

The Council, therefore, recommended that the arbitration system should co-exist with the curial system. It further recommended that it be court-annexed i.e. court administered and supervised.

2.77 We saw above that the Council drew a distinction between consensual and mandated arbitration. The Council recommended the introduction of a scheme of consensual court-annexed arbitration, which would allow parties to agree to be bound by the arbitrator's award without a right of rehearing, in certain family situations. However, it also recommended a mandated system of court-annexed arbitration for certain family disputes. It examined the issue of re-hearings after arbitration and recommended that parties to arbitration in either form (consensual or mandated) should be able to elect as of right to have a curial re-hearing.

In deciding the jurisdiction of each form of arbitration (consensual and mandated), the Council set out certain situations where, as a matter of public policy, arbitration should not be allowed and only a court should hear the matter:

- (1) Where one or more of the parties is under a legal disability e.g. a child, a person who has not attained majority, a person suffering from a mental incapacity.
- (2) Where there are allegations of child abuse.

- (3) Where the proceedings and issues are such that the Court sees fit to appoint a representative for the child.
- (4) Where the proceedings are for principal relief (dissolution, annulment).⁴³
- (5) Where the proceedings are for enforcement.

The Council set out guidelines which would help the courts decide when they should mandate arbitration (i.e. in the absence of the consent of both parties):

- (a) the need to achieve as expeditious a resolution as possible of the proceedings or issues;
- (b) the need to achieve a determination of those proceedings or issues by the most economic means available commensurate with the complexity thereof, ensuring the equality of the status of the parties, and the safeguarding of the welfare of any child;
- (c) the availability of an appropriately qualified and accredited arbitrator to hear and determine proceedings without undue delay; and
- (d) any other relevant matter.

Effect Of Award And Rehearings

2.78 In addition to recommending that a system of consensual arbitration be introduced in relation to certain disputes, the Council recommended that this scheme allow the parties to agree to be bound by the arbitrator's award without a right of rehearing in some circumstances, subject to certain safeguards. It also recommended that parties to either form of arbitration (consensual or mandated) be able to elect as of right to have a curial re-hearing. Parties would not be able to exclude the right to a re-hearing in disputes relating to child welfare matters. A court would be entitled to set aside an arbitrator's award which is deemed to be an order of that Court if it is satisfied that there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance. Such proceedings would have to be instituted within 12 months of the making of an order arising from the arbitrator's award, although the Court would have the discretion to extend this time period if satisfied that the interests of justice so require.

2.79 The Council recommended that the system establishing arbitration of family disputes should contain provisions enabling awards of arbitrators to become in appropriate circumstances orders of a Court, subject to safeguards

43 Because these concern questions of status which have far-reaching consequences for the parties, others and society in general, and they cannot be settled but rather must be determined in accordance with law. Referring such matters to arbitration would not in any event be feasible in Ireland in light of our Constitutional provisions.

relating to appeals and/or rehearings by a Court. Where provision is made to allow parties to agree to be bound by an award, such agreement would have to be made effective by registration.

The Arbitrator

2.80 The arbitrator would be required to make his or her determination according to law. He or she would be allowed to relax the strict requirements of the laws of evidence on the consent of the parties. Standard sets of procedural rules should be available which the parties would be able to modify to suit their case. The arbitrator would be required to provide brief reasons for his or her decision so that the parties could decide whether or not to seek a rehearing. The arbitrator would enjoy an immunity similar to that given to a judge or registrar. He or she would have the power to refer to a Court any person who in his or her opinion may have committed the offence of contempt during the arbitration. The arbitrator would be under a duty to terminate proceedings if issues arise which are not available for arbitration and to refer the matter back to the court. The arbitrator would also have an unfettered discretion to state a case for the opinion of the Court.

2.81 Regarding qualifications, the Council envisaged that arbitrators would be persons qualified in the areas of law, social work, psychology, psychiatry, accountancy, education, or be a religious leader. However the "paramount qualification" would be the "ability to enjoy the respect of the parties to the arbitration". The Council recommended a "process of accreditation for appropriately qualified persons". The Attorney-General of the Commonwealth would have responsibility for the appointment of arbitrators to a panel.

Funding

2.82 Most significantly, the Council recommended that the government would be responsible for the payment of arbitrators in a court annexed system. Also, court facilities or other government premises would be available for cases where it was inappropriate to use the arbitrator's private office.

CHAPTER 3: PRE-TRIAL PROCEDURES AND DOCUMENTATION

(1) CONSOLIDATION OF TRIALS

3.01 One aspect of the problem of fragmentation of jurisdiction examined above in Chapter One is the inability of some litigants in family law proceedings to consolidate all issues of the same controversy within the one trial. A single marital breakdown situation may lead to a number of applications being brought in the courts, for example, for orders for protection, barring, separation, custody and division of property. Calls have been made, therefore, for provisions allowing different cases to be consolidated in a single trial.

Other Jurisdictions

3.02 An example of a provision allowing for consolidation of trials is to be found in New Zealand legislation. The *Family Proceedings Act, 1980* deals, in its substantive part, with separation, validity of marriage, welfare of children and maintenance. Section 160 of this Act provides that an application under the Act may be joined with an application under the *Guardianship Act, 1968* and the *Matrimonial Property Act* and that "it shall not be necessary to file separate applications". Subsection (2) provides that a Court may hear and determine any proceedings under the same Act or under the *Guardianship Act, 1968* and the *Matrimonial Property Act, 1976* in any case where (a) all the proceedings are between the same parties, or (b) all proceedings are in respect of members of the same family. Subsection (3) provides that sub-section (2) applies whether or not any other person is also a party to the proceedings.

3.03 The Canadian Law Reform Commission recommended that rules of procedure be devised to enable all related matters to be consolidated for trial and heard by the same judge at one time, and that the rules should provide simple methods whereby all persons who may be affected by the disposition of

the issues may be made parties to the proceedings.¹

3.04 The Family Law Sub-Committee of the English Law Society examined the issue of fragmented treatment of divorce cases.² It said that one of the disadvantages of this system was the increased cost, both directly in money and indirectly because of increased time. It thought that a reduction in the number of separate hearings would bring about considerable savings and would produce two other benefits. The first was that a court which had before it at one time full information on all the inter-dependent aspects of a case would be better able to judge the relative importance of the various issues involved and the consequences of its decision on any one aspect for the others. The second benefit was that the need to prepare a case fully before filing a divorce petition would discourage dilatoriness of the part of the petitioner - a common cause for delay in divorce proceedings. The Sub-Committee recommended that the rules on divorce procedure allow the presentation of a complete case allowing all issues to be decided by the court.

(2) COURT DOCUMENTS

Ireland

Commencing Proceedings In The High Court

3.05 Family matters in the High Court are commenced by way of two main documents. Until 1990, all proceedings in matrimonial causes and matters were commenced by filing a petition, which is in Form No. 1 Appendix L of the Rules of the Superior Courts. However Statutory Instrument No. 97 of 1990 (RSC (No. 1) 1990) came into force on May 1 1990. This provides that a Family Summons shall be used to commence proceedings under the following statutes:

- the *Married Women's Status Act, 1957*;
- the *Guardianship of Infants Act, 1964*;
- the *Family Law (Maintenance of Spouses and Children) Act, 1976*;
- the *Family Law (Protection of Spouses and Children) Act, 1981*;
- applications pursuant to section 3 of the *Adoption Act, 1974* or section 3 of the *Adoption Act, 1988*;
- applications pursuant to sections 4 or 5 or 9 of the *Family Home Protection Act, 1976*;
- applications pursuant to sections 6 or 7 of the *Family Law Act, 1981*;

1 Working Paper No. 1, *The Family Court*, p.35.

2 *A Better Way Out* (1979), paras. 153-159.

- applications for judicial separation under section 2 of the *Judicial Separation and Family Law Reform Act, 1989* or any ancillary application thereto;
- any proceedings transferred to the High Court pursuant to section 31(3) of the 1989 Act.

There is one exception to the rule that proceedings under these Acts are to be commenced by way of Family Summons, namely an application pursuant to section 6A(3) of the *Guardianship of Infants Act, 1964* (as inserted by s.12 *Status of Children Act, 1987*) which is by motion on notice to the mother.

3.06 The endorsement of claim is entitled "Special Endorsement of Claim" and must state specifically, with all necessary particulars, the relief sought and the grounds upon which it is sought, and a sufficient statement of the facts alleged to establish the right to such relief, together with all such ancillary relief and the grounds upon which it is sought. Indeed, the need for clarity in the drafting of the special endorsement of claim was emphasised in the decision of O'Hanlon J. in *H. v H.* In affirming the decision of the Master to strike out the plaintiff's summons on the grounds, *inter alia*, that the summons was too lengthy and contained matters unnecessary in the Special Endorsement of Claim, O'Hanlon J. noted that:

"The summons should not contain unnecessary detail and should not be of unnecessary length [I]n any proceedings before the court there is an obligation to ensure that the proceedings be free from unnecessary complexity."³

In practice, however, despite this exhortation, the new Rules with regard to the form of affidavits have resulted in affidavits becoming very long, in that they tend to refer to every possible legal and factual permutation - even matters which will not usually be considered at the trial. On the other hand the new Rules have reduced the likelihood of inflated claims and inflammatory language appearing in the affidavit.

3.07 Rule 3 provides that in proceedings pursuant to Rule 1(3), (5), (6) or (7) an affidavit verifying such proceedings or in reply thereto shall contain the following:

- (a) Full particulars of any children of the applicant or respondent stating whether they are dependent children and stating whether and if so what provision has been made for each or any such dependent child.
- (b) Full particulars of any income, assets and outgoings of the applicant and, where known, of the respondent.

³ 1 February 1991, High Court, unreported.

- (c) Whether any possibility of a reconciliation between the applicant and respondent exists and if so on what basis it might take place.
- (d) Whether any preliminary order referred to in Section 11 of the *Judicial Separation and Family Law Reform Act, 1989* is being sought and full particulars of the same.
- (e) Whether and if so what other matrimonial proceedings have been brought by either party or are pending in any other Court (including any Court outside the jurisdiction).
- (f) Where such party is domiciled at the date of the application or where each party has been ordinarily resident for the year preceding the date of such application.
- (g) Whether maintenance pending suit is sought and if so what amounts.
- (h) Whether any periodical payments order or secured periodical payments order or lump sum order is being sought.
- (i) Whether a property adjustment order of any type is being sought.
- (j) Whether the extinction of the rights of any party under the *Succession Act, 1965* is being sought.
- (k) Whether any other ancillary order specified in s.16 of the *Judicial Separation and Family Law Reform Act, 1989* is being sought.

Thus, the new Rules provide that details of all financial and property matters should be set out immediately. Whilst in theory this would seem to be a good idea, by the time the case comes on for hearing the situation may have changed substantially. Also this can cause difficulty for the applicant in that he or she will have to make up his or her mind at a very early stage as to what exactly is to be claimed. This is intended to encourage a more realistic approach to litigation and prevent greed, thereby reducing the inflammatory effect of the document. In practice, the result is that the initial documents will tend to plead every relief possible, making it difficult for the party receiving the document to know what is realistically sought or expected of him/her.

3.08 The affidavit must exhibit the certificate required under s.5 or s.6 of the 1989 Act. This certificate is in the following form:

CERTIFICATE OF COMPLIANCE WITH SECTION 5 OR (AS THE CASE MAY BE) SECTION 6 OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT.

XY of the estranged
spouse of ZY

1. I, AB, a solicitor of (firm of solicitors) situate at (insert address) do certify that I have discussed with the above-named XY the possibility of his or her reconciliation with ZY and that I have given him/her the names and addresses of the following persons who are qualified to help effect a reconciliation between spouses who have become estranged:-

[Set out here the names and addresses of such qualified persons.]

2. I also hereby certify that I have discussed with the above-named XY the possibility of engaging in mediation to help effect a separation on an agreed basis with ZY and that I have given to him/her the names and addresses of the following persons and organisations qualified to provide such a mediation service:-

[Set out here the names and addresses of such qualified persons and organisations.]

3. I further certify that I discussed with the above-named XY the possibility of negotiating and concluding a separation deed or written separation agreement with ZY.

4. I further certify that I believe that no application has been made by the above-named XY for a decree of judicial separation (or in the case of a solicitor acting for a respondent) I hereby certify that having received instructions from the above-named respondent ZY on the day of 19.. that I have discussed the above mentioned matters with ZY as soon as possible thereafter.

Dated the day of 19..

Signed _____
(Name and address of Solicitor)

Proceedings under rule 1(3), (5), (6) and (7) are as follows:

- (3) ... An application pursuant to section 4 or 5 or 9 of the *Family Home Protection Act, 1976*.

- (5) ... Any proceedings pursuant to the *Guardianship of Infants Act, 1964*, the *Family Law (Maintenance of Spouses & Children) Act, 1976*, or the *Family Law (Protection of Spouses & Children) Act, 1981*, instituted and maintained in the High Court pursuant to Article 34.3.1 of the Constitution.
- (6) ... An application for a decree of judicial separation pursuant to section 2 of the *Judicial Separation and Family Law Reform Act, 1989* and any ancillary application thereto.
- (7) ... Any proceedings transferred to the High Court pursuant to section 31(3) of the *Judicial Separation and Family Law Reform Act, 1989*.

3.09 Rule 12 provides that an application pursuant to s.22 of the *Judicial Separation and Family Law Reform Act, 1989* should be made by motion on notice supported by affidavit. Rule 13(1) provides that an order pursuant to s.11 or s.29(2)(a) of the *Judicial Separation and Family Law Reform Act, 1989* may be applied for *ex parte* in urgent cases. Rule 13(2) provides that applications under section 13 of the Act for maintenance pending suit, and all applications under section 29, should be made by motion on notice grounded on an affidavit setting forth particulars of the financial or other relief claimed or granted, and where applicable particulars of the disposition or transfer of property done with the intention of defeating the claim for financial relief, together with documents or other exhibits supporting such claims.

3.10 Proceedings in the High Court other than those commenced by the Family Summons continue to be commenced by petition under Order 70 RSC.

Commencing Proceedings In The Circuit Court And District Court

3.11 The relevant forms are scattered throughout a number of statutory instruments. The examples given here relate to the bringing of maintenance proceedings under section 5(1) of the *Family Law (Maintenance of Spouses and Children) Act, 1976*.

DISTRICT COURT [FL (MSC) ACT 1976] RULES 1976
S.I. No. 96 of 1976

General heading to be used on all forms:-

SCHEDULE OF FORMS

AN CHÚIRT DÚICHE

THE DISTRICT COURT

FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN)
ACT, 1976

section 5(1)(a)

MAINTENANCE SUMMONS

District Court Area of

District No.

..... Applicant

..... Respondent

WHEREAS a complaint has been made by
the above applicant

*residing
.....
*carrying on profession, business or occupation

at
†(in court area and district aforesaid)

that you
the above named respondent

*residing
.....
*carrying on profession, business or occupation

at
†(in court area and district aforesaid)

being the spouse of the said applicant have failed to provide such maintenance
as is proper in the circumstances for the said applicant

†[and the dependent children of the family namely
..... born on
..... born on
under the age of 16 years]

†[and born on

who has attained the age of sixteen years and is under the age of twenty-one
years and who is †(will be) receiving full-time education or instruction at an
educational establishment]

†[and born on

who has attained the age of sixteen years but who is suffering from mental or physical disability to such an extent that it is not reasonably possible for him to maintain himself fully]

THIS IS TO COMMAND YOU to appear on the hearing of the said complaint at the District Court at in the court area and district aforesaid on the day of 19 , at .m.

Dated this day of 19 .

Signed
Justice of the District Court,
Peace Commissioner, or
District Court Clerk

To

of

(the above named respondent)

(*Delete whichever inapplicable)

(†Delete where inapplicable)

RULES OF THE CIRCUIT COURT (No. 6) 1982

S.I. No. of 1982

FORM NO. 3

AN CHUIRT CHUARDA

(THE CIRCUIT COURT)

Circuit

County of

Record No

APPLICATION

FAMILY LAW (MAINTENANCE OF SPOUSES & CHILDREN) ACT,
1976, SECTION 5(1)(a)

BETWEEN

A.B.

APPLICANT

and

C.D.

RESPONDENT

TAKE NOTICE that the above named Applicant of _____ in the County of _____ hereby applies to the Court sitting at _____, pursuant to section 5(1)(a) of the above Act for an Order that the Respondent do make to the Applicant periodic payments for the support of *(a)* the Applicant and each of the dependent children of the family for such period during the lifetime of the Applicant of such amount and at such times as the Court may consider proper and for an Order providing for the costs of this Application.

AND TAKE NOTICE that the Applicant will rely upon the following matters in support of the Application:

1. (Here set out residential address and occupation of Applicant).
2. (Here set out residential address and occupation of Respondent).
3. The Applicant was on the _____ day of _____ married to the Respondent at *(b)*
4. (Here set out the names and dates of birth of all children of the marriage).
5. (Here set out the nature of the failure to maintain the Applicant and/or the dependent children of the family).

AND TAKE NOTICE that this Application will be mentioned before the Court on the _____ day of _____ 19____, or on the first available day thereafter and shall be heard on that day or on such date as the Court may fix for the hearing thereof.

AND TAKE NOTICE that if you intend to dispute the Applicant's Claim you must within four days of the service of this Application on your file

with the County Registrar in the Circuit Court Office at
an Answer in the form prescribed by the Rules of the Circuit Court.

Dated the day of 19

Signed
(Applicant or solicitor for Applicant)

Address:

To: (C.D.)
 (Respondent)

Of
(Address)

(a)Delete the words "the Applicant and" where no claim is made on behalf of the applicant

(b)Here identify the Church or Registry Office at which the marriage ceremony was performed.

Other Jurisdictions

3.12 Samples of the forms used in the New Zealand Family Courts are set out in Appendix 2 for the purpose of comparison. It should be noted that the forms are specific to each type of case and are phrased in relatively clear terms. In addition, the forms explicitly instruct litigants not to provide details as to every aspect of the case so as to limit the inclusion of acrimonious material.

Previous Proposals For Reform In Ireland

3.13 The *Joint Committee on Marriage Breakdown* (1985) inspected the documents used in family law cases and described them as "generally complex and intimidating in nature and using a type of language and format which is off-putting and unintelligible to most people". Even District Court Forms, which were shorter and easier to understand, were open to criticism in that little or no information was given as to the nature of the case that a person will have to meet. The Committee recommended that one type of form should be used for all family matters, which would set out:

- (1) the remedy sought;
- (2) the grounds on which the application was based; and
- (3) the steps which the recipient should take.

3.14 In 1992 the County Registrar for Dublin approached the Family Lawyers Association and asked them to submit a draft for a new set of Circuit Court Rules for family matters. A sub-Committee was set up by the Family Lawyers Association to draft the Rules and submit the draft to the Department of Justice and the Rule Making Committee. The Rules drafted are accordingly being proposed by the County Registrar for Dublin and were at the time of writing being redrafted. The Rules endeavour *to facilitate a more efficient and speedy hearing* of family court cases. In particular the draft Rules take on board the suggestion made in an early draft of this Consultation Paper that the present method of pleadings could be improved by the adoption of clear and concise language in the initial form, instructing the recipient as to the case he/she will have to meet. In particular the document should detail the remedy being sought; the grounds on which the application is based and the steps which the recipient should take.

Conclusions

3.15 The Commission tentatively suggests that the present method of pleadings in the High Court could be improved by the adoption of clear and concise language in the initial form, instructing litigants with regard to the particular remedy being sought, the grounds on which the application is based, and the steps which litigants should take. By limiting the form in such a manner, the inclusion of inflammatory material may be avoided.

Listing Of Family Law Cases

3.16 In February 1993 Costello J. issued a practice note in family law cases in the High Court in Dublin. In essence this provides for a call over on a Friday for the cases listed for *the following week*. Barristers should be present to say whether their case is ready to go on for hearing or not; if a listing is rejected due to unpreparedness another case may take its place in the list. Previously family law cases were only given listings on the day of their trial. Now, if a case can be brought into court at short notice, or if it is of a very urgent nature and deals only with net issues, it can be dealt with at three days notice. The Family Lawyers Association are making representations to amend this practice to one of calling over cases to be heard in two weeks instead of for the following week in order to give litigants more time to prepare.

CHAPTER 4: THE CONDUCT OF FAMILY PROCEEDINGS

4.01 In many jurisdictions throughout the common law world, there have been proposals for change in regard to the conduct of family law proceedings. Various aspects of these proceedings have been criticised for being confusing and unsatisfactory and for aggravating the frustration and distress often associated with a family dispute. Moreover, the procedural aspects of family law proceedings may have a tangible effect on the practical working of substantive laws. The purpose of this chapter, therefore, is to focus on certain key issues that arise in the conduct of family law proceedings in Ireland. Rather than attempting to provide an exhaustive account of all the procedural aspects of such proceedings, the Commission has chosen particular issues which were considered to be of key importance by the Working Group on Family Courts. These include an examination of the appropriate form of family proceedings, representation of children, and the extent to which the proceedings should be publicly accessible.

(1) THE FORM OF FAMILY LAW PROCEEDINGS

(a) *Adversarial or inquisitorial procedures?*

4.02 In general, there are two separate and distinct forms of court proceedings, viz. adversarial and inquisitorial proceedings. The adversarial procedure is the system of law which operates in most common law countries. It is a system which is premised on the view that the truth is best elicited when two sides to a dispute pitch their wits and skills against each other in eliciting evidence; and where the judge's role is much diminished insofar as she or he is not permitted to come into the arena by taking over the examination of witnesses. Thus, the adversarial system has been described as follows:

"The [adversary] adjudicative process is based on the elicitation and evaluation of evidence. The adversary model in its classic form requires

that evidence to be adduced *viva voce* The essence of the judge's role ... is to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large ... Nevertheless ... the judge is not a mere umpire, but his predominant objective is to find out the truth. Central to the achievement of that objective is the process of cross-examination"¹

4.03 Inquisitorial proceedings, on the other hand, predominate in civil law countries. Their essential feature is that the judge is given an investigative role and is not confined to adjudicating upon the evidence presented by the parties. Rather than casting the proceedings as a duel, the inquisitorial system is based on a cooperative quest for the objective truth in a dispute. The inquisitorial system has been defined as follows:

"... [t]he inquisitorial system normally involves the judiciary in a far more active role during litigation. The judge actively seeks out the truth by questioning witnesses and if necessary asking a court officer to obtain evidence on behalf of the court. Thus at the time of the actual litigation lawyers play a lesser role than in an adversary system".²

Ireland

4.04 While Irish family law cases are conducted according to the adversarial procedure, specific inquisitorial-type powers may be conferred on judges. For example, under section 11 of the *Guardianship of Infants Act* (as amended by section 40 of the *Judicial Separation and Family Law Reform Act, 1989*), the court may, in proceedings for judicial separation, of its own motion give directions to procure a report from such person as it may nominate on any question affecting the welfare of an infant. The court must have regard to the wishes of the parties, but is not bound by them. The court may receive the report in evidence at the proceedings and may cross-examine the person making the report as witness.³

4.05 Section 27 of the *Child Care Act, 1991*, enables the court, of its own motion or on the application of any party to certain proceedings concerning a child under the Act, to procure a report from any person affecting the welfare of the child. A copy of any report must be made available to counsel or solicitor representing each party in the proceedings, or, if any party is not represented, it is to be made available to that party. The reports may be received in evidence at the proceedings and the person making the report may be called as a witness.

4.06 Section 20 of the *Child Care Act, 1991*, confers on the court a power of a more far-reaching nature. It provides that if, in proceedings under the *Guardianship of Infants Act, 1964*, or the *Judicial Separation and Family Law Reform Act, 1989*, or any other proceedings for the delivery or return of a child,

¹ Finlay, *Dispute Resolution in Australian Family Law*, (1984) 58 A.L.J. 213 at 218-9.

² J. Wade, *The Family Court of Australia and Informality in Court Procedure*, (1978) 27 I.C.L.Q. 820 at 840.

³ See below, Chapter 4 s.1(b).

it appears to the court that it may be appropriate for a care order or a supervision order to be made, the court may adjourn the proceedings to enable the health board to investigate the child's circumstances. This may be done irrespective of the wishes of the parents. It creates a power that clearly goes beyond the adversarial nature of proceedings in that the court is not acting or adjudicating upon the wishes or proposals of the parties.

Some Other Jurisdictions

England

4.07 The Finer Committee pointed out that certain aspects of English Family Law already had inquisitorial features. In the divorce jurisdiction, for example, the court is charged with the duty of being "satisfied" that it could grant relief, which involves, in appropriate cases, a duty to enquire into matters which may not be disputed by the parties. Similarly, in child custody cases, the court has to have regard to the "paramount interests" of the child - a consideration which is not necessarily determined by the views of the parties even if their views coincide. The Committee rejected the idea of any further inquisitorial element in family law cases. By contrast, the Family Law Sub-Committee of the Law Society in England has recommended the adoption of an inquisitorial system in family proceedings.⁴ It envisaged that the court would be able to conduct its own examination of the parties or witnesses, and that in giving judgment it could select a course of action other than that required by either party, if this seemed desirable.

4.08 One of the Sub-Committee's reasons for proposing an inquisitorial-type trial was that it would reduce the competitive element in the trial and emphasise instead the making of fair arrangements and ensuring the welfare of children. A second reason was that tax, welfare and social security matters were often important issues, and the court should be able to ensure that the best arrangements were reached even if the spouses were unable to adduce expert evidence. The Sub-Committee accepted that the inquisitorial process could be longer because of the Court's duty to investigate, but pointed out that the consolidation of trials (i.e. one hearing of all matters related to one particular family dispute) would reduce overall hearing time.

Canada

4.09 The Canadian Law Reform Commission considered that "...[i]n general the adversary approach promotes a ritualistic and unrealistic response to family problems"⁵ and that "... [p]leadings and procedures should stay away from the traditional adversary or fault-oriented approach".⁶ By contrast, the Law Reform Commission of Ontario has recommended the retention of adversary procedures

4 *A Better Way Out* (1979).

5 Law Reform Commission of Canada, *The Family Court* (Working Paper No. 1), June 1974, at p.11.

6 *Id.*, at 33.

in family law cases:

"[I]f we believe that the pursuit of truth is still an essential part of the court's objective then we should retain the adversary system and seek to temper the adverse consequences of its formality as best we can The possible disadvantages of the strict adversary system can be diminished to a large extent by making the procedure of the Court flexible enough to allow spouses and children to be treated as individuals with individual problems, to discourage further hostility between parties, to avoid jeopardizing any possible chance of reconciliation and settlement, and to minimize the inevitable insecurity and indignity felt by the parties".⁷

New Zealand

4.10 The New Zealand Family Courts are armed, under the *Family Proceedings Act, 1980*, with quasi-inquisitorial powers, including the power to call as a witness any party to the proceedings, or the spouse of any such party. A witness called by the Court has the same privilege to refuse to answer any question as when called by a party to the proceedings. The witness called by the Court may be examined or re-examined by the Court, or by any barrister or solicitor assisting the Court, and may be cross-examined by or on behalf of any party to the proceedings, or a barrister or solicitor representing a child involved in the proceedings. The expenses of any witness called by the Court are paid out of monies appropriated by Parliament.

Previous Proposals For Reform In Ireland

4.11 The Joint Committee on Marriage Breakdown recommended that the manner of hearing, in which each side in a case is responsible for presenting its own case, should continue. However, family law judges should be given a slightly more inquisitorial role. This would be achieved by giving them the power to direct that further evidence other than that produced by the parties be heard by the court.⁸

4.12 The Law Reform Commission addressed the issue of adversarial procedures in family law cases in the *Report on Divorce a Mensa et Thoro and Related Matters*:⁹

"A major criticism of the law and procedure governing the conduct of matrimonial proceedings is that the proceedings are adversarial in the sense that the petitioner has to establish his or her case, that there is in effect no real attempt made to have an independent inquiry into the facts of the marriage, that the witnesses are the parties' witnesses and not, as they should be, the court's witnesses, that the proceedings are too

7 Law Reform Commission of Ontario, *Report on Family Law*, Part V, Family Courts, at pp.45-46.

8 *Report of the Joint Committee on Marriage Breakdown* (April 1985), at p.110, para. 9.15.

9 LRC 8-1983, pp.62-3.

formal and that the system militates against reconciliation instead of encouraging it. To meet this criticism we recommend that the legislation should provide that, in proceedings for legal separation ... the court may call any witness (expert or other) additional to those suggested or called by the parties

We should stress that, if adversarial procedures are not to apply, then there should be a positive obligation on the court to enquire into the case and not simply to permit the case to proceed on whatever basis the parties may choose to present it. The legislation should in express terms, require the court to discharge this function. In this context, we see no reason why, in order to import this obligation on the court, the legislation should not adopt wording similar to that use in Article 40.4.2 of the Constitution, which prescribes that "the [Court] ... shall forthwith enquire into the said complaint".

Conclusions

4.13 The main arguments in favour of retaining the traditional adversarial system in the conduct of family proceedings would appear to be twofold. First, the adversarial approach is said to be the most effective way to test the credibility of a witness's evidence by virtue of the process of cross-examination and examination-in-chief.¹⁰ Second, the adversarial system mitigates the risk of excessive judicial interference in the conduct of a family law case. The main arguments against the adversarial system in the context of family law are that it may have a further polarising effect on the parties, and will not always provide the court with the full range of facts which it needs to make informed decisions in areas such as financial provision and child custody. Also, to work effectively, the adversarial system is heavily dependent on the skill and preparation of lawyers on both sides.¹¹ The proper balance may best be achieved by maintaining the adversarial system, while continuing to supplement it by conferring specific powers of an inquisitorial nature on judges. We proceed to a consideration of one such power.

(b) Admission of reports

4.14 One example of a judicial power which may be considered appropriate in family law proceedings is the power to order a report from a person or agency on a particular issue with a view to assisting the court in making the relevant order. As we have seen in the previous section, there are only two provisions in Irish Law that specifically empower a court to order a report to assist it in making a decision. These are section 40 of the *Judicial Separation and Family Law Reform Act*, 1989, which confers on the court the power to order a report

10 W. Zelder, *Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure*, (1981) 55 A.L.J. 390 at 397.

11 The adversary system "...[d]epends heavily on counsel who have mastered the difficult art of examining and cross-examining witness and who are willing to invest the time required for an adequate preparation for the trial". *Ibid*, at 390.

on any question affecting the welfare of an infant; and section 27 of the *Child Care Act, 1991*, enabling the court to order a report with respect to any question regarding the welfare of a child. There is no provision in Irish law granting the power to a court to order a report from an expert or agency in the course of maintenance proceedings.¹²

Other Jurisdictions

Australia

4.15 Section 62A of the *Family Law Act, 1975*, as amended, provides that in any proceedings under the Act in which the welfare of a child under the age of 18 years is relevant, the court may direct a court counsellor or welfare officer to furnish to the court a report on matters relevant to the proceedings. The court may make orders or give further directions as it considers appropriate in relation to the preparation of the report. A report furnished to the court in this way may be received in evidence in any proceedings under the Act. The court is not obliged to request a report in every case in which the welfare of a child is relevant. The court may direct a party or child to attend upon the person preparing the report, and disobedience of such an order may lead to contempt proceedings. The procedure is not confined to custody or access proceedings. The court has a wide discretion as to what matters the report should contain. The practice of different judges varies considerably. Nonetheless, the report must be relevant to the proceedings. The court should have regard to the fact that the ordinary rules of evidence will apply at the trial and should not ask the reporter to pursue irrelevant matters.

4.16 The report may be received in evidence at the discretion of the court. It was held in *In the Marriage of Mulcahy*¹³ that the court has a discretion to receive the report and make it available to counsel but not to the parties. However, section 62A of the *Family Law Act, 1975* is open to the alternative interpretation that the court may not act on such reports unless they are received in evidence in the presence of the parties in the ordinary way.

4.17 The report itself is in writing, but the court may permit oral examination and cross-examination of the reporter. The reporter is the witness of the court and not of either party. The principle that a judge should not allow any person to communicate with him or her in the absence of the parties or their legal representatives applies to court counsellors.

Canada

British Columbia

4.18 Section 15 of the *Family Relations Act, 1979*, (R.S.B.C. 1979, c.121)

¹² See above, s.(1)(a).

¹³ (1978) 4 Fam. L.N.S.; 33 F.L.R. 323.

empowers the court in proceedings under the Act to direct an investigation into a family matter by a person who has had no previous connection with the parties to the proceeding, or to whose investigating each party consents; and where the person is a family counsellor, social worker, probation officer, or other person approved by the court for the purpose. The report may not be brought before the court unless it has been served on every party to the proceedings 24 hours in advance. In addition, it should be noted that the *Family and Child Service Act, 1979*, (R.S.B.C. 1979, c.119, section 6(3)) enables the family advocate, where she or he suspects that a child is abandoned, deserted or maltreated or otherwise in need of protection, to request a report from any person whom she or he believes to have relevant information.

Ontario

4.19 In Ontario there is the Official Guardian *ad litem* of infants.¹⁴ The *Matrimonial Causes Act*, (R.S.O. 1970, c.265) section 6, as amended by the *Matrimonial Causes Amendment Act*, (R.S.O. 1978, c.2) section 83, provides that the Official Guardian shall cause an investigation to be made and shall report to the court on all matters relating to the custody, maintenance and education of the child, where in a petition for divorce or an action of annulment there is a child under the age of 16, or of 16 or 17 years and engaged in a full-time education institution or unable through illness or infirmity to earn a livelihood. The Act allows the Official Guardian to engage a person to make an investigation on his or her behalf. The report may be received in evidence after the investigator has verified it by affidavit. Where the facts in the report are disputed, the Official shall, if directed by the court, and may, when not so directed, attend the trial and cause the person making the investigation to attend as a witness.

New Brunswick

4.20 The *Judicature Amendment Act, 1979* (S.N.B. 1979, cc.36, section 11.4(1)) provides that upon *ex parte* application, or on his or her own motion, a judge of the Family Division may direct a family counsellor, social worker, probation officer or other person to make a report concerning *any matter* that in the opinion of the judge is a subject of the proceedings. A related power is provided for in the *Child and Family Services and Family Relations Act, 1980*, (S.N.B. 1980, cc.2.1) under which the court may, in any proceedings under the Act that affects a child, require that a child, parent or any other person living with the child undergo psychiatric, psychological, social, physical or any other examination or evaluation specified by the court prior to or during a hearing. In the event of a refusal or failure of a person to participate, the court may draw such inferences as appear to be warranted in the circumstances.

Newfoundland

4.21 Newfoundland appears to have been influenced by the British Columbia provision as to reports. The District Court of St. John's in Newfoundland is served by a Unified Family Court. Section 16 of the 1977 *Act Respecting the Creation of a Unified Family Court* provides that upon an *ex parte* application, the court may direct a person who (1) has had no previous connection with the proceedings and (2) is a family counsellor, social worker, probation officer or other person appointed by the court, to make a report on a party to a family matter or any other person who in the opinion of the court is associated with the family matter. A copy of the report must be served on every party to the proceedings not less than 24 hours before it is presented.

England

4.22 Under section 12(3) of the *Domestic Proceedings and Magistrates' Court Act, 1978*, a Magistrates' Court may at any stage of proceedings in which children under 18 are involved, request a local authority to arrange for an officer of the authority to make to the court a report, orally or in writing, with respect to such matter as the court may specify or may request a probation officer to make such a report to the court. The court is empowered to take account of any statement contained in the report or included in the evidence of the person making it notwithstanding any enactment or rules of law relating to the admissibility of evidence. However, nothing may be included that was said by either party to the marriage in an interview at which a probation officer was present with a view to the reconciliation of the parties, unless both parties consent. If the report is in writing, a copy must be given to each party to the proceedings or their counsel or solicitor either before or during the hearing.

4.23 Under section 7(1) of the *Children Act, 1989*, in proceedings in which the court is considering a question with respect to the child under the Act, it may ask a probation officer or a local authority to provide a report on the child's welfare and specific matters relating to the child's welfare. According to section 7(4) statements in the report and any evidence given in respect of the matters referred to in the report will always be admissible in evidence, even if a rule of law otherwise excludes it. In addition, a guardian *ad litem* appointed on behalf of the child¹⁵ is authorised under section 41(2) of the Act to report to the Court; and under section 41(8), the High Court may ask the Official Solicitor to provide a report.

Conclusions

4.24 There was general agreement among the Working Group on Family Courts that the traditional use of reports, whereby each party obtains an expert to prepare a report as part of that litigant's case, was often unproductive and costly. It was recognised that there were certain advantages to the idea of

augmenting the present position by statutorily empowering a judge to order an investigation and report in certain family law proceedings, e.g. maintenance proceedings. It was recognised that the use of such procedures should be at the discretion of the judge. In addition, it was felt that infringement of the hearsay rule could only be justified if the report is furnished to all parties to the proceedings, and all parties are given an opportunity to cross-examine the person who has prepared the report as regards its content and the sources of information used in its preparation.

(2) **FORMALITY**

4.25 A related issue in this context is the extent to which proceedings in family law matters should be conducted in a formal or informal manner. In Ireland, there have been a number of recent legislative provisions aimed at reducing the formality of family law proceedings. Section 33(1) of the *Judicial Separation and Family Law Reform Act, 1989*, for example, provides that Circuit Family Court proceedings shall be "as informal as is practicable and consistent with the administration of justice". Section 33(3) provides the same with respect to family law proceedings before the High Court, and section 45(1) with respect to proceedings under a number of family law statutes in the District Court. Section 29 of the *Child Care Act, 1991*, provides that care proceedings shall be heard in private and shall be as informal as possible. Another positive step which has been taken in Ireland to reduce the formality of family hearings is the abolition of the wearing of wigs and gowns.¹⁶

Reservations As To Informality Of Procedure

4.26 Informality of procedure may be interpreted in any of three ways. First, it might mean simply that the proceedings should not be hostile or intimidating and that judges and counsel should be sensitive in their handling of litigants in family law cases. One Australian writer suggests that changes of this nature may be challenging for judges accustomed to traditional court procedures:

"The Act [Family Law Act, 1975] requires that judicial appointees by reason of training, experience and personality be suitable persons to deal with matters of family law. However, the reality is that the vast majority of first generation judicial appointees to the Family court have been conditioned by the procedure in traditional superior courts. Some of these judges naturally find it difficult to adjust to the lesser degree of formality in the Family Court and the philosophy behind the ideal Family Court".¹⁷

16 S.33(2) of the *Judicial Separation and Family Law Reform Act, 1989* provides that neither judges sitting in the Circuit Family Court nor barristers nor solicitors appearing in such courts shall wear wigs or gowns. S.45(2) of the same Act makes similar provision in respect of family law proceedings in the District Court. Rule 17 of Order 70A R.S.C. (inserted by R.S.C. (No.1) 1990, S.1 No. 97 of 1990) provides that Order 119 Rules 2 and 3 shall not apply to any proceedings under order 70A or 71, i.e. that wigs and gowns shall not be worn in the High Court in most family law proceedings.

17 Wade, *The Family Court of Australia and Informality in Court Procedure*, (1978) 27 I.C.L.Q. 820 at 844.

4.27 Second, the direction that proceedings be conducted informally might be seen as turning family proceedings into inquisitorial proceedings. This was the view taken by at least one Australian judge in relation to a similar provision in Australian legislation. Section 97(3) of the *Family Law Act, 1975*, provides that in proceedings under the Act, the Court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted. When the Act first came into effect, this provision prompted the question whether proceedings would in the future be conducted according to the traditional adversarial procedure or by way of enquiry by the judge. One judge, Watson J., was of the opinion that the nature of family proceedings under the Act had been changed. However, the view that proceedings under the Act were to be inquisitorial rather than adversarial was rejected in *R v Watson; Ex parte Armstrong*¹⁸ in which the High Court made it clear that section 97(3) did not authorize a judge to convert proceedings under the Act into an inquiry. The court held that judges of the Family Court exercise judicial power and must discharge their duties judicially, clearly meaning in accordance with the established rules of evidence and procedure.

4.28 Third, informality of procedure might be seen as being synonymous with the erosion of the normal rules of evidence in civil cases. As one writer has warned:

"[There] is a real risk that enthusiasm for the therapeutic and conciliar, or the reassuring and accessible atmosphere could produce unfair and adverse consequences. Unbridled abrogation of the customary rules of court proceedings is probably more likely to result in sloppiness and disrespect than reassurance".¹⁹

In the United States, for example, informality of procedure in juvenile cases led to the erosion of due process and other resultant problems which had to be eradicated in the leading Supreme Court decision of *In Re Gault*.²⁰ In that case, a 15 year old boy was taken into custody without notice to his parents, and was accused of making an obscene telephone call. The petition filed at the hearing the following day was not served on or shown to the boy or his parents. The petition made no reference to the factual basis for the judicial action, stating only that the boy was a delinquent minor. The complainant was not present at the hearing. No-one was sworn at the hearing. Neither the boy nor his parents were notified of his right to be represented by counsel. The boy was committed to custody for a maximum of six years. The boy's petition for *habeas corpus* before the Maricopa County Superior Court, Arizona, was subsequently dismissed, which decision was later affirmed by the Supreme Court of Arizona. On appeal, the Supreme Court of the United States reversed the decision, holding that the boy had been denied due process of law.

18 (1976) 136 C.L.R. 248.

19 E. Szwed, *Family Court - Do They Provide Solutions?*, Hast Legal Workshop, Institute of Advanced Legal Studies 1983, pp.4-5.

20 387 U.S. 1, 18 L. ed. 2d 527, 87 Ct. 1428.

4.29 Perhaps, the lesson to be learned from *Gault* and applied to family law cases is that in advocating flexibility of procedure, we should not lose sight of basic procedures. As Mr. Justice Fortas in *Gault* pointed out "... [d]ue process of law is the primary and indispensable foundation of individual freedom". This should not be taken as suggesting that there should be no changes in procedures in family cases, but rather as encouraging precision in the recommendations for reform. A friendly and helpful atmosphere in family law cases is not incompatible with due process. It is suggested, that if flexibility in family law cases is desired, specific changes of procedure should be enumerated rather than a blanket "informality" mandate. On the other hand, if a change in atmosphere is what is really meant by the term "informality", the way of altering this is by choosing appropriate and sensitive judicial personnel.²¹ New Zealand, in particular, would appear to have struck a reasonable balance. There, informality has been achieved by a combination of specially appointed judges, early counselling efforts and trials conducted "in such a way as to avoid unnecessary formality" (*Family Courts Act, 1980* section 10) together with an express statutory prohibition against the wearing of wigs and gowns.

(3) REPRESENTATION OF CHILDREN IN FAMILY LITIGATION

4.30 A movement in favour of the legal representation of children in family litigation has been in evidence in recent years. This is the result of increased understanding of the psychological development of children and an awareness that the interests of a child are not necessarily identical at all times with those of his or her parents. The main questions that arise in this context are the types of situations in which the child should receive separate representation, if any, and the identity and role of the person carrying out such representation.

Ireland

4.31 The Law Reform Commission has already considered the issue of representation of children in the context of care proceedings in its *Consultation Paper* and *Report on Child Sexual Abuse*. In the Consultation Paper,²² it was suggested that provision should be made for the appointment by the justice of an independent representative for the child where this appeared to be necessary in the interests of the child. It was envisaged that in many cases the justice would take the view that the child's interests were represented adequately by the health board. However, some cases would arise where an independent voice on behalf of the child would assist the court in achieving a balanced view, for example in the case of an older child who has strong objections to the plans being made for him or her by the Health Board.

4.32 The above provisional recommendation was affirmed by the Law Reform

²¹ See below, Chapter 6.
²² See para. 2.27.

Commission in its *Report on Child Sexual Abuse*.²³ Its final recommendations in this area were as follows:

- (1) A child should have a right to be heard in care proceedings relating to him or her, except where it appears to the court that this would not be in the child's interest. (Para. 3.22)
- (2) Provision should be made for the appointment by the Justice of an independent representative for the child where, in the opinion of the Justice, this appears to be necessary in the interests of the child. The person providing representation should be legally qualified. He or she should be appointed by the Court from among lawyers who by reason of training and experience are competent to represent children. A panel of such lawyers should be established. The criteria for appointment to the panel, including the possibility of specialist training, are matters which should be considered by the two professional bodies. (Para. 3.22)

4.33 Since then, the *Child Care Act, 1991*, has been enacted containing certain provisions relevant to the child's voice in court. Section 24 provides that in any proceedings under the Act relating to the care and protection of a child, the court shall (a) regard the welfare of the child as the first and paramount consideration, and (b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child. Section 25 empowers a court to make a child a party to all or part of care proceedings and to appoint a solicitor to represent the child in any case where the court is satisfied that this is necessary in the interests of the child. Where a solicitor is appointed by the court, the costs and expenses incurred will be paid by the health board involved in the proceedings unless the court orders otherwise. Section 26 empowers a court to appoint a guardian *ad litem* for a child in care proceedings where the court is satisfied that this is necessary in the interests of the child. The cost incurred by a person acting as a guardian *ad litem* will be paid by the health board involved in the proceedings unless the court orders otherwise. Where a child with respect to whom a guardian has been appointed subsequently becomes a party to the proceedings, the order appointing the guardian will cease to have effect. Although not provided for initially in the first draft of the *Child Care Bill* as approved by the Dáil, this section incorporating the notion of a guardian *ad litem* was inserted following the contributions made by a number of Senators during the Committee Stage in Seanad Éireann.²⁴

23
24

LRC 32-1990.

See, in particular, the comments of Senator David Norris during the Second Stage: "Guardians *ad litem* are court appointed professionals who have a very specific and independent role in relation to children who are the subject of court hearings. The main job of the guardian *ad litem* is to focus very specifically on the interests of the child and report to the court for the purposes of the court hearings. It is not intended that the relationship is an ongoing or therapeutic one. It is contemplated solely with regard to the court and comes into play where the parent is absent through illness, death or incompetence of various kinds or is a party to contentious proceedings....": Seanad Éireann, *Official Report*, 7 March 1991, at 2088-2089.

4.34 At the time of writing, the *Child Care Act* is being brought into operation piecemeal and the Department of Health is still working on the details of the rules and regulations necessary to bring section 26 of the Act into effect. Hence, the practical implementation of section 26 remains to be seen. Nonetheless, some insight into the prospective role of the guardian *ad litem* can perhaps be gleaned from the statements made by the Minister for State, Mr. Noel Treacy, during the final reading of the Bill in the Dáil:

"The purpose of the guardian *ad litem* would be to represent the child, take care of the child, observe the child and ensure that the child's interests are protected beyond any doubt in the care proceedings, the court proceedings and in the interim period. Instead of a solicitor the court [sic] appoints a guardian *ad litem* or, alternatively, in the interests of the child the court could appoint both a solicitor and a guardian *ad litem*".²⁵

According to Mr. Treacy, it was envisaged that while the health board will be responsible for the expenses of the guardian *ad litem*, it may recoup its expenses from a party or parties to the proceedings if it can be proved conclusively that those parties have the necessary resources to contribute to the costs.²⁶

The United Nations Convention On The Rights Of The Child

4.35 The *United Nations Convention on the Rights of the Child* was adopted by the General Assembly of the United Nations on 20 November, 1989, and has been ratified by Ireland. Article 12 of the Convention provides as follows:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The reference to "any judicial and administrative proceedings" in Article 12.2 means that the *Child Care Act, 1991*, as it stands may be insufficient to satisfy the Convention's requirement of representation in a much wider range of proceedings. The reference to "administrative" proceedings suggests that there might be a need to provide children with representation in applications before

25 Dáil Éireann, *Official Report*, Vol. 410, No. 2, 2 July 1991, at 442.
26 *Ibid.*

the Adoption Board.²⁷

Legal Representation Of Children In Other Jurisdictions

Australia

4.36 The first significant federal enactment in the family law area pursuant to Australian Constitutional power was the *Matrimonial Causes Act, 1959*. This was superseded in 1975 by the most important federal enactment in the family law area to date, the *Family Law Act* of that year. Rule 115A of the *Matrimonial Causes Rules*, which accompanied the *Matrimonial Causes Act, 1959*, permitted the appointment of a guardian *ad litem* for the purposes of a child being represented in divorce proceedings. It seems that the rule was rarely used because it placed the burden of costs on one or other litigation parties.

4.37 Section 65 of the *Family Law Act, 1975*, introduced a new provision with respect to the representation of children. As amended, it now reads:

"Where, in any proceedings under this Act in which the welfare of a child is relevant, it appears to the court that the child ought to be separately represented, the court may of its own motion, or on the application of the child or of any other person, order that the child be separately represented, and the court may make such other orders as it considers necessary for the purpose of securing such separate representation".

This clause empowered the court to grant a child separate representation in custody or maintenance proceedings affecting the child. It was envisaged that the cost of this representation would normally be paid from legal aid sources, and the regulations which accompanied the *Family Law Act, 1975*, provided for a request to the Australian Legal Aid Office to arrange the child's representation.

4.38 In 1980, the Joint Select Committee on the Family Law Act, 1975, examined section 65. It found that the *Family Law Act* intended that disputes involving children would be resolved as far as possible by mediation rather than adversary proceedings. The power to appoint a separate representative was relevant to adversary proceedings, and tended to cause adjournments, delays and extra costs. The Joint Select Committee thought that it would not be sensible for the court to appoint a separate advocate in every contested case as "this would involve a very large financial commitment and might be perceived as underwriting the adversary approach to the settlement of disputes". The Committee thought

27 In this respect, it should be observed that the Report of the Review Committee on Adoption Services (1984) noted that the right of a child to be heard on an application for adoption order is not specified in law, although the Adoption Board is under a statutory obligation to take account of the wishes of a child over seven years of age on the date of the application for the order. The Committee recommended that the law should require an adoption agency, before it decides to place any child with prospective adopters, and the Adoption Court (the creation of which was also proposed by the Committee) before it makes an adoption order, to ascertain as far as practicable the wishes and feelings of the child and to give due consideration to them, having regard to his age and understanding.

that available resources should be directed towards the conciliation elements of the court's work and declined to make recommendations concerning the separate representation of the child. In 1983, the Chief Justice of the Family Court issued "Guidelines for Separate Representatives of Children Appointed Pursuant to section 65 of the Family Law Act". However, these guidelines failed to clarify the confusion surrounding the role of the separate representative, i.e. whether it is to assist the Court or to provide independent representation for the child.²⁸

4.39 In June, 1989, the Family Law Council of Australia produced a Report on Representation of Children in Family Law Proceedings in which it suggested that a clear definition of the role of the separate representative was necessary. Noting that it was current practice for the court to order a report from a Family Court counsellor when it required the wishes of the child to be known, the Council was of the view that this was the proper way in which this information should be made available to the court. If the child's wishes were the only matter in issue, appointment of a separate representative was not appropriate.

4.40 The Family Law Council recommended that in other cases the role of the separate representative should be that of an *amicus curiae*, a neutral and independent assistant to the court who focuses on the position of the child in the dispute. He or she should ensure that all evidence relevant to the child's welfare would be placed before the court. Therefore, he or she would act as case coordinator, but would not have a role as a legal advocate nor any adversary functions. His or her duty would be to the court and full disclosure would be the rule. However, the separate representative would still require advocacy skills in order to be in a position to test evidence by cross-examination.

4.41 Court counsellors²⁹ would be in the best position to identify early in the proceedings the cases in which a separate representative might be required and should indicate such necessity in their report to the court, although the appointment of the representative should remain at the discretion of the court. The court might also be alerted by the pleadings to the need for a separate representative.

4.42 In order to avoid ambiguity, the Family Law Council proposed that the separate representative be titled the Official Solicitor because this name reflected the independence of the role; and that she or he be given all required rights and powers by statute. For example, the Official solicitor could apply for costs against another party on procedural matters or application for adjournment. Costs would, however, never be available against the Official Solicitor. He or she would not be allowed to appeal the case, as this would conflict with the neutral role, but interlocutory orders could be appealed.

28 Indeed, the role of the separate representative has been described in judicial decisions as anything between representing the child "as counsel would ordinarily" and making a "full investigation" or reporting to the court. Compare *E. v E.* (1979) F.L.C. 90-645 and *Todd v Todd* (No. 1) (1970) F.L.C. 90.001.

29 The Family Court of Australia has attached to it a counselling service to which resort may be had before and during proceedings. This service is staffed by a Principal Director of Court Counselling, Director of Court Counselling, and Court Counsellors.

Canada³⁰

British Columbia

4.43 British Columbia instituted the office of Family Advocate by section 8 of its *Unified Family Court Act, 1974*, which office was confirmed throughout British Columbia by section 2 of the *Family Relations Act 1979*. She or he is authorised to act as counsel for the interests and the welfare of the child *inter alia* in adoption, guardianship, custody or maintenance cases, as well as cases involving the alleged delinquency of the child. The research in British Columbia suggests that one major advantage of separate representation of the child is that it promotes out-of-court settlements. Some of the suggested reasons for this are that (1) children may be prepared to tell their own representative with whom they wish to live, but not their parents, and faced with this information the parent may be prepared to abandon the claim, (2) the lawyer helps to clarify and limit the area of dispute, (3) the parents assume that the position adopted by the children's representative will be influential at trial and will be prepared to follow his or her advice in order to appear to be acting reasonably e.g. attending a meeting for the purposes of settlement.

Alberta

4.44 Since 1966,³¹ Alberta has used the *amicus curiae* procedure for judicial consideration of the interests of children in custody disputes in the Supreme Court and, later in the District Courts. The Department of the Attorney General provides the services of some of its lawyers to act as *amici curiae* upon the order of a judge of the Supreme Court. Originally, an *amicus curiae* was appointed on the initiative of the trial judge, but today counsel for one of the parents often suggests, or the parents agree to, such appointment. The *amicus curiae* is appointed with the "consent of counsel" and is always a lawyer. This means that a disputing parent, through counsel, has a veto on the appointment of an *amicus curiae*.

4.45 Certain problems with the role of the *amicus curiae* have been identified. The first of these is delay. The solicitor from the Attorney General's Department routinely warns counsel that no home investigation report should be expected in less than ninety days and in some cases it is much longer. The second problem is that of finance. No specific funding appears to have been arranged for the office of *amicus curiae*. The third problem relates to evidence. The *amicus curiae* brings an investigative element into the proceedings, and the normal rules of evidence (such as the rule against hearsay) do not apply. It has been suggested that the applicable rules should be laid down, so that there are no differences of approach between one court and another. Another problem is that of duplication. For example, the court may appoint an *amicus curiae* and also request a psychologist to compile a report.

30 The following is a summary of some of the Canadian provinces arrangements for the representation of children as set out in Olive M. Stone, *The Child's Voice in the Court of Law* (Butterworths, 1982).

31 *Woods v Woods* (1966) No. 41748, unreported.

request a psychologist to compile a report.

4.46 In addition, it appears that the *amicus curiae* has no function in Alberta with respect to child protection cases and in 1981 the Alberta Ombudsman recommended in his Special Report that consideration should be given to the potential role of the *amicus curiae* in these cases. In 1976, the Institute of Law Research and Reform in Edmonton had sponsored a report which suggested that the *amicus curiae* should be able to intervene in cases of alleged abuse and neglect as well as cases of custody, access and guardianship.³²

4.47 In 1972, the Institute of Law Research and Reform in Edmonton, Alberta published a Working Paper on the Family Court, in which it said that the *amicus curiae* procedure satisfied an "urgent and important need". It recommended that this service should be available in the Family Court without expense to the litigant. It further recommended that the *amicus curiae* should have the right to examine and cross-examine witnesses, and the right to bring cases back to the court if there is reason to believe that the child is not being properly looked after by the person to whom custody is awarded.

Ontario

4.48 Provisions for the separate representation of minors have been established for a long time in Ontario. As far back as 1881, statute provided that the solicitor appointed by the Court of Chancery as guardian *ad litem* of infants should be the first Official Guardian *ad litem* of infants, and successive Judicature Acts continued this responsibility. The *Matrimonial Causes Act, 1970*, of Ontario provides that where in a petition for divorce or an action for annulment of marriage there is a child of the marriage under the age of 16, or a child of 16 or 17 years of age and engaged in full-time attendance at an educational institution or through illness or infirmity unable to earn a livelihood, the Official Guardian shall cause an investigation to be made and shall report to the court upon all matters relating to the custody, maintenance and education of the child.³³

4.49 Under the Rules of Practice and Procedure of Ontario dealing with matrimonial causes, when a petition contains particulars of children of the marriage, all papers and pleadings are to be served on the Official Guardian. The report of the Official Guardian and the supporting affidavit must be served on the parties. The Official Guardian has the right to particulars, discovery and production in all matters touching on the custody, maintenance and education of the child, whether or not any such matter is in issue in the proceedings. The Official Guardian is a lawyer. The Ontario legislation specifically gives the person appointed an independent right of appeal from any order in a custody hearing. The Official Guardian may engage any person to make an investigation

32 S. McKeown, *Representation of the Infant in Legal Proceedings - Who Speaks for the Child?*, Edmonton; Institute of Law Research and Reform, 1976.

33 R.S.O. 1970, c.285, s.6, as amended by the *Matrimonial Causes Amendment Act*, S.O. 1978, c.2, s.83.

on his or her behalf. This report may be received in evidence after the investigator has by affidavit verified it as to the facts within his or her knowledge. Where the facts in the report are disputed, the Official Guardian may attend the trial on behalf of the child and cause the person making the investigation to attend as a witness.

4.50 In the area of adoption, the *Child Welfare Act, 1980*, provides that the court may appoint a guardian *ad litem* of any child under the age of 18 years either before or on the hearing of the adoption application if it considers such an appointment is required to protect the child's legal interest in the proceedings. Also, where the parent of a child being adopted is under the age of 18, the parental consent is not valid unless the Official Guardian is satisfied that the consent reflects the true informed wishes of the parent.

4.51 However, while the legal provisions for separate representation of children in Ontario appear to be adequate on paper, it has been said that the arrangements are unsatisfactory in practice. Delays in custody cases are seen as a major problem. Legal practitioners also report that the reports compiled by the social workers of the Official Guardians Office tend to avoid controversial matters, which means that the value of the service for children is reduced.

U.S.A.

New York State

4.52 The office of the Law Guardian exists in the State of New York. The Law Guardian may represent a child in a juvenile delinquency matter or in a child welfare matter. The stated purpose of the Law Guardian is to guarantee procedural and substantive due process for a child. The role of a lawyer provided for a child is similar to that of defence counsel in an adult criminal prosecution.

Uniform State Laws

4.53 The National Conference of Commissioners on Uniform State Laws produced in 1970 a *Uniform Marriage and Divorce Act*, which, following amendments in 1971 and 1973, provides by section 310 for the appointment of an attorney to represent the interests of a minor or dependent child with respect to his support, custody and visitation. The *Uniform Parentage Act* was approved by the National Conference of Commissioners on Uniform State Laws in 1973. It is principally concerned with children born outside marriage or those born in marriage whose paternity is in doubt. Section 9 of the Act empowers the court to appoint a guardian *ad litem* where the child is a minor. The child's mother or father may not represent the child as guardian or otherwise.

The Connecticut Inquiry

4.54 In 1977, a study was conducted in Connecticut among eighteen attorneys

who had represented children in divorce suits. The investigators were agreed that there was a need to clarify the functions of the child's advocate following this inquiry. The advocates involved had revealed a confusion of perception of the role of the child advocate, some seeing themselves as fact-finders, others as advocates, and others as hybrids of the two. For example, one felt he should withdraw from a case if he disagreed with the child's position, another thought he should conduct litigation in accordance with the child's preference, and another said that, where the child was too young to express a preference, he saw his role as a guardian *ad litem* rather than an attorney. The attorneys who identified their main task as one of fact finding to assist the judge felt that it was necessary to take on advocacy, counselling and mediating responsibilities. In some cases this raised the possibility of duplication and conflict with investigation carried out by other social work agencies. Like the conclusion drawn by the Australian Family Law Council, this study supports the view that the role of an independent representative should be made clear.

England

The Official Solicitor³⁴

4.55 In England, the Official Solicitor to the Supreme Court has certain functions with regard to representation of children in litigation. The office was created in 1875 and is presently confirmed by section 90 of the *Supreme Court 1981*. The Official Solicitor is a servant of the Crown and may at any time be called upon by a judge to carry out an investigation or to assist the court to see that justice is done between the parties. The Official Solicitor is appointed to act where, if this were not done, there would be a denial or a miscarriage of justice. The Official Solicitor does not act for private clients and is not empowered to intervene in any proceedings without the direction of the court. The primary duty of the Official Solicitor is to the court, but when constituted to act for individuals, he or she has the duties associated with that role (guardian *ad litem*, next friend, receiver etc.).

4.56 Cases in which the Official Solicitor may represent children fall into two main groups. First, there are those in which relief is sought against a child in general litigation, e.g. claims for damages or inheritance claims. Second, there are cases where the child's welfare is the subject of the dispute. In these latter cases, the Official Solicitor acts not only as guardian *ad litem*, but also as solicitor.³⁵

4.57 Until 1981, the increase in use of wardship was reflected in the increased demand for the services of the Official Solicitor. A Practice Direction in 1981 was intended to limit this involvement. It is now the practice to join the child as

34 *Clarke, Hall & Morrison on Children*, 10th ed.

35 There are three types of case in the second group: (i) applicant as guardian *ad litem* in High Court adoption applications (Governed by *Adoption Rules 1984*); (ii) applicant under the *Matrimonial Causes Rules 1977*; and (iii) wardship proceedings where the child is to be joined as a party (R.S.C. Ord. 90 r.3(2)).

a party in wardship proceedings and to ask the Official Solicitor to represent the child only in special circumstances.³⁸ A report from a court welfare officer will usually be considered sufficient. However, the increase in High Court adoption applications again extended the Official Solicitor's activities in representing children.

4.58 The Official Solicitor may be appointed by a judge or registrar, of his or her own motion or on the application of a party. As guardian *ad litem* of the child, the Official Solicitor does not have the custody of the child nor is he or she a welfare officer. The function of the Official Solicitor is to place before the court, generally in the form of a report, the evidence which she or he considers to be material on the child's behalf, and where necessary, to instruct counsel to present the case at the hearing.

Guardians Ad Litem

4.59 Concern for the representation of children in care and related proceedings was voiced in 1974 by the Field Fisher Report, following the tragic case of Maria Colwell, who died as a result of abuse by her mother and stepfather after a care order was discharged. The *Children Act, 1975*, provided for the establishment of panels of guardians *ad litem* and reporting officers in adoption and freeing proceedings, as well as in care and related proceedings where there might be a conflict between the child and his or her parents. In November 1976, that part of the Act which amended the *Children and Young Persons Act, 1969*, was partially implemented to provide for the appointment of a guardian *ad litem* where there is an unopposed application for the discharge of a care order (unless the Court is satisfied that to do so is not necessary for safeguarding the interests of the child or young person). The remainder of the section was not brought into effect until May 1984.

4.60 The guardian *ad litem* is an independent social worker appointed in each case by the court. Upon appointing a guardian *ad litem*, the justice or justice's clerk must also consider whether the juvenile should be legally represented and may direct that the guardian *ad litem* is to instruct a solicitor to represent the child. The guardian *ad litem*, acting in conjunction with the solicitor, must consider how the case is to be presented for the juvenile and must instruct the solicitor, unless the solicitor considers, having taken into account the views of the guardian *ad litem*, that the juvenile wishes to give instructions which are in conflict with those of the guardian *ad litem* and that he or she is able to give instructions on his or her own behalf.

4.61 The duty of the guardian *ad litem* is to safeguard the interests of the child in court proceedings. His or her functions include interviewing persons, inspecting records and reports and obtaining professional assistance. In some cases, the guardian *ad litem* may feel that professional assistance is required, such

as specialist assessment of the child by a paediatrician, child psychiatrist, educational or clerical psychologist, neurologist, or radiologist. If the child is the subject of an interim care order, permission must be sought from the local authority. Otherwise, consent must be obtained from the person with custody of the child. If the guardian *ad litem* is refused permission to obtain professional assistance, he or she may refer back to the court for directions, consider making the child a ward of court, or place the decision made by the local authority under judicial review. After full investigation, a guardian *ad litem* writes the report. This is sent to the Court, with a request that it be distributed to the relevant parties in the proceedings, if time is available. If time is short, the report may be distributed by the child's solicitor to the parties after obtaining permission of the court.

The Children Act, 1989

4.62 The *Children Act, 1989*, introduced radical changes into the private and public law affecting children in Britain. As regards and appointment of guardians *ad litem*, the Act provides in section 41(1) that in certain proceedings, a guardian *ad litem* must be appointed unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests. These proceedings are listed in section 41(6) of the Act and relate mainly to care and supervision and to orders under Part V of the Act, principally emergency protection and child assessment orders. As under the old arrangements, local authorities are responsible for the payment of fees, allowances and expenses of guardians. Rules of Court will require guardians to be appointed earlier than they often were under the old law.

4.63 The guardian is expected to play a role throughout proceedings so that, for example, he or she may advise the court about the making of interim orders, or questions relating to contact with the child. Under section 41(10), the guardian may also apply for directions to be made or for interim orders to be discharged if they are no longer needed. Andrew Bainham notes that under this new provision, the guardian *ad litem* is "more than a mouthpiece" for the child. His or her duty is to safeguard the interests of the child, and while this includes ascertaining the child's wishes, the child's wishes and interests may not be synonymous.³⁷

4.64 Another significant change made by the Act concerns the appointment of a solicitor on behalf of the child. Under section 41(3) and (4), the court may appoint a solicitor for a child if no guardian *ad litem* has been appointed, where the child has sufficient understanding to instruct a solicitor and wishes to do so, or it appears to the court that it would be in the child's best interests. Such appointment is at the discretion of the court. It is understood that if both a solicitor and a guardian *ad litem* are appointed, the solicitor will represent the child in accordance with the guardian *ad litem*'s instructions. However, if the

37

Andrew Bainham, *Children - The New Law - The Children Act 1989* (Bristol: Jordan and Sons, 1990), at p.192.

child is old enough to give instructions, the solicitor will take directions from the child, which may be important where the child disagrees with that guardian *ad litem's* view of his or her best interests. Bainham observes that this may have the unfortunate consequence of leaving the guardian *ad litem* without legal representation.

4.65 In recent years a problem has come to light in the operation of the guardian *ad litem* system in England. In theory the guardian *ad litem* is an independent social worker appointed from a panel of expert social workers by the court. The panel is administered by the local authority which has responsibility for providing the members of the panel with preparation and training. According to Christopher Jackson:³⁸

"the idea of panels from which the court could appoint experienced social work professionals to assess the plans and proposals of the local authority in a particular case, to assess and report to the court in the interests of the child and to arrange the separate legal representation of that child if and when that was thought to be appropriate was an excellent one. It was an idea way ahead of anything that had previously existed and was universally welcomed. However the notion that these panels should be set up, administered, managed and financed by the local authorities, an authority that is almost invariably a party to the proceedings in which the guardian was operating, was a very poor idea".

The Report of the Joint Working Party of Members of the Association of Directors of Social Services, the Association of County Councils and the Association of Metropolitan Authorities, published in February 1986, stated:

"almost all sources doubted whether true independence could be compatible with the local authority responsibility to set up, administer, train and finance the panels ... the extent to which a panel could be really independent if it is appointed by a group of local authority staff who have an involvement in perpetuating the child care practice of that local authority is doubted."

4.66 The 1991/92 Annual Report of the Children Act Advisory Committee refers to the problem³⁹ and states:

"Concerns have been expressed to the Committee about whether the independence of a guardian *ad litem* might be compromised by being a paid employee of a local authority. The Committee acknowledges the substantial safeguards taken to preserve the independence of guardians *ad litem* and accepts that funding, of itself, need not threaten independence. Equally, it is conscious ... that it is essential that the

38 Reporting on Children, the Guardian Ad Litem, the Court Welfare Officers and the Children Act 1989, (1992) *Family Law Quarterly* 252.

39 *Annual Report*, Chapter 4, p.29.

court and the public should have confidence in the independence of the guardians *ad litem* and that the guardians *ad litem* themselves should feel confident of their independent status."

4.67 A similar difficulty arises in England in relation to the re-appointment of guardians *ad litem* which, under guidance from the Department of Health, is carried out every three years. A guardian *ad litem* who has questioned the local authority's handling of cases could reasonably feel that his or her re-appointment might be threatened, because the officers of the authority whose cases he or she is investigating are involved in the re-appointment.

4.68 An associated problem is that local authorities claim not to have been given adequate funds to run the panels. Local authorities which attempt to manage the quality of the service of the panel are accused of interfering with the independence of the guardian. The panels have not been able to cope with demands for guardians and in some areas this has led to delays in processing cases through the courts. Worse than this, in many areas it has led to Justice's clerks deciding not to appoint guardians in cases where it would otherwise be thought appropriate.

Conclusions

4.69 Amongst the members of the Working Group on Family Courts, two clearly discernible points of view emerged on the separate legal representation of children in family law proceedings. On the one hand, reservations were expressed about the idea on the grounds that involvement of children in custody proceedings, for example, may result in pressure being brought to bear on the child to choose as between the parents. It was also felt that financial considerations militated against the notion of separate representation of children, particularly since the Probation and Welfare Service might be adapted to fulfil a similar function. Moreover, proceedings could be unnecessarily protracted by virtue of the presence of a third legal representative who might wish to introduce a new set of witnesses.

4.70 The second point of view was that separate representation of children was desirable in principle. This view was premised on the belief that there could be a need for a child-centred brief in proceedings where the interests of the child were not necessarily *ad idem* with those of the parents or the health board. While some adherents of this view thought separate representation to be essential in all child care proceedings, most were of the opinion that the judge should have discretion to decide whether or not the appointment of an independent representative was necessary to represent the child's interests. On the whole, it would appear that the experience of other jurisdictions in relation to the separate representation of children has been a positive one.

(5) **THE PRIVACY OF FAMILY PROCEEDINGS**

(a) *Public and media access to hearings*

Ireland

4.71 Article 34(1) of the Constitution provides that "Justice shall be administered in courts established by law... and save in such special and limited cases as may be prescribed by law, shall be administered in public". Section 45(1) of the *Courts (Supplemental Provisions) Act, 1961*, provides that "Justice may be administered otherwise than in public in ... matrimonial causes and matters ... and minor matters." Minor matters are cases involving children. The general practice is not to admit the public or the media to family proceedings.

4.72 There are a number of other provisions laying down restrictions in respect of specific proceedings. Rule 17 of the Circuit Court Rules (No.6) 1982⁴⁰ provides that applications under the Rules shall be heard otherwise than in open court (i.e. applications under the *Guardianship of Infants Act, 1964*, the *Family Law (Maintenance of Spouses and Children) Act, 1976*, and the *Married Women's Status Act, 1957*). Section 25(1) of the 1976 Act provides that proceedings under the Act shall be heard otherwise than in public, while subsection (2) provides that proceedings in the High Court and Circuit Court under the Act shall be heard in chambers. Section 14 of the *Family Law (Protection of Spouses and Children) Act, 1981*, makes similar provision. Section 12(4) of the *Married Women's Status Act, 1957*, confers a discretion to hear the case in private, while section 10(6) of the *Family Home Protection Act, 1976*, requires all proceedings to be heard otherwise than in public. Proceedings under the *Judicial Separation and Family Law Reform Act, 1989*, are to be heard otherwise than in public (section 34). Section 29 of the *Child Care Act, 1991*, provides that care proceedings will be heard in private.

Other Jurisdictions

4.73 In general, other countries examining the issue of privacy in family law proceedings have agreed that a balance must be struck between openness and privacy. While the litigants in family cases are entitled to a degree of privacy, the public is also entitled to know the way justice is being administered in the courts.

Canada

4.74 The Law Reform Commission of Canada recommended that family proceedings should be closed to the public subject to a discretion in the court to admit persons with a *bona fide* public or private interest:

We believe that legislative provisions should prevent undue publicity and promote private hearings and the confidentiality of court records. The

40 S.I. No.58 of 1982.

parties, the judge and auxiliary personnel should have every opportunity to examine the total situation with a view to achieving reconciliation, amicable settlement or the most appropriate judicial disposition. Although this necessitates some degree of privacy and confidentiality, it should not be confused with total secrecy. The public is entitled to know the way justice is administered in the courts; no court should be permitted to operate in secrecy.⁴¹

The Commission also envisaged that representatives of the media would be admitted to the court.⁴²

New Zealand

4.75 Section 159(2) of the *Family Proceedings Act, 1980*, provides that the only persons entitled to be present during the hearing of any proceedings under the Act (other than criminal proceedings or proceedings for contempt of court) are officers of the court, the parties and their lawyers, witnesses and any other person whom the Judge permits to be present. Subsection (3) provides that any witness shall leave the courtroom if asked to do so by the Judge. Subsection (5) provides that nothing in the section shall be construed to limit any other power of the Court to hear proceedings in private or to exclude any person from the Court.

Australia

4.76 The issue of publicity in family proceedings in Australia is a controversial one. Originally, section 97(1) of the *Family Law Act, 1975*, provided that proceedings in the Family Court or in another court exercising jurisdiction under the Act would be held in *closed court*. This was subject to section 97(2) which provided that relatives, friends, marriage counsellors, welfare officers, legal practitioners could be present in court unless the court ordered otherwise. In 1980, the Joint Select Committee on the Family Law Act examined the issue. The Committee took into account the divided view of the judges of the Family Court and of the legal profession. Some felt that the court should be opened so that justice could be seen to be done, while others were of the view that the court should remain closed because of the private nature of family law disputes and because publicity or trials would negate the Family Court's attempts to make litigants feel relaxed. The Committee concluded that "the decision to close the Family Court to the public went further than was necessary to protect the privacy of the parties to proceedings in the court". It recommended that the Family Court be opened to the public, provided that the judge retained a discretion to exclude persons from the court.

4.77 In 1981, Judge Opas of the Family Court was assassinated. This was seen by some as evidence of bad feeling associated with the secret nature of the

41 Working Paper No.1, *The Family Court*, p.36.

42 *Ibid.*

court. As one textbook records:

"[The] Family Court was acquiring the image of a Star Chamber, or secret court, that its procedures were often unjust and that because of its secret nature it was impossible for the man in the street to know what it was doing".⁴³

4.78 Two other factors have been identified as fuelling the change from closed courts to open courts. The first was the fact that the Family Court of Western Australia has always been open and yet few members to the public did in fact attend. The second factor was that the change in grounds for divorce removed the curiosity aspect for the prurient: "in other words, individuals who gained some perverse pleasure from watching the conduct of a case, say involving adultery or cruelty, would not find the same interest in irretrievable breakdown of marriage evidenced by 12 months' separation".⁴⁴ The *Family Law Amendment Act, 1983*, replaced the original subsections 97(1) and (2) with sub-sections providing that all proceedings under the Act were to be heard in open court, subject to the court's power to make a number of orders directing who could or could not be present in court.⁴⁵

(b) *Publication of details*

Ireland

4.79 Certain general restrictions concerning publication of reports of judicial proceedings are contained in the *Censorship of Publications Act, 1929*, some of which touch on family cases indirectly and some directly. Section 14(1) of the Act provides that it is unlawful to publish in relation to any judicial proceedings (a) any indecent matter the publication of which would be calculated to injure public morals, and (b) any indecent medical, surgical or physiological details the publication of which would be calculated to injure public morals. A person who publishes matter of this kind is guilty of an offence and liable on summary conviction to a fine not exceeding £500 or, at the discretion of the court, to imprisonment with or without hard labour for a term exceeding not six months, or to both.

4.80 Subsection 14(2) provides that it is unlawful to publish any matter in relation to proceedings for divorce, nullity of marriage, judicial separation or restitution of conjugal rights, with the exception of:

- (a) the names, addresses and occupations of the parties and witnesses;
- (b) the court, the name of the Judge, and the names of the solicitors and

43 Finlay, *Bradbrook*, at p.50.

44 Bates, *Introduction to Family Law* (1987), p.9.

45 In this regard, the case of *In the Marriage of A* should be noted, in which Lambert J. held that the principles of natural justice govern the exercise of the court's discretion in this respect, and that these principles must prevail other than in exceptional cases; (1988) 10 Fam. L.R. 485 at 488.

counsel professionally engaged in the case;

- (c) a concise statement of the charges, defence, and counter charges;
- (d) any point of law raised and the decision thereon;
- (e) the summing up of the Judge and the findings of the jury or the decision of the court and the observations of the Judge when pronouncing decision.

4.81 The restrictions in section 14 do not apply to, *inter alia*, law reports not forming part of any other publication and consisting solely of reports of proceedings in courts of law, or any publication of a technical nature *bona fide* intended for circulation among members of the legal profession or medical profession. Although publishers of law reports are not subject to section 14 restrictions, in practice, names, addresses, and distinguishing features of the parties are erased from all reports, as well as from unreported judgments. Section 31 of the *Child Care Act, 1991*, prohibits the publication or broadcast of any matter that would serve to identify a child who is the subject of care proceedings.

Other Jurisdictions

Canada

4.82 The Law Reform Commission of Canada recommended that representatives of the media should be allowed to attend and report family law proceedings, but that their reports should not include particulars that would lead to identification of the parties. It recommended further that steps should be taken to ensure the publication of decisions in professional journals.⁴⁶

New Zealand

4.83 Section 169 of the *Family Proceedings Act, 1980*, prohibits the publication of any report of proceedings under the Act (other than criminal proceedings or proceedings for contempt of court) except with the leave of the Court which heard the proceedings. Subsection (2) authorises the publication of the names and addresses of the parties, the name of the judge, and the order of the court in the case of proceedings for the dissolution of marriage, unless the court orders otherwise. Section 169 does not apply to the publication of any report in any publication that is of a *bona fide* professional or technical nature, and is intended for circulation among members of the legal or medical professions, officers of the Public Service, psychologists, advisers in the sphere of marriage counselling, or social welfare workers.

46

Law Reform Commission of Canada, Working Paper No. (1), *The Family Court* (January 1974), at p.36.

Australia

4.84 In Australia, section 121 of the *Family Law Act, 1975*, originally provided that a person could not publish a report that proceedings had been instituted or any account of evidence in proceedings. Exceptions to the ban on publication were the printing of transcripts and court documents, and *bona fide* publications intended for professional use. The publication ban could be relaxed at the discretion of the court, such as where the assistance of the public was requested in the tracing of a child, or where there had been a serious contempt.

4.85 A majority of the Joint Select Committee on the Family Law Act (1980) were in favour of relaxing the publication restrictions because the existing provisions were "too restrictive and inhibit proper public debate concerning the work and performance of the court". However, it acknowledged that certain parties might be vulnerable to exploitation of their affairs by the media. It recommended that the publication of the details of proceedings under the Act should be permitted, provided that the names of parties and any other identifying information were prohibited from disclosure, and that severe penalties could be imposed for infringement.

4.86 Section 121(1) of the Family Law Act as amended prohibits the media publication of any account of family law proceedings which identifies any party to the proceedings, or any person related to or identified with any party or a witness. Section 121(9) exempts from the provisions of section 121 communications concerned with the proceedings themselves, communications involving bodies responsible for discipline in the legal profession and legal aid organisations. Neither do the provisions apply to publications directed by the court or to publications of a technical or professional character, such as law reports, textbooks or periodical articles.

Previous Proposals For Reform In Ireland

4.87 On the subject of the privacy of family law proceedings in general, the Joint Committee on Marriage Breakdown underlined the importance of public scrutiny acting as a check on arbitrary decision-making in its 1985 Report:

The reasons why family proceedings are dealt with in private, sometimes referred to as *in camera*, is that frequently evidence in the case refers to personal and intimate aspects of the parties' lifestyle. If such matters were dealt with in open court, many who have a just cause of action might be deterred from proceeding further ... *In camera* hearings do, however, have a detrimental side-effect. Public scrutiny is the natural enemy of arbitrariness and injustice in a legal system. Our courts, while hearing family cases, have operated without this salutary check. When decisions are made in private, members of the general public can often misunderstand what takes place in the court. This can diminish confidence in the fairness of the administration of justice in this

particular field.⁴⁷

4.88 As regards the publication of details, the Committee further recommended that written court judgments should be publicly accessible, but designed to ensure the anonymity of the parties.

47 *Report of the Joint Committee on Marriage Breakdown* (March 1985), at p.110.

CHAPTER 5: SUPPORT SERVICES

5.01 Family law cases differ from many other cases in that the particular issue in dispute usually arises in the context of a broader family problem, and in the even broader context of social problems such as poverty and alcohol abuse. The disposition of a family case does not usually terminate the dispute nor erase the problem. The social and personal problems giving rise to the dispute cannot be solved by the legal and adjudicative process alone. Consequently, a number of professions play a role in family cases in addition to the legal profession. In the court setting, these would include the police, expert witnesses such as doctors, psychiatrists, and psychologists, and the probation and welfare service. Also, a family in a state of conflict might interact with the health boards and the welfare services. Another group involved with family litigants are persons who participate in counselling or mediation, whether privately or through the Family Mediation Service. These groups of professionals may be grouped under the general heading of "Support Services".

5.02 A recurring complaint in other jurisdictions is that there is insufficient co-ordination between the court and the existing support services. Clearly one aspect of this is the fact that each of the groups has limited knowledge of the other's work - an issue which is addressed below in Chapter Six. The issue being examined in this Chapter is whether support services should be better organised at a structural level. Specific concerns that arise in this context include, for example, the fact that the court does not have panels from which to draw expert witnesses - the choice of psychologist or medical practitioner being left to the individual litigant. Also, until the Family Mediation Service is established on a nationwide basis, it cannot properly be said that the courts dealing with family cases are fully supported by mediation services. There is no structure in place which allows litigants to transfer back and forth between a mediation service and the court service as required at different stages of the case.

5.03 There may be a need for certain services which, at present, simply do not exist. For example, there is no accredited panel of professionals from which the courts can appoint a children's representative for the purpose of court proceedings. Another service which is said to be lacking is an information and intake service which would provide potential or actual litigants with advice and basic information about the availability of other services. Calls have been made for the establishment of effective enforcement services so that the administrative back-up necessary to give effect to and supervise the operation of court orders would be forthcoming.¹

Ireland

5.04 In 1985, the *Joint Committee on Marriage Breakdown* reported that "one of the most disturbing aspects of the present court structure" was the lack of any proper in-court service.² It recommended that a comprehensive welfare service should be set up which would be staffed by social workers with experience in marital difficulties. The aim of this service would be to:

- (a) carry out investigations into family circumstances on behalf of the court;
- (b) report to the court on family circumstances;
- (c) arrange for the provision of further professional advice such as the assessment of children by a child psychiatrist or psychologist;
- (d) help the parties with the practical difficulties resulting from their marital problems such as child care and finance;
- (e) provide referral to other agencies, such as mediation and counselling; and
- (f) provide support and assistance for the members of the family before and after proceedings.³

5.05 While an in-house service with this level of sophistication has not yet been established, two particular support services already in existence in Ireland deserve closer examination because they already fulfil certain of these functions and because of their potential to assist the courts administering family law with even more efficiency. These services are the Probation and Welfare Service and

1 In this respect, see the conclusions of P. Ward in *Report on the Financial Consequences of Marital Breakdown* (Combat Poverty Agency, 1990) that only 13% of live maintenance orders were fully paid up and that 77% were more than six months in arrears. Similarly, it is said that there is a need to supervise the effect of custody and/or access orders, since many arrangements with respect to children may deviate considerably from the court order dealing with custody or access as time goes on. The issue of enforcement in the context of family law orders is, however, outside the scope of this Consultation paper as it is a complex and self-contained area which would merit separate and detailed examination. We note simply that there may be a need to develop an effective enforcement service without in any way suggesting how this might be achieved.

2 *Report of the Joint Committee on Marriage Breakdown* (April 1985), at p.107, para. 9.7.

3 *Ibid*, at pp.107-8, para. 9.8.

the collection of statistics.

(1) *The Probation And Welfare Service And Family Cases*⁴

5.06 Although the Probation and Welfare Service of the Department of Justice is already well developed, calls have been made from within the service itself for institutional restructuring in order to enable it to deal more effectively with family law cases. At present, the service plays a significant role primarily in family cases before the District Court. Work in family cases is carried out by probation and welfare officers around the country as one part of a wider range of duties. One of the officers attached to Dolphin House in Dublin deals exclusively with family work.

5.07 When a family case comes on for hearing, the judge will sometimes adjourn the case to allow the probation and welfare officer to investigate the circumstances of the family and will occasionally order a report. Reports are ordered mainly in custody/access cases, cases where barring orders are sought, and only very rarely in maintenance cases. The probation and welfare officer's work includes meeting with the family members, and other persons who might be in a position to provide relevant information, such as neighbours, friends, relatives or school teachers. Usually, the parties are asked to attend a first interview in the officer's office, where it is explained that the process is voluntary. The officer goes over the court proceedings to date, looks at the marital history and the difficulties leading to the litigation in question. In a custody/access case, the aim of the first interview is to focus the parties' attention on the welfare of the children.

5.08 After the first interview, the officer undertakes the investigation, interviewing the parties separately, the children (with or without a parent, or each other) and other persons. Often the officer undertakes a form of counselling, which may result in the parties resolving their differences. If such is the case the court case may be abandoned or a consent order made. The officer may also advise one of the spouses to seek counselling or assistance of a particular nature, such as where the spouse suffers from alcohol or psychiatric problems, or where a spouse has been raped. If there is some suspicion of child abuse, the officer might ask the mother to try to bring the child to the hospital and to bring it to the attention of the Garda Síochána. The investigation process of the officer takes approximately 6-8 weeks.

5.09 If the officer is requested to write a report, the report will include all the necessary information about the dispute and the family background, and will, if appropriate, record the view of the children of the family. The format of a report has become standardised over the years and usually is as follows: family background, details of children, marital situation, marital difficulties, unusual

⁴ Information obtained from Mr. Chris O'Toole, Senior Probation Officer (Wheatfield), Mr. Anthony Cotter, Senior Probation Officer (Smithfield), and *The Probation and Welfare Service and Civil Family Law* (Probation and Welfare Officer Branch, U.P.T.C.S.).

features of the case, and assessment. In barring cases, however, the report will not include any recommendation unless there is extreme danger of a physical nature to a spouse or the children.

5.10 The report may be made available up to a week before the hearing if requested, except in areas where the case build-up is such that the probation officers have difficulty producing the report in time for the hearing itself. Because of the problems of staffing and delay, it is difficult to make the report available to the legal advisers far in advance of the hearing. If a copy of the report is not yet ready, the officer will usually indicate the general contents of the report to the parties involved in advance of the hearing. The officer is present in court at the hearing and may be cross-examined on the contents of the report.

5.11 The Probation and Welfare Service does not provide a comprehensive service in family law cases. At Circuit Court level, there is no service outside Dublin and in Dublin the service is rarely used. The service which operates at District Court level is inadequately staffed. Officers outside Dublin carry heavy case-loads. There is now only one officer attached to District Court 11 in Dublin, with the result that there is currently a delay of 12 months in the provision of reports requested by the judge. Until 1990 there had been the equivalent of two and a half officers servicing the Court with an average reporting time of about three months.

5.12 The absence of a statutory basis for the work of the probation service in family cases has been criticised. A paper published by the Probation and Welfare Officer Branch of the U.P.T.C.S. says:

"While there is a legislative basis under the *Probation Act, (1907)*, *Criminal Justice Act, (1984)*, and the *Misuse of Drugs Act, (1977)*, for the work of the service in the criminal courts, no such legislative basis exists in the family law area. Largely because of this void, the Service's involvement in the family law area has evolved in rather haphazard and erratic fashion. Involvement was dependent on the attitude and approach of individual Justices and Judges ... The purpose of this branch at this time is to seek legislation to provide for and clarify the role of a Court Welfare Service in civil cases, with a view to ensuring the rights and dignity of individuals in their contact with us and to delineate for the judiciary what roles we can realistically and properly perform".

It appears that the probation service has not undertaken the task of preparing reports under Section 11 of the *Guardianship of Infants Act, 1964*, as inserted by the *Judicial Separation and Family Law Reform Act, 1989*, because of insufficient staff to meet the case-load.

5.13 The paper referred to above suggests that the criminal and civil work of the probation service should be distinguished and that a civil section within the service should be set up to be known as the Court Welfare Service. This would deal with two distinct areas of work. The first would include marriage

counselling and conciliation⁵, and the second the assessment and report-writing function. "Marriage counselling" is defined as a service "offered to parties who wish to live together but want to resolve problems which have arisen and to improve their relationship". "Conciliation" is defined as a service "offered to parties who wish to live separately but are unable to agree on the terms of such a separation" and which would help them "to reach mutually acceptable decisions with regard to matters arising from the breakdown of their marriage, especially the continued constructive parenting of their children". It has been said that the counselling and conciliation service, on the one hand, should be distinguished from the report writing function, on the other, in that no one officer should perform both tasks in the same case.

5.14 It has also been suggested that there should be a research and development officer to collect information and statistics about the family work of the probation and welfare service, for example on training needs, trends, the writing of reports and stress involved in the work. From the point of view of professional support in relation to the build-up of stress, it is worth noting that, in addition to a monthly meeting held to discuss case-load and progress, there is considerable informal discussion of cases between officers.

(2) *Statistics And Other Information*

5.15 Although the collection of statistics and other information about the disposition of family cases in the courts may not be a support service in the strict sense, it is an activity which is considered crucial to the monitoring and improvement of the family law system in all the jurisdictions studied. In the present section, we examine the type of statistics that might be required, and the present method of collecting statistics about family cases, together with the changes presently being implemented by the Department of Justice.

(a) *Types of statistical survey*

5.16 At the minimum, a proper system of collection should include statistics on the number of applications made and orders awarded, figures on enforcement and details of the grounds upon which certain reliefs (such as orders for judicial separation and nullity decrees) are made. There is also need for systematic research and information-gathering concerning the nature of orders made in matters involving judicial discretion, such as the level of maintenance orders, the length of barring orders, and child custody and access arrangements. Statistics and research would be of immense benefit to several groups including litigants and practitioners. To take one example, if research revealed that court orders on the issue of custody are not adhered to in practice and that parties implement their own arrangements after a certain period of time, judges would bring the benefit of this knowledge into the decision-making process. Similarly, further information about settlements and adjournments might suggest areas where

⁵ The term 'conciliation' is used but the definition in the Paper, set out above, suggests that it is similar to 'mediation'.

mediation services would be most effective. The lack of comprehensive information about court business means that problem areas, such as delays or the actual sums of maintenance awarded, or the number of spouses absconding from the country, are concealed. A thorough statistics and research service might also study the views of litigants availing of the family law system, so that an accurate picture of litigants' experiences in the courts can be formed.

5.17 At present, statistics on the family law business of the courts are compiled by the Department of Justice. Those regularly have been confined to cases in the District Courts, and even this information is limited. For example, the 1993 Statistical Abstract published by the Central Statistics Office gives the figures for the number of applications in the District Courts for various forms of relief in family law. No other details are given, not even the number of orders made. No information is given concerning applications to the Circuit Court or the High Court.

(b) Methods of collecting statistics

5.18 The collection of statistics is effected by court clerks and registrars for the Department of Justice. It appears that these persons are reluctant to undertake this activity, partly because their traditional function is to organise and expedite court business, and partly because courts are short-staffed in any event and compiling statistics represents an extra burden. Collection of family law statistics is also hampered by the fact that the extraction of information on family cases involves the clerk going through all the civil case files individually.

5.19 The Department of Justice appears anxious to obtain further and better statistics on court business, including family cases. It feels that this is essential for the proper administration of the system, for providing information to the public, and for providing legislators and researchers with necessary data. The Department is presently implementing a new system of collecting information. Thus far, this is limited to Circuit Court business. In the family area, the forms cover Circuit Court business under the *Judicial Separation and Family Law Reform Act, 1989*, and will aim to extract information on the applications made, the number of orders granted, the male/female breakdown of litigants, the type of property involved and the grounds for separation. The department is also encouraging clerks to make quarterly returns instead of annual returns.

Support Services In Some Other Jurisdictions

5.20 In the present section, we examine the kinds of support services available in other jurisdictions as well as various proposals for reform thereof. Studies of support services in other jurisdictions have been somewhat limited. Understandably, attention has been devoted mainly to the operation of the courts themselves. To the extent that improvements in support services have been advocated, they have tended to concentrate on the availability of counselling and conciliation services to the court. Information services, expert panels, and panels of children's representatives do not appear to have received significant attention.

However, stress has been laid repeatedly on the need for statistics and research in the family law area.

Australia

5.21 In Australia, there are three support services to the courts administering family law which are of particular interest:

- (1) ***Counselling Service:*** The Australian Family Court has attached to it a large counselling service which offers both counselling and conciliation. This service is complemented by the existence of marriage counselling organisations in the community which may be "approved" under the *Family Law Act 1975* and funded by Parliament.
- (2) ***Australian Institute of Family Studies:*** The Australian Institute of Family Studies was set up by the *Family Law Act, 1975*, which provided that its functions would include (a) the promotion, identification, and development of understanding of the factors affecting marital and family stability in Australia through the conduct of research and other means, with the object of promoting the protection of the family as the natural and fundamental group unit in society; and (b) advising and assisting the Attorney General in relation to the making of grants for purposes related to the functions of the Institute and supervising the employment of such grants.
- (3) ***Family Law Council:*** The *Family Law Act, 1975*, also provided⁶ for the establishment of a Family Law Council consisting of persons appointed by the Attorney General, comprising a Judge of the Family Court, other judges, officers of the Public Service, representatives of marriage counselling organisations and other persons. The function of the Council is to advise and make recommendations to the Attorney General either of its own motion or upon the Attorney General's request, on the working of legal aid in family law proceedings, and any other matter relating to family law. The Council must present an annual report to the Attorney General.

Canada

5.22 In 1974, the Canadian Law Reform Commission noted that the successful operation of a Family Court requires "that administrative counselling, conciliation, investigative, legal and enforcement services be made available to promote reconciliation and, where this is not possible, to promote pretrial settlements of collateral issues"⁷ Accordingly it recommended that the following services should be attached to a unified family court: (1) information and intake service; (2) counselling and conciliation services; (3) investigative services, and (4)

6 S.115.
7 LRC Canada, Working Paper No.1, *The Family Court* (January 1974), p.17.

enforcement services.

- (1) **Information and Intake Service:** Personnel would be engaged to deal with inquiries from individuals. They would determine the nature of the client's problems, provide information on the various support services in the community, and advise on the possible courses of action open to the client. Usually, contact with this service would be brief and the client would be referred to an appropriate social, medical or legal agency or individual. Use of the service would be voluntary.
- (2) **Counselling Services:** Pre-marital counselling would be excluded from the service. The service would deal with conciliation counselling and post-adjudicatory counselling. The latter would deal with issues which arise after a divorce has been granted.
- (3) **Investigative Services:** The Commission referred to the use of the probation service to prepare pre-sentence reports in juvenile delinquency proceedings and the use of investigative reports in custody, wardship, adoption and neglect proceedings. It proposed that reports would be made available in cases involving maintenance applications because the use of adversary procedures to determine the means and needs of the parties was not only time-consuming but also tended not to reveal the true state of affairs. It proposed that judges should also have the power to order investigative reports in custody cases. The Commission proposed that investigative services should be attached to the court and that the "objectivity of an investigation or investigative report is more effectively guaranteed by right of scrutiny and cross-examination being afforded to the parties or their counsel than by any physical segregation of investigative services from the court". However, it felt that *some* such services could be left outside the court, such as investigations by child welfare authorities in cases involving adoption, wardship and neglect.
- (4) **Enforcement Services:** The Commission was strongly of the view that a unified family court should take more responsibility for securing enforcement of its orders, to be achieved through auxiliary services. Although the operation of enforcement services would be worked out according to local conditions, the functions of these services would have to include:
 - receipt and disbursement of moneys paid under court orders;
 - maintenance of records and accounting systems to ensure an up-to-date picture of the status of court orders;
 - action to ensure that any default is explained and that it is made good; and
 - development of an effective system of tracing the spouse or

parent who has disappeared.

5.23 The Commission also stressed the need for the *collection of statistical* and other data for the following reasons:

"First, it permits the court to discharge its obligation to keep the public informed and enables it to focus public attention on weaknesses or defects in the court or in the community at large, thus bringing pressure to provide more adequate resources to contribute to the constructive resolution of family problems. Second, relevant data is also required to promote more effective administrative procedures and to ensure that the manpower in the court is used to its fullest advantage ... Third, statistical and social data can provide a secure basis for assessing the effectiveness of auxiliary services and of dispositions made of the court".

5.24 In our examination of the courts in the Canadian provinces dealing with family cases, it emerged that many courts had attached to them a counselling/conciliation service. However we were not made aware of the existence of information and intake facilities, enforcement services, data collection services or investigative services.

England

5.25 In addition to judges, registrars, magistrates and solicitors, other groups of professionals involved in family cases in England include:

- (1) **Local authority social services:** One of the functions of those bodies is to provide for children in need within their geographical area of responsibility. They are also charged with child protection. Social Services departments may also find themselves involved in private family proceedings, where, for example, a child whose custody is disputed by his or her parents has been under the supervision of a local department.
- (2) **Divorce Court Welfare Service:** This is staffed by Divorce Court Welfare Officers whose task is to provide reports to the divorce court, whenever requested by the court to do so, in cases involving child custody. This service is organised by the Probation Service and varies from location to location.
- (3) **Conciliation Services:** As we have seen, conciliation services may be independent of the court or organised by the Probation Service as part of the Divorce Court Welfare Services.
- (4) **Guardians Ad Litem:** The function of the guardian *ad litem* is to represent the child's interest to the court. The guardian *ad litem* is usually a trained social worker.
- (5) **D.H.S.S.:** The Department of Health and Social Security is responsible

for the administration of the system of welfare benefits.

- (6) *Police:* The police play a number of roles in family proceedings:
- (a) in enforcing the criminal law in the context of domestic violence or abuse;
 - (b) in enforcing certain orders of the court restraining the use of violence by one partner against another; and
 - (c) in taking certain forms of actions for the emergency protection of children.
- (7) *Psychiatrists, Psychologists, Physicians:* Such medical experts may be used as expert witnesses in family law cases.

The Report Of The Finer Committee

5.26 In 1974, the Finer Committee Report drew attention to the social work services of the courts. Having recommended the creation of a family court, it said that this court would have a "continuing, perhaps an extended, need for investigative, reporting and supervisory services such as are at present available to the matrimonial courts in both jurisdictions through their own welfare officers and the local authorities".⁸ It envisaged that the entire complex of activity in the welfare field would have to be divided, some parts being carried out by personnel serving the court directly, and other parts by agencies invoked by them. Consequently, there would have to be a network of relationships between the court and outside agencies such as the social services, education and housing departments of local authorities, the national health service, and the police.

5.27 The Report then focused on the nature of the service through which the family court would act. In this respect, we have already observed in Chapter 2 that the Committee considered three options for the basis of this in-court service: (1) the probation service, (2) local authority social services departments, and (3) a new family court welfare service. The Committee favoured the third option. Regarding the issue of communication between the court welfare service and other services, the Committee stressed that for most broken homes, "family law and the law of social security are different sides of the same coin".⁹ However, the courts and the social security authorities tended to maintain an isolated identity from each other. The Committee favoured the principle of co-operation between these two entities.

5.28 The Finer Committee also emphasised the need for co-operation in the compilation of official statistics. It appears that adequate statistical information

8 Para. 4.315.
9 Para. 4.337.

has been available for a long time in matters relating to divorce.¹⁰ However, the statistics of the matrimonial work of magistrates were found to be most unsatisfactory on the grounds that they bore all the marks of criminal association since they were published by the Home Office in their publication entitled "Criminal Statistics".¹¹ The committee also complained that the statistics were unreliable and inadequate, giving only the number of applicants and the number of orders made.

5.29 The Committee recommended that a statistics collection system should be devised which would provide annual and integrated data about both tiers of the proposed family court.¹² Its reasons for advocating improvement in court records were as follows:¹³

"Good court records are essential both for the proper administration of justice and for the compilation of figures relating to the work of the courts in order to provide a measure of their efficiency. But far more important, the doing of justice requires knowledge of the results of its own procedures. Legislators, judges, administrators, critics and citizens must have the knowledge of the social consequence of legal actions without which a democratic society cannot keep its institutions under constant and open scrutiny. Court records and legal statistics cost money; but it is money well spent, for they are an indispensable though humble part of the processes of government in a democracy".

The Nuffield Inquiry

5.30 The Nuffield Foundation funded a three year inquiry (1987-90) into the development of support services for the family justice system. It was set up in October 1987 at Bristol University, although it was envisaged as a small *ad hoc* national initiative. Its concluding report was published in November 1990 and is entitled "The Family Justice System and its Support Services". It focused on (1) cross-disciplinary training¹⁴ (2) information services, and (3) court-related welfare services.

5.31 The Inquiry reported agreement that there was a need to rationalise the specialist welfare support services of the family jurisdiction. It noted that the court welfare support agencies are presently split into four groups, each of which is organised differently:

- (1) the divorce court welfare service arm of the probation service;

10 Para. 4.412.

11 In this publication, the Committee complained, matrimonial statistics were presented in a table entitled "Matrimonial Courts; Certain Other Proceedings", in which the number of orders in matrimonial proceedings were followed by the number of orders for the destruction of meat, the removal of dead bodies, and the forfeiture of indecent photographs! The statistics were also published in the *Civil Judicial Statistics*.

12 Para. 4.415.

13 Para. 4.417.

14 See Chapter 6.

- (2) the specialist social work panels of guardians *ad litem* and reporting officers established in 1984 for some aspects of child care and adoption, administered by local authorities.
- (3) the various conciliation services, loosely co-ordinated by the NFCC; and
- (4) the Official Solicitor in the specialist child representation role.

The Inquiry thought that these should be rearranged along the following lines:

- (1) At government level: one division of one Department (the Community Service's Division of the Department of Health) should co-ordinate the development of the probation service, the guardian *ad litem* service, and conciliation.
- (2) At regional/circuit and local level: a new management structure should be separated from the local Authority.

In its discussion paper published in 1989, the Inquiry had noted general opinion that the local authority should not provide the organisational base for a court welfare service, because it is often a party to proceedings. It felt that the choice lay between creating a new specialist service, or a separate civil branch of the Probation Service.

5.32 As to whether conciliation services should be included within the service, the Inquiry noted the view of the NFCC that conciliation should be separate from the court and other court social work services. However, the Inquiry felt that the preferred view was that the functions of the new Family Court Welfare Service should include the provision of conciliation services.

5.33 The Nuffield Report also laid emphasis on Information Services. It argued that there was a clear need for those responsible for the family jurisdictions to develop an information strategy which would have three functions:

- (1) provision of information for litigants so that they can better understand the system and know what to expect when they go to court;
- (2) provision of statistical information about case load, case-flow and costs, to facilitate the work of official reports and academic studies;
- (3) provision of a "planned programme of government supported social research" which would be harnessed to the process of family law reform.

5.34 The Report noted that the Department of Health, the Lord Chancellor's Office and the Home Office had established an internal committee structure, the Family Law Administration Working Party, to tackle information requirements. Finally, the Nuffield Report suggested that it might be a mistake to introduce information technology into the courts and that it might be better to build it into

a court welfare system. The idea would be to provide a "proper management structure for the court welfare service, coupled with the need for modern case-flow management".

CHAPTER 6: JUDGES AND LAWYERS

6.01 A number of professionals are directly involved in family law proceedings. The legal profession (judges deciding family cases, and solicitors and counsel representing spouses in the course of litigation) plays a central role. Other professionals include probation and welfare officers, social workers, as well as psychologists, psychiatrists and physicians who may be called as expert witnesses by the parties. It has been said that each group of professionals operates within its own context with little knowledge or understanding of the work of the other professionals. For example, judges are traditionally perceived to have little knowledge of the areas of individual psychology or family behaviour. Conversely, social workers may have insufficient knowledge of the legal framework within which they operate. There is the allied question of suitability to deal with family cases. The characteristics of family cases are such, it is said, that persons becoming involved in the area should be suited to do so by reason of their personality and experience.

6.02 In this Chapter we examine the position of Irish judges in terms of qualifications, appointment and training. We then set out developments in other jurisdictions in this area. It will be seen that all of the jurisdictions examined have some sort of judicial training programme in operation, and that some of them require that judges dealing with family cases be selected on the basis of suitability to deal with family law. We also include some observations on the training and accreditation of family lawyers.

Ireland

(a) Appointment of judges

6.03 Judges dealing with family cases in Ireland have not necessarily practised in the field of family law prior to their appointment. In accordance with the

Courts (Supplemental Provisions) Act, 1961, the qualifications for office are that the person is at the date of appointment: a practising barrister of at least 12 years' standing (High Court and Supreme Court); a practising barrister of at least ten years' standing (Circuit Court); or a practising barrister or solicitor of at least ten years' standing (District Court). A judge is appointed to the District Court, Circuit Court, High Court or Supreme Court. A judge is never appointed specifically as a family law judge.

(b) Judges dealing with family matters

6.04 Informal arrangements in the courts provide for the rotation of judges, so that they spend certain continuous periods on family law cases before moving on to other cases. High Court judges usually spend no more than six weeks at a time on family law cases. Circuit Court and District Court judges spend longer periods dealing with family cases, sometimes years, although they do not usually deal exclusively with family cases.

(c) Training

6.05 There is no official form of specialised training for judges in the area of family law after appointment, whether in the form of instruction in allied social fields, such as psychology, or in relation to legal developments. For example, the recent *Judicial Separation and Family Law Reform Act, 1989*, was enacted and is in operation without any formal discussion by judges as to its implementation, despite the fact that it confers wide new powers and provides for new structural arrangements with regard to family cases.

(d) Constitutional implications

6.06 Articles 34.1 and 37.1 of the Constitution provide that justice in all criminal cases and in civil cases, except where it involves the exercise only of limited powers and functions, must be administered by judges appointed under the Constitution. No judge may hold any other office or position of emolument (Article 35.3). The implications of these Constitutional provisions have been described as follows:

"[T]he Constitution militates against the participation of lay persons in the administration of justice (save in the case of jury service). It does not forbid the appointment of non-lawyers as judges, but in effect it prevents the appointment as part-time judges of persons who are pursuing other professions."¹

6.07 Although lay persons having other paid occupations could not be involved in the process of judicial decision-making by virtue of the above constitutional provisions, it appears that they might play a role in the judicial

¹ W. Duncan, in Eekelaar and Katz, eds., *Resolution of Family Conflict-Comparative Legal Perspectives*, p.393.

process by providing advice to a judge. This was the assumption proceeded on by the *Review Committee on Adoption Services, (1984)* and the *Task Force on Child Care Services, (1980)*. Therefore, the question of lay participation discussed in other jurisdictions is not altogether irrelevant to Ireland. The Constitution does not require judges to be lawyers, or practising lawyers.

Other Jurisdictions

New Zealand

6.08 Section 5(2)(b) of the *Family Courts Act, 1980*, provides that a person shall not be appointed to be a Family Court Judge unless he or she, by reason of training, experience, and personality, is a suitable person to deal with matters of family law. The Royal Commission on the Courts (1978) had noted general agreement that a degree of specialisation in family law was essential but that there was no consensus beyond this. Some submissions urged that Family Court judges should deal solely with family law work. Others suggested that a continuous diet of family cases is intolerable and "ultimately warping to the personality". The Commission inclined to the view that judges in the Family Courts should not deal solely with family cases. It suggested that Family Court judges should spend about 80% of their time on family cases with the balance spent on other types of litigation.

6.09 Judges for the New Zealand Family Court are specifically appointed to the court and are chosen because of their aptitude for family law work. The Family Court judges include several women and have mostly been chosen directly from the family law bar. They are people whose key qualities are "not so much an academic appreciation of the law as human concern to help parties through an emotionally trying experience".² Client opinions of judges have been positive overall.

6.10 The Royal Commission had received submissions suggesting that Family Courts might become lay panels, consisting of a chairperson drawn from any discipline, and two other persons, one a chartered accountant, and the other a stable experienced person, not necessarily legal. The Commission rejected the proposal, saying that:

"We do not think a lay panel treating social problems should be transplanted into family law. It would seem an inappropriate use of social workers' special training to involve them at the time of final decision. They would do better employed in counselling on conciliation before the matter....comes before the court; they may also continue their role at a later stage. Interpretation and application of the statutes and other sources of family law raise legal questions, the resolution of which requires legal training and experience. Issues such as custody of

children, maintenance, and the decision of matrimonial property are of crucial importance to the parties. If family disputes were decided simply on what seems fair, in the subjective view of a lay panel, it would seem almost inevitable that an unequal and arbitrary application of the law would result....We believe it better to provide Family Courts with non-legal techniques and personnel as part of their support service than to give legal authority to non-judicial agencies".³

Australia

6.11 Section 22(2)(b) of the *Family Law Act, 1975*, provides that a person shall not be appointed as a Judge of the Family Court unless he or she is, by reason of training, experience and personality, suitable to deal with matters of family law. The retirement age for judges appointed after May 1977 is 65.

6.12 Part of the new image intended for the Family Court of Australia when it was set up in 1975 was that the bench would be staffed by judges who were not only suited to family law, but who would deal exclusively with family law. The Australian Family Court bench is composed of the Chief Justice of the Court, the Deputy Chief Justice of the Court, Judge Administrators, Senior Judges and other Judges.⁴ The Chief justice is responsible for ensuring the orderly and expeditious discharge of the business of the Court and may make arrangements as to the Judge or Judges who are to constitute the Court in particular matters or classes of matters.⁵ The Deputy Chief Justice assists the Chief Judge in the exercise of these functions.⁶ A Judge Administrator assists the Chief Judge and the Deputy Chief Judge in the exercise of such of the above functions as are from time to time assigned.⁷

6.13 *The Australian Judicial System Advisory Committee to the Constitutional Commission* had said in 1987 that a number of measures were required at the level of court facilities and organisation. Two of the suggestions were the giving of additional commissions to Family Court judges to increase the variety of their judicial work, and the appointment of Federal Court Judges to the Family Court by way of joint commissions and vice versa.⁸ The Final Report of the Constitutional Commission in 1988 stated that the problems relating to the Family Court included "the isolation of the Family Court's judges from the remainder of the judiciary and the lack of variety of their work".⁹ It did not, however, make any recommendation on the issue.

6.14 In 1980, the Joint Select Committee on the Family Law Act reported that "high and somewhat unrealistic expectations abound as to the qualities that a

3 Paras. 481-483.
4 S.21(3) F.L.A. 1975.
5 S.21B(1), as inserted by s.12 Act 72 of 1983.
6 S.21B(2), as inserted by s.10 Act 8 of 1988.
7 S.12B(3) F.L.A., as inserted by s.10 Act 8 of 1988.
8 Statement of Preliminary Views, para. 96 (c) and (d).
9 Para. 6.233

Family Court Judge should have".¹⁰ It noted that some people stressed that judges should be trained in relevant social and behavioural sciences, while others recommended frequent in-service training so that judges would be up to date on the latest findings of social scientists. The Joint Committee said:

"it is agreed that judges should be open and sympathetic to learning from disciplines other than their own. However, they are appointed as judges and must therefore preside and adjudicate. Court counsellors are available to supply the social science input into the court and it is considered that the judges should co-operate rather than compete with the counsellors".¹¹

6.15 Mention should be made of the judicial registrars attached to the Family Court of Australia, who play a vital role in the administration of family business. The Judges of the Family Court are empowered to make Rules of Court delegating to the Judicial Registrars all or any of the powers of the Court, *except* the power to make an order in relation to the custody, guardianship or welfare of, or access to, a child, other than an order until further order, or an order made in undefended proceedings, or an order made with the consent of the parties.¹² Certain provisions govern the review of decisions of Judicial Registrars and for the transfer to a judge of cases which would not be suitable for hearing by a Registrar. Judicial Registrars may be appointed on a full-time or part-time basis.¹³ The qualifications for appointment as Judicial Registrar are similar to those for appointment as judge¹⁴ and a normal retirement age of 65 applies.¹⁵

6.16 Changes to the *Family Law Act, 1975*, have included a considerable expansion of the powers of Registrars. Under S.37A of the Act as amended, it is provided that particular powers of the court may be exercised by a Registrar. These powers are mainly concerned with procedural matters but are nonetheless important. The Registrar is empowered to make orders for the enforcement of maintenance orders, orders for maintenance in urgent cases, orders for the payment of maintenance pending disposal of the proceedings, and order directing the parties to attend conferences with court counsellors or welfare officers. The Family Court may review the exercise of the powers by a Registrar.

England

6.17 In England, family cases are presently dealt with by both professional judges and lay persons. At the bottom tier of the system, certain family applications are made to lay magistrates. The professional judges include the County Court Judges and the Judges of the Family Division of the High Court.

10 Para. 717.
11 *Ibid.*
12 S.26B(1) F.L.A. 1975.
13 S.2GG F.L.A. 1975.
14 S.26H(1) F.L.A. 1975.
15 S.26H(2) and s.267(1) F.L.A. 1975.

(1) *The Judicial Studies Board*

6.18 The Judicial Studies Board is responsible for the training of judges, lay magistrates and the chairpersons and members of most tribunals in England. It runs three types of course, induction, refresher, and specialist. The Board's work is undertaken by specific Committees, one of which is the Civil and Family Committee. Its first priority is the training of Assistant Recorders and Deputy Registrars. In the case of lay magistrates, the Board is required to "supervise" rather than perform training. The Civil and Family Committee is itself chaired by Judges of the Queen's Bench and Family Divisions. The Judicial Studies Board has always been and continues to be "judge-run". The training provided in family law matters is multi-disciplinary and is given by academic lawyers, child psychiatrists, paediatricians, directors of social services, court welfare officers and guardians *ad litem*.¹⁶

(2) *The Lord Chancellor's Report*

6.19 In 1986, a Consultation Paper published by the Lord Chancellor's Department examined the issue of judicial appointment to the bench of a unified family Court. It identified two major questions:

- (1) whether members of a Family Court bench should deal exclusively with Family Court matters; and
- (2) the nature and extent of the role of lay members of the bench.¹⁷

6.20 On the issue of specialisation, the Committee observed that even if the magistrates' jurisdiction were transferred to the High Court and County Courts, it was uncertain whether the opportunity to specialise exclusively in this way would attract lawyers of the right calibre to apply to become judges or registrars in the Family Court. It believed that there were already few enough candidates available for appointment as Circuit judges or County Court registrars, as a result of which there would be a risk that the size of the bench required could not be achieved without a reduction in the quality of the judiciary.

6.21 The Committee was not in any event persuaded that the need to ensure a bench with necessary specialist skills required that its members concentrate exclusively on family matters:

"Experience of specialised jurisdictions such as that of the Commercial Court suggests that the assignment of judges to a jurisdiction for specific periods can be very successful in bringing both wider awareness and specific experience to the cases that come before it".¹⁸

6.22 On the issue of lay participation in the judicial process, the Committee

¹⁶ See speech of Lord Mackay L.C., (1991) *New Law Journal* 570.

¹⁷ Para. 7.22.

¹⁸ Para. 7.27.

favoured the continuing role of lay members of the bench for a number of reasons:

- (a) Due to the scale of business conducted in the Magistrates Courts a large number of new appointments of judges and magistrates would be required if this business were transferred to a judicial bench; such new appointments would prove difficult in terms of both availability and cost.
- (b) Much of the criticism of Magistrates Courts related to the procedure and surroundings of the courts rather than the magistrates themselves.
- (c) For many issues in family law the qualities required of the bench were as likely to be found among experienced lay people as among professional judges.
- (d) A bench of lay persons made it possible to ensure that both sexes were represented.

6.23 The Committee examined the suggestion that lay magistrates sit with members of the judiciary, thus combining the advantage of lay participation with the presence of a professional judge, and noted that mixed benches were successfully used in other areas, notably industrial tribunals. Such a mix could be described as "adding a professional judge to strengthen a lay bench" or "adding laymen to improve the quality of decisions of professional judges".¹⁹ However, the drawbacks of the mixed bench included the need to appoint additional judges and magistrates to hear cases presently heard by magistrates alone, involving higher costs and administrative difficulties.

6.24 The Committee considered whether lay members of the proposed Family Court should be drawn only from the lay magistracy or whether they should be recruited specifically for a Family Court. It also considered specialisation of lay members as it had done with respect to judges. It thought that if the independent jurisdiction of Magistrate Courts were retained, it might be simpler from an administrative point of view to retain the unified lay bench and arrange that its members should receive continuing specialised training. However, it also recognised that it might be desirable for lay members to specialise in the family jurisdiction.

(3) *Cross-disciplinary education: The Nuffield Inquiry*

6.25 The Report of the Nuffield Inquiry (1990) on Family Justice and its Support Services placed emphasis on the need for cross-disciplinary education. It is particularly interesting that it did not confine its view of education in this

¹⁹ Para. 7.31.

context to specialist training for judges, but rather saw cross-disciplinary education as a multi-faceted process, involving some degree of education for all professions involved in family disputes with respect to each other's work. Thus, social workers and police officers would need to know more about the law while Judges should know more about social and behavioural issues.

6.26 The Final Report of the Inquiry pointed out that participation at the regional conferences held in preparation for the Report had emphasised repeatedly the need for cross-disciplinary work of a fundamental nature. The Inquiry suggested that there were "deep barriers of isolation, suspicion, and long-term habits of thought and behaviour to be overcome which could not possibly be expected to change with short bursts of training and didactic teaching."²⁰ The Inquiry also referred to the different lengths of time spent on education or training of each of the groups of professionals at present, ranging from a few weeks/months in the case of the police force, for example, to many years in the case of lawyers and doctors.

6.27 The Inquiry thought that attempts to provide education/training should take these factors into account. It referred to the lectures held by the Judicial Studies Board as "an important first step but not really enough". While this allowed adjudicators to learn about child care from a different point of view, it gave little opportunity for non-adjudicators to understand the legal process. Education in this context should not be limited to substantive knowledge. It was equally, if not more, important to educate each group about the work of the other groups and to foster communication and co-operation. Thus, it would be more useful for judges to know when to use a probation report and how to evaluate it, than to be able to write one themselves. The Inquiry identified five needs relevant to training: (a) the need to know; (b) the need to understand; (c) the need to be able to communicate; (d) the need to learn co-operative methods and skills; (e) the need to achieve professional support. It observed that, although the preferred mode of the Judicial Studies Board was the imparting of knowledge, this type of education was in the long run the least important.

6.28 The Report set out in broad terms how the five needs might be satisfied:

- (a) **The need to know:** The Report thought that this could be satisfied by cross-professional groups meeting under the aegis of one particular group, or through an educational programme in a university, or organised by the Judicial Studies Board. This type of programme was the one favoured in all of the countries studied.

(b), (c) and (d): The need to understand, communicate and learn co-operative skills:

The Report disagreed with the "widespread belief that the mere imparting of knowledge will impliedly enable all those other types of learning to go on". It acknowledged that opportunities for these modes of learning were more difficult to organise, but suggested as a possibility the concept of providing a "forum" for the different professionals to meet, sometimes accompanied by food and wine, so that interaction between the professions would be encouraged.

(e) The need for personal consultation and support:

The Report referred to the emotional demands which family breakdown cases create for practitioners. Of all the groups represented in the preparatory conferences, social workers and conciliators were the most sophisticated in their use of consultative support; legal groups were the least so. There was recognition of the need for external consultation, which involves a third party assisting the individual practitioner to come to terms with his or her personal reactions to crisis-laden material, so as to enable the professional to carry on with the work. The Report noted a variant of the typical consultation model (professional and third party) developed by the Family Mediators Association. The Association is developing the joint training of solicitors and social workers/counsellors/psychologists in mediation techniques, in which a solicitor and mediator are paired together. The trainees are required to use a third person as a training consultant to help them deal with the stress which arises in connection with mediation as well as the problems of learning to work together.

(4) *Barristers and solicitors*

6.29 There is no certification system nor any panels within the English bar for family law. Barristers may acquire a degree of specialisation in the area through their practice. The Family Law Bar Association organises one major residential weekend conference and one one-day conference each year. The papers of the conferences are later published. The Bar Council has an annual conference which usually contains a session on family law.

6.30 The General Council of the Bar has set up a Working Party to look at continuing education and training of barristers. A paper was submitted to the Group by the Family Law Bar Association, which examines the first three years of practice. It recommended that there should be a ten-week course, of weekly lectures of one hour, for new practitioners. It recommended that this should focus on the practical aspects of family law, rather than the relevant law.

6.31 In 1985, the English Law Society established a specialist panel of solicitors for child care work. This has been considered a success because it has raised the standard of representation in the field.²¹ However, revision of the panel has become necessary because of the introduction of the *Children Act 1989*.

At present, in order to satisfy the criteria for joining the child care panel a person must:

- (1) hold a current unconditional practising certificate;
- (2) have not less than 18 months' advocacy experience;
- (3) undertake normally to conduct personally cases referred to him or her as a member of the panel;
- (4) have attended a training course approved for this purpose;
- (5) either have relevant experience of conducting care cases or have observed one or more hearings of a contested care case as required; and
- (6) have satisfied an interview panel of his or her suitability to be included.

6.32 Reselection to the panel is necessary after 5 years. Training courses are approved by the Law Society for solicitors wishing to join the panel. These training courses last not less than one day and cover the practical aspects of representing children, as well as aiming to help solicitors to deal sensitively with children. Speakers represent various professions, including a solicitor, a local authority representative, a social worker and a *guardian ad litem*.

6.33 Complaints against members of the panel are referred to the Solicitor Complaint's Bureau, who may receive advice from the Family Law Committee. The Bureau decides on any action it deems necessary, and then refers the case to the Committee which decides what action to take in relation to membership of the panel.

21 It should be noted, however, that the Law Society has not found it desirable to establish a specialist panel covering all family work. This was due to the views expressed in the Government's Green Paper issued in January 1989 which said: 'The main advantage of specialist panels to the public is to give them an easier and more informed choice of practitioners who they can be assured are skilled in a particular field of law. At the same time, not every area of law requires specialist expertise. Care must be taken to ensure that only those areas of law which need specialism are designated as such, and that the criteria for recognition as a specialist are high enough to ensure competence and maintain standards but no higher. The criteria must not become unnecessary obstacles which discourage practitioners from becoming specialists, or which artificially limit the supply of legal services to the public in a particular field...The Government does not believe that practice in an area that has been designated as a specialism should be restricted to those recognised as specialist practitioners alone. Such an approach could create new entry barriers, put up costs, deprive clients of choice and protect those within the specialism from competition from those outside it'.

Canada

(1) *Law Reform Commission recommendations*

6.34 In 1974, the Canadian Law Reform Commission²² recommended the creation of a Family Division within the Superior Court system. The Federal Government has exclusive power to appoint judges to the Superior Courts. Accordingly, the Commission suggested that judges of the Family Court be appointed after joint consultation between the federal and provincial authorities. The Commission was in favour of specialisation and recommended that steps be taken to ensure that judges of a unified Family Court deal exclusively with family law matters. It recommended that Family Court judges should receive permanent appointments with security of tenure.

6.35 With regard to qualifications, the Commission recommended that all judges appointed to the Family Court should be barristers or solicitors of not less than 10 years standing. It added that in making appointments to the Family Court, avenues for consultation should be established among the concerned professions and quite possibly with members of the public. Family Court judges should be drawn preferably from persons in the legal profession who have had broad experience in family law matters.²³

6.36 With regard to the training of Judges, the Commission said:

"An essential part of a unified Family Court system is the existence of training programs and continuing education programs. The judge and senior support staff should be fully involved in the creation and maintenance of these programs.

It is the opinion of the Commission that at the time of appointment a judge should undergo a period of training before discharging judicial responsibilities. At regular intervals, all judges should participate in continuing education programs covering a wide range of subjects that will provide a better understanding of family conflicts and appropriate dispositions of such conflicts".²⁴

(2) *The Canadian Judicial Council*

6.37 Training in the family law field is provided for judges of the Superior and County Courts of Canada by the Canadian Judicial Council, created in 1971. The activities of the Council fall into four categories: (1) arrangements for the continuing education of judges; (2) complaints against the conduct of individual judges; (3) providing a forum for developing consensus on matters of interest to judges; and (4) making representations to the Government on behalf of judges with respect to salaries and benefits. The Council is composed of the Chief

22 The Law Reform Commission of Canada, Working Paper No.4, *The Family Court* (1974).

23 *Ibid.*, at p.31.

24 *Ibid.*

Justice of Canada, the Chief Justices, associate Chief Justices, Chief Judges and associate Chief Judges of all the courts whose judges are federally appointed.

6.38 One of the Council's roles is to establish seminars for the continuing education of judges. The Council arranges meetings, conferences and seminars in addition to meetings which judges are required by law to attend. The educational programs are arranged by the Judicial Education Committee of the Council, with the assistance of a consultant from the academic community. Two seminars are sponsored by the Council every summer, one for judges of superior courts and one for judges of county and district courts. The sessions are of four to five days' duration. Discussion leaders prepare papers which are distributed in advance so that participants may take part in small group discussions. In the Superior Court Judges Seminar in 1987, for example, two out of ten topics presented concerned family law.

6.39 In addition to the Council's own educational programs, it recommends meetings, seminars and conferences for designation under Article 41(c) of the *Judges Act*. In 1987-88, there were five such events. Also, to assist newly appointed judges, there is a four-day seminar every spring with sessions led by experienced judges. In 1988-89, the Canadian Judicial Council launched the National Study Leave Fellowship Program, under which selected judges can spend 6 months at Canadian law schools for in-depth study and research, together with limited teaching assignments.

(3) *The Canadian Judicial Centre*

6.40 The Canadian Judicial Centre was established in 1987 as a permanent national secretariat for judicial education programs. This centre is jointly financed by the federal and provincial governments and is designed to co-ordinate educational services for both federally and provincially appointed judges. The Judicial Centre began offering courses in 1989.

(4) *Ontario*

6.41 *Courts:* Ontario Court of Justice (General Division), Ontario Court of Justice (Provincial Division), Unified Family Court of the District of Hamilton-Westworth.

The *Ontario Court of Justice (General Division)* consists of 200 Justices and serves a population of some 8.6 million people. Most of its members are required to deal with family law matters. In the larger centres, however, the bulk of the family law work is done by judges with an affinity for this area of the law. The Judges of the *Provincial Division* and the *Unified Family Court* hear only family law matters and, prior to their appointment to the Bench, generally practised in the family law field. By contrast, few Justices of the General Division were family law specialists prior to their appointment to the Bench. Seminars and educational programmes are arranged each year for the members of the various courts. Each seminar has a family law section.

(5) *British Columbia*

6.42 *Courts:* Supreme Court, County Court, Provincial Court (Family Division).

There is a clear difference between the practice in the Supreme Court and the Provincial Courts in this province. In the Provincial Court there is a family division that sits in Victoria on Vancouver Island, and the Lower Mainland area of the province - these being the most populous areas. In all other areas, the Provincial Court is a generalist Court, whose judges deal with all criminal and civil matters, including but not limited to family matters. Even where there is a specialist family law division, judges from the general criminal and civil division would also hear family law cases if there is an overload. Technically, judges are appointed to the Provincial Court and not to a particular division of the court. Therefore, they sit in all divisions of the court. However, the judges assigned to the specialist family law divisions of the Provincial Court are selected from members of the Bar who have had extensive experience and express a continuing interest in family law. There appears to be a trend away from specialisation at present and all candidates appointed to the Court are expected to sit in all of its divisions.

6.43 Within a year of appointment, new Provincial Court Judges attend an eight-day intensive training session concerning all aspects of Provincial Court jurisdiction. Twice a year, all Provincial Court judges attend further judicial training in the divisional subject areas, including family law. Also, it appears that quarterly meetings of the judges sitting on the specialised family law divisions are held to discuss matters of common interest and to review recent developments in the law.

6.44 In the Supreme Court of British Columbia, all the judges are generalists. There is a limited measure of informal specialisation in family law in the Vancouver courthouse only. This specialisation is achieved by the appointment of judges who have an interest and experience in family law to a panel of five judges who will be assigned family law cases in priority over a six month period. Each judge on the panel sits two weeks out of each four week period on family cases. The third week is spent on non-family matters, and the fourth week is for judgment writing and other such matters. If there is no member of the panel available for a family law case it will be assigned to whatever other judge is available, with preference for assignment to someone who has previously served on the panel.

6.45 The appointment of a judge to the panel is limited to a six month period on the assumption that the wear and tear of family law exceeds that of other cases and that members will want to rotate away from family law. Members become eligible for re-assignment after about three years, but will inevitably have picked up other family law cases from the overflow list and while on circuit. While some of the other judicial centres are staffed by resident judges, the numbers involved do not permit even the level of informal specialisation seen in Vancouver.

6.46 All members of the Supreme Court are offered opportunities to attend conferences and seminars dealing with family law from time to time, offered by various bodies, including the Canadian Judicial Council, the Canadian Institute for the Administration of Justice and the Association of Family and Conciliation Courts.

(6) *Quebec*

6.47 *Courts:* Superior Courts (Family Division), Youth Court, Provincial Court.

Most of the one hundred and sixty judges who make up the Superior Court are assigned at one time or another to sit in the family division. On average, each judge spends about one fifth of his or her time hearing family matters. The judges assigned to that division and others who sit regularly in family matters meet monthly to discuss the developing case law, legislative changes and any other problems which arise. The Court does not have any specialised course of studies for family law judges, but such matters are dealt with in the various courses and seminars arranged by the Court or other Quebec or Canadian legal and judicial organisations.

Sweden

6.48 The Swedish National Courts Administration (Domstolsverket) was established in 1975. Its function is to provide public authorities within its domain with administrative services, including financial and personnel administration for the courts. Since 1987, it has been housed in one building, which includes a ground floor devoted to educational facilities. Once a year, Domstolsverket arranges a seminar for judges regarding child custody laws and children's rights and welfare in divorced or divorcing families. About 25 judges take part, together with 4 or 5 solicitors or barristers. Speakers are members of the Swedish Bar Association, social workers and research advisers from the Swedish Law Schools. The seminar lasts 3 days, and about half the programme involves small-group discussions of family law questions. Judges also take part in seminars and courses organised by other authorities such as the National Board of Health and Welfare. Seminars and courses for solicitors and barristers are mainly organised by the Swedish Bar Association.

Previous Proposals In Ireland With Regard To Lawyers In Family Law

6.49 The *Task Force on Child Care Services, (1980)*²⁵ recommended the creation of a Children's Court, the jurisdiction of which would be exercisable by a Justice of the District Court nominated from a panel of the Justices in the District Court. The panel of Justices would be prepared by the President of the District Court and the President of the High Court in consultation with the

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See paras. 18.4.1-18.4.6.

Attorney-General and would be revised annually. In selecting Justices for the panel, regard would be had to training and experience. The Task Force considered but rejected the possibility of providing separately appointed and separately qualified children's Justices. However, it recommended that Justices of the District Court should be encouraged and facilitated to acquire knowledge and training necessary for problems involving children.

6.50 The Task Force also addressed the issue of lay participation. It accepted that Articles 34, 35 and 37 of the Constitution required criminal justice to be administered by judges, but recommended that a justice of the Children's Court be allowed to sit with a maximum of two "assessors" who, in his or her opinion, might be of assistance. These assessors would advise the justice, but would not play any part in reaching a decision. The Task Force proposed that a panel of assessors be prepared for each area of the District Court by a committee consisting of the Justice of the Children's Court in the district, and a person nominated by the Attorney-General or the State Solicitor. This panel would be revised annually.

6.51 The *Supplementary Report to the Task Force Report (1980)* recommended that the Children's Court should be headed by a specially qualified professional Children's Judge.²⁶ It gave the following reasons for this proposal:

"Any Children's Court will have the power to affect the lives of children and parents very radically. We are very conscious of the special characteristics of children. As we said in the Main Report, 'a child is more impressionable, more vulnerable, more changeable and more liable to being influenced for better or for worse than an adult; the effects of what happens to him are likely to be more profound and less easily reversible than they will be when he is grown up and matured'. (2.1.5) Making decisions about children is a much more delicate and a much more hazardous undertaking than making decisions about adults and, if it is to be done well, it requires a great deal more knowledge and sensitivity. In addition, the functions which we would give to the Children's Court demand special skills".

6.52 The Supplementary Report proposed that Children's Judges should be recruited by an independent body (such as the Civil Service Commission or a special judicial commission) from barristers or solicitors with at least 5 years' experience. Their appointment would be conditional on their completing an appropriate course of studies and practical experience designed to equip them for specialised work. The Supplementary Report accepted that this might be impractical, but said that if a system of family courts were established, the problem of practicability might be removed. The Supplementary Report also recommended that in all formal hearings the Judge should sit with two assessors. However, they did not agree that the involvement of assessors should be at the

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ibid, para. s.5.3.3.

discretion of the Judge, nor with the view that the Judge should be involved in their selection.

6.53 The *Report of the Review Committee on Adoption Services (1984)* recommended the creation of an Adoption Court to replace the Adoption Board, with more extensive powers. It recommended that Judges of the Adoption Court be specially appointed for that purpose. It suggested as a model for selection the Australian requirement that the judge be suitable to deal with matters of family law by reason of training, experience and personality.²⁷

6.54 The Review Committee also considered the issue of lay participation. Having regard to the "complexity of family problems and human issues that may be associated with the type of applications coming before the Court", it recommended that two assessors should sit with the judge in all disputed cases except those dealing exclusively with points of law.²⁸ The assessors would be chosen from a panel of persons appointed by the Minister for Health, and should be chosen for their experience and knowledge of child and family matters.²⁹

6.55 The *Joint Committee on Marriage Breakdown, (1985)* recommended the creation of a Family Tribunal for Ireland and made the following proposals with regard to the appointment of judges to the new court:³⁰

- (a) the court should be staffed with a sufficient number of judges to ensure that family cases are heard fully and speedily;
- (b) judges should be appointed solely to hear family cases;
- (c) special criteria should be applied in selecting Family Tribunal Judges, so that the selected judge would have a real understanding of the difficulties presented and an ability to deal with cases in a compassionate and sympathetic way;
- (d) appointments should (perhaps) be limited to five year terms;
- (e) "suitable training" should be provided to judges and lawyers who deal regularly with family law matters in order to give them a proper insight into the social and psychological aspects of the type of cases that occur.

6.56 The Report of the *Working Party on Women's Affairs and Family Law Reform, (1985)*³¹ noted that the submissions received by it generally supported the view that judges dealing with family law cases should receive special training in the "social, psychological and other non-legal aspects of family relationships".

27 Para. 9.20, p.70.

28 Para. 9.25, p.71.

29 Para. 9.28, p.71.

30 Para. 9.5, p.107.

31 *Irish Women: Agenda for Practical Action*, (Pl. 3126, 1985), pp.293-4.

6.57 The Law Reform Commission has already examined the role of judges and other professionals in the context of child sexual abuse. In the *Consultation Paper on Child Sexual Abuse*,³² we said that, while we were not in a position to comment generally on the training of health and social work professionals, there was a need for them to have some understanding of the legal environment in which they operate. We noted that we had encountered "negative attitudes to the law, ranging from lack of knowledge, to scepticism about what the law can achieve, to uncertainty and even anxiety about the legal parameters of permissible action". As regards lawyers who become involved in cases of child sexual abuse, we observed that they need to know (a) something about the capacity of children at different stages in their development, about the effects on children of child sexual abuse, and about the typical ways in which children react to it, (b) the language of children and how to communicate with children in the language appropriate to the particular stage of the child's development, (c) something about family dynamics, and the impact on, and likely reactions of, family members when an allegation of abuse is made. We suggested that there should be a panel of lawyers from whom the D.P.P. could select prosecution counsel in child sexual abuse cases. We thought that the legal professions should give serious consideration to (1) the adoption of special codes of practice relating to the conduct of cases involving children, and (2) ways of ensuring that lawyers involved in such cases have appropriate training or experience, such as a certification system. We thought that opportunities should be provided for judges to acquire relevant information by means of training courses and seminars. These proposals were confirmed in the Commission's Final Report.³³

Opinions Of The Working Group On Family Courts

6.58 Despite the trend towards a degree of specialism in some jurisdictions, it was felt by some members of the Working Group on Family Courts that there would be drawbacks to the appointment of specialist Family Court Judges. Working exclusively on family cases might be too demanding. Also, the appointment of specialist judges involves a risk that the perspective of particular judges would constantly be brought to bear and that this might lead to a degree of inflexibility in the decision-making process.

6.59 The idea of an accreditation system for solicitors and barristers practising in the field of family law was questioned by the Working Group on the basis that it would not be feasible to require extra qualifications for persons practising family law when specialisation was not required in other areas. Moreover, it was felt that extra qualifications are not necessarily synonymous with a higher level of expertise in a given field, since competence is usually the product of practical experience in case work. The Working Group was generally in favour of voluntary participation by judges and lawyers in continuing education programmes.

32 August 1989.

33 *Child Sexual Abuse* (LRC 32-1990), para. 8.03.

6.60 Finally, there was agreement among the members of the Working Group that lay participation in the decision-making process would not be desirable. This view was based primarily on the belief that there was a level of expertise and training in objectivity necessary for the adjudication of family disputes which would be lacking in lay participants.

CHAPTER 7: CONCLUSIONS AND PROVISIONAL RECOMMENDATIONS

Criticisms Of Existing System

7.01 We must begin this chapter by expressing concern about a range of serious problems and defects in the manner in which family cases are handled within our existing courts system. This concern is shared by many professionals working within the system. Many of the problems derive from under-resourcing, both physical and human. The picture which emerges is one of a system struggling and barely managing to cope with the very great increase in family litigation in recent years. The result is a sad parody of that which might be expected in a State whose Constitution rightly places such emphasis on the protection of family life.

7.02 Of major concern are the impossibly crowded lists in many Circuit and District Courts, leading to a wholly unsatisfactory situation in which judges are being forced to make the impossible choice between brief and hurried hearings or intolerable delays. The situation is particularly acute in the Circuit Court outside Dublin, where in some venues a judge may face a list of as many as seventy cases in one day. Included among these cases are applications for judicial separation raising complex issues of family finance and property, and sensitive problems concerning child custody and access. We have heard of judges sitting late into the night in attempts to complete their lists, but for many cases adjournments for several weeks are inevitable. This is an intolerable situation for judges and litigants alike. The parties and their legal representatives, when faced with the prospect of a lengthy queue, a long wait, a somewhat peremptory hearing, or a lengthy adjournment, are forced to make difficult tactical choices. Unsatisfactory and hurried compromises may be the result. While negotiated settlements are to be welcomed, those reached in these circumstances are not the most likely to secure the long term interests of a dependent spouse or children.

7.03 The quality of justice is affected. Judges must work under intolerable pressures of time. Additionally, in the absence of any requirement of special qualifications or experience in judges appointed to hear family law cases, doubts have been expressed about the aptitude of some of them to cope expertly and sensitively with such cases.

7.04 The physical conditions of many courts outside Dublin are not appropriate for family cases. There are Circuit and District Court venues which do not have adequate accommodation or heating. The absence of proper waiting room facilities sometimes leaves opposing spouses to confront one another seated on benches in cold and draughty corridors. Adequate facilities for consultations between lawyers and their clients are rare, and some of the court rooms display a Dickensian squalor. By contrast, the modern facilities in Dublin offer a model of what a family court can be.

7.05 Another constant and related theme in the comments we have received is the very large number of inappropriate cases which come before the courts which are not ripe for adjudication or in which the particular issues would be better addressed by some mechanism other than adjudication, perhaps counselling, mediation or conciliation. Judges, particularly at the District court level, are often confronted by apparently deadlocked cases in which they sense that reason might yet prevail if only it were given some encouragement. The common practice of granting adjournments, putting off the day of the order, are symptomatic of this. Some inappropriate cases will always slip through the net and end up in court too soon, and in these cases the wise judge must consider how to encourage agreement and avoid a premature closure of the case. Our information is that these cases arise with alarming frequency, and that they do so largely because alternative methods of resolving the dispute have not been readily available to the parties.

7.06 By contrast, we have heard some criticisms of family law judges for their slowness or reluctance to make firm decisions in cases where adjudication is appropriate and necessary. One practitioner, when asked to indicate the most desirable quality in a family court judge, responded "the ability to come to a decision." Considerable frustration can be caused when, after a long waiting period and the eventual hearing, the judge holds back from making the necessary decision. Allied to these criticisms is concern about the frequency with which cases reappear in court, whether by reason of adjournments or applications to vary orders relating to matters such as maintenance or access to children. Again, some reappearances are inevitable, but there are many instances where the problem appears to have become chronic, and it must be asked of these cases whether regular fixtures for formal adjudication offer the parties the best or most effective means to resolve continuing problems and aggravations.

7.07 The fragmentation of jurisdiction between three levels of court in family matters gives rise to a measure of confusion, and sometimes presents difficult tactical choices to practitioners. Clients can become confused over the physical location of the different courts in large centres like Dublin. The different forms

of pleading add to the complexities of the system.

7.08 Some critics have suggested that the District Court in particular may be an inappropriate forum in which to hear lengthy and complicated family disputes. It is not unknown for a complex custody case to last for several days. The concern arises in part from the enormous caseload under which the District Court is labouring and the often inadequate, and sometimes deplorable, physical conditions in which District Judges are compelled to work, together with inadequate basic ancillary facilities such as consultation and waiting rooms.

7.09 There is increasing concern about some of the consequences of holding family law proceedings behind closed doors. There remains a universally strong desire to protect family members from unnecessary intrusions at a difficult and sensitive times in their lives. However, it is increasingly recognised that the absence of any opportunities for external scrutiny of family proceedings, even if it does not in fact affect the quality and consistency of judicial behaviour, creates an unhealthy atmosphere in which anecdote, rumour and myth inform the public's understanding of what goes on in the family court.

7.10 Attention should be drawn to a somewhat intangible and yet significant general criticism of our system for resolving family disputes. Its ethos and general approach, it is said, is negative. Instead of concentrating on the empowerment of individuals to resolve their own family disputes, by encouraging negotiation and agreement, the emphasis of our system, with its concentration on adjudication, is on solutions which take control away from the participants. A humane system of family law, it is argued, is one which encourages the responsible resolution and management of disputes wherever possible by members of the family themselves. Judicial intervention is of course necessary to prevent exploitation or abuse between family members. The ideal of empowerment should not blind us to problems of inequality which may arise in a system of private ordering. This apart, it is perhaps time to consider how reforms in our legal processes may help in the process of personal and family empowerment.

7.11 It is not within our present brief to examine the scheme of civil legal aid and advice as it applies in family law cases. However, this picture of the family law system would be incomplete without some mention of the serious resource problems which confront it. Long waiting lists have become endemic in the system with consequent delays, sometimes of several months, in non-emergency cases before an applicant's eligibility is determined. Moves have been made to alleviate the situation. *Inter alia*, the grant in aid to the Legal Aid Board for 1993 was increased by almost 20% to £3.206 million, and 12 additional solicitors have recently been appointed. We are not in a position to judge the adequacy of these and the other measures which have been taken. Suffice it to say that there has been a very considerable increase in the number of applications for judicial separation since the introduction of the *Judicial Separation and Family Law Reform Act, 1989*, and that, quite apart from the possible introduction of divorce following the forthcoming referendum, a number of other legislative

reforms in family law are planned which will undoubtedly result in further demands being made on the civil legal aid and advice services.

Special Features Of Family Law Cases

7.12 A sensible starting point for reform is to consider in what ways family disputes and cases are special. What are the reasons for suggesting that they may require procedures or treatment different from those which apply, for example, to ordinary commercial disputes? Special features of family cases include the following:

- (1) The issues in dispute in a family law case usually constitute only part of a broader set of problems arising from family disharmony. Some of the issues, especially those relating to child rearing, as well as maintenance, have a continuing dimension. Appropriate solutions must take account of the long, as well as the short term, needs of family members, including the importance of promoting future cooperation between estranged spouses in relation to their child-rearing roles.
- (2) Some of the issues in a family dispute, especially again those which concern parenting responsibilities, are not resolved in the traditional manner of adjudicating as between competing rights. The adjudication looks to the future more than the past and seeks a solution which will promote the welfare of the child. The outcome depends in part on predictions of how events and relationships will develop in the future. Making a decision on welfare grounds based on predictions about future human behaviour is not a typical judicial activity. This is not to suggest that judges are inappropriate to make such decisions, nor that judicial expertise in fact finding and the determination of rights has no place in family proceedings (clearly much of family law involves these matters). What is implied is the need for additional skills and perhaps special procedures adapted to meet the unusual objectives of legal proceedings concerning children.
- (3) Special societal interests are usually involved in family law cases. There is first the interest which society has in supporting stability in family life generally, and in the social arrangements for the care and nurture of children in particular. Secondly our society accepts that it has a duty to protect family members from abuse or exploitation, especially those family members who are in dependent situations or who are otherwise vulnerable. Thirdly society has an interest in seeing that the obligations which are owed by family members to one another, in relation to such matters as support and housing, are fulfilled. This interest arises partly from society's protective function but also from a desire to avoid dependent family members becoming a burden on the taxpayer.

7.13 These features of family law cases, when viewed in combination, suggest the possibility that special arrangements and safeguards are needed, adapted to

meet these special needs. In other words there is a strong case for suggesting that family cases should be treated by our legal system as a class apart.

Ideals And Objectives Of A Good Family Courts System

7.14 Bearing in mind the criticisms levelled at current arrangements, and the special features of family law cases noted above, we would suggest the following as some of the hallmarks of a good family courts system.

- (1) *It should provide speedy and effective access to protective remedies in emergency situations.*
- (2) *It should as far as possible avoid the use of procedures which may have a further damaging effect on family relationships, or which may cause harm or unnecessary distress to family members and especially children.*
- (3) *It should give prominence at all stages to the interests and welfare of dependent children where they are affected.*
- (4) *It should promote the resolution by agreement of the problems consequent on the breakdown of a family relationship.*
- (5) *Its procedures should be geared towards the avoidance of court proceedings except where inevitable or necessary in the interests of justice.*
- (6) *It should be integrated within a range of family services which include information, family support and welfare, mediation, health and child protection services.*
- (7) *It should treat family members with dignity and respect for their fundamental rights.*
- (8) *It should be capable of addressing any problems of injustice arising from the inequalities which may exist following the breakdown of a relationship.*
- (9) *The system should be organised in such a way as to encourage members of a disharmonious family themselves to control the issues arising from breakdown, and should promote cooperation between them in managing any of the continuing problems, especially those connected with child rearing.*

One member of the Commission would wish to add a tenth principle, viz:

- (10) *The system should be organised in such a way as to ensure that spouses who have committed themselves to a marriage should have their interests legislatively protected in accordance with the constitutional guarantees relating to the family and marriage."*

It is argued that this principle arises from the constitutional guarantee to protect the family under Article 41. Marriage which involves mutual commitment of fidelity for life has to be protected not merely by substantive legal principles but also by the judicial system. A judicial system which fails to provide adequate protection for those who have committed themselves to a marriage could violate the constitutional protection of marriage. The other Commissioners regard this matter as relating to substantive rather than procedural law, and they are of the opinion that the need to respect the constitutional rights of spouses is properly reflected in (7) above.

A Proposed Model

7.15 We will begin by describing in broad outline our provisional view of the family court structure that might be appropriate for Ireland. *The model we provisionally favour is one in which the family court would have a unified jurisdiction. The court would operate at Circuit Court level and would be located in a limited number of regional centres. Each regional family court would be set in the context of, and in physical proximity to, a range of family services. The District Court would continue to provide, at its more localised venues, emergency and certain specific reliefs.* The emphasis in the new system would be on encouraging out-of-court resolution of family disputes.

7.16 We are convinced that one of the principal problems at present is the large number of inappropriate cases coming to court, some of which may be susceptible to out-of-court resolution, in whole or in part. These are cases in which the underlying problems require intervention of a different sort in the form of social support, counselling, conciliation or mediation. The legal system is frequently being used, not because it offers the appropriate service, but because it is the only service which is available or visible to the family members. The result is that judicial time is wasted, the results of litigation are often inconclusive, the public funds which support the judicial system are not being sensibly applied, and worst of all difficult family situations may deteriorate further.

7.17 Two requirements must be met if this situation is to be improved. First, there must be available in all parts of the country the appropriate alternative family services, in particular counselling and mediation. Second, measures must be taken to ensure that awareness of the existence of these alternative services is promoted and their use encouraged before resort is had to the courts. *Attached to every regional family court, and operating under the auspices of the court, should be a family advice centre. This would provide an information and referral service, offering information to clients about counselling and mediation services, social welfare entitlements and services, legal aid and advice services, as well as basic information about the operation of the family court and the remedies available in it.* It should have available various information packs, carefully designed and consumer friendly. One of the underlying themes in the provision of all these services should be constant reiteration of the need to place the interests of children uppermost. This emphasis, as well as the provision of

information, might be reinforced by the production of appropriate short video films.

7.18 *Parties to proceedings before the family court should be required, as soon as possible after proceedings have been instituted, if they have not done so previously, to attend the family advice centre to receive information and advice about the alternatives to litigation, including in particular mediation.* It would also be a function of the family advice centre to support and encourage negotiated settlements between the parties' lawyers, where this is their clients' preferred approach. Facilities should be available for the holding of pre-trial conciliation sessions, involving the parties and their lawyers, with the court registrar available in an advisory capacity.

7.19 *All documents initiating family proceedings should, as far as possible having regard to the relevant substantive legal principles, be non-confrontational. They should also contain information about the family court advice centre, and should highlight the requirements concerning the parties attendance at the advice centre.*

7.20 Where court proceedings are unavoidable, they should be conducted by the judge sitting alone. The proceedings of the court should continue to be based on a model which ensures protection for the rights of the parties, and which adheres to the requirements of a fair hearing. The adversarial form of the proceedings should be mitigated by an increase in the power of the judge to obtain reports from independent experts, and by providing for increased representation of children where appropriate. Members of the general public should continue to be excluded from the proceedings of the court.

Regional Family Courts

7.21 *Our provisional recommendation is that planning should begin for the establishment of a number of regional family courts. These should be approximately 8 to 10 in number.* Their precise location should be determined on the basis of considerations of population density and geographical accessibility. Initially, it would be necessary to make use of existing (probably Circuit Court) venues. We have considered very carefully the arguments in favour of maintaining the present system. The very large number of existing venues for sittings of the Circuit or District Court brings the distinct advantage of accessibility. However this is bought at a high price, in terms of the inadequate physical facilities in many of these venues, the low priority accorded to family law cases and their separation from many of the ancillary services which we believe should be associated with a family court. Undoubtedly local sittings, particularly of the District Court, must remain available to provide accessible, swift and reasonably cheap remedies for emergency or specific reliefs in matters of physical protection of family members, maintenance orders and custody of children.

7.22 We must re-emphasise the desperate need, especially outside Dublin, to attach greater priority to family law cases. A special court is part of the answer.

When included in a mixed jurisdiction family cases are too often consigned to the bottom of the heap. In this day and age it is not unreasonable to expect parties and witnesses to travel to a regional centre for the hearing of a family law case. Indeed there is some advantage in the anonymity provided by a court which is not located in the district in which the family resides. If family cases are to be given the special attention which we believe is warranted, if they are to be dealt with in adequate physical surroundings, and if the family court is to be clearly seen to be operating in the context of a range of family support services, with the emphasis on encouraging negotiated and agreed solutions to family disputes, there is in our provisional view a compelling case for the establishment of a limited number of regional family court centres.

The Appropriate Level Of Court

7.23 Recent reforms, beginning with the *Courts Act, 1980*, have tended to begin a concentration of family law jurisdiction in the Circuit Court. This process would continue if the proposals¹ in the Government's recent document on marital breakdown are accepted. That document for example proposes that the Circuit Court should be given jurisdiction to grant nullity decrees concurrently with the High Court. The document also proposes that in the event of the introduction of divorce, the Circuit Court should also have a jurisdiction in that matter concurrent with the High Court. On the other hand, a great deal of family law business (indeed the vast majority of cases) is still conducted at District Court level. Also recent legislation in the area of child protection and welfare has viewed the District Court as having the principle responsibility for that area.

7.24 As regards the aptitude of judges in the two courts to deal with family cases the evidence on which we have to rely is largely anecdotal. However it would seem fair to suggest that, while in both the Circuit and District Courts there are judges who have gained high respect for their skill, sensitivity and patience in presiding over family cases, there are others in both courts whose performance has given rise to criticism.

7.25 Procedurally the District Court suffers from certain disadvantages (for example the absence of "discovery"), but these are not insurmountable. As regards costs, the District Court has the advantage. However, there seems no inherent reason why the cost should differ greatly as between courts dealing with cases which require similar treatment and a similar expenditure of time.

7.26 The level of court at which family cases are heard is of less importance than securing that certain requirements of substance are met, as follows:

- (a) that the accommodation and setting of the court is appropriate;

¹ See Dept. of Justice, *Marital Breakdown, A Review and Proposed Changes* (Pl. 9104).

- (b) that adequate time is made available for family cases;
- (c) that judges who deal with family cases are nominated to do so on the basis of their aptitude for such cases; and
- (d) that the costs are kept to a necessary minimum.

7.27 We will be making the provisional recommendation (see para 7.56) that judges should be specially nominated to serve on the family court, but that provision should be made for their rotation. This implies that the family court should in some way be integrated within the existing court structure, and that there should exist a sufficiently large pool of suitably qualified judges to allow for such rotation.

7.28 We have considered three options:

- (1) that regional family courts should operate as a division of the District Court, being presided over by specially nominated District Judges,
- (2) *that regional family courts should operate as a division of the Circuit Court, being presided over by specially nominated Circuit Judges, and*
- (3) that regional family courts should operate as a division of the Circuit court, but that it should be possible for District as well as Circuit Judges to be nominated to preside over such courts.

7.29 We do not favour the first option. Our provisional view is that the primary role of the District Court in family law cases should be to provide emergency remedies, together with other specific reliefs in matters such as maintenance and child custody and access. More fundamental issues relating to status, and associated ancillary remedies, should be resolved at a higher level within the courts system. The third option has the advantage that it would provide a large pool from which family court judges could be drawn, facilitating rotation. There are already a number of District Judges with a tried and tested capacity to deal expertly and sensitively with family law cases, and this system would make it possible to exploit that existing resource. However, a system under which certain judges would in effect rotate between the District and Circuit Courts would, in our provisional view, give rise to serious problems of judicial status.

7.30 *Our provisional view is to favour the second option.* We recognise that in order to create a sufficiently large pool of expertise within the Circuit Court to allow for rotation *it would be necessary to appoint additional Circuit Judges, and that most of these would have to be suitable for nomination to the Family division.* It appears to us that the appointment of these additional judges is in any case necessitated by the increased burden of work, particularly in the area of family law, carried by and in prospect for the Circuit Court.

7.31 We emphasise that our views on the matter of an appropriate family court structure are provisional, and we would welcome comments and opinions on the various options which present themselves. In the course of our discussion we have also considered the possibility of fixed-term appointments to the family court judiciary as a means of broadening the pool of expertise from which family judges are to be drawn. We doubt whether this would be consistent with the requirements of judicial independence, but on this matter also we welcome views.

A Unified Jurisdiction

7.32 We have argued that, if there are to be special provisions for family cases (special procedures, appropriate accommodation, specially nominated judges and appropriate support services), a specialist court is necessary. Once a degree of specialisation is admitted, it makes sense to ensure that all the different proceedings to which that specialised approach is suited are brought together. *We therefore provisionally recommend that the regional family court should have jurisdiction in the following matters:*

- (1) *Legal separation and ancillary relief under the Judicial Separation and Family Law Reform Act, 1989;*
- (2) *Child custody, access and other guardianship matters under the Guardianship of Infants Act, 1964;*
- (3) *Maintenance proceedings (without upper limits on awards) under the Family Law (Maintenance of Spouses and Children) Act, 1976;*
- (4) *Barring (without limit of time) and protection orders under the Family Law (Protection of Spouses and Children) Act, 1981;*
- (5) *Proceedings under the Marriage Act, 1972;*
- (6) *Proceedings for matrimonial injunctions;*
- (7) *Proceedings under the Family Home Protection Act, 1976;*
- (8) *Proceedings under the Married Women's Status Act, 1957;*
- (9) *Proceedings under the Succession Act, 1965;*
- (10) *Proceedings (between family members) under the Partition Acts, 1868 to 1876;*
- (11) *Wardship proceedings;*
- (12) *Proceedings under the Legitimacy Declaration (Ireland) Act, 1868;*
- (13) *Proceedings under part six of the Status of Children Act, 1987.*

The Circuit Court already has a partial jurisdiction in each of these matters.

7.33 *We recommend in addition that the regional family court should have jurisdiction in the following matters:*

- (1) *Nullity proceedings together with ancillary relief, as proposed in the White Paper on Marital Breakdown. (See Scheme of the Family Law (No. 1) Bill, section 46).*
- (2) *Proceedings under section 3 of the Adoption Act, 1974 and section 3 of the Adoption Act, 1988. We believe that the family court would be the appropriate setting in which to resolve the matters (such as dispensing with consent to adoption and determining whether a marital child with a living parent may be freed for adoption) addressed in these sections.*
- (3) *Proceedings, other than emergency proceedings, under the Child Care Act, 1991. Again, we believe that the family court is the proper setting for the making of decisions concerning the future care or custody of a child deemed to be in need of care or protection. The same applies to proceedings under the School Attendance Acts, 1926 to 1967.*

The Jurisdiction Of The District Court

7.34 *We recommend provisionally that the District Court's jurisdiction in family matters be confined to the giving of emergency and certain specific remedies, viz:*

- (1) *Barring and protection orders, as at present (i.e. barring orders up to a maximum of one year's duration).*
- (2) *Orders under s.11 of the Guardianship of Infants Act, 1964, i.e., principally orders for custody of and access to children. It is necessary for the District Court to retain the power to make such orders pursuant, for example, to a barring order. Full custody hearings should, however, take place in the Regional Family Court.*
- (3) *Maintenance orders under the Family Law (Maintenance of Spouses and Children) Act, 1976, subject to existing maxima (£200 per week for a spouse, and £60 per week for a dependent child).*
- (4) *Orders under s.9 of the Family Home Protection Act, 1976, subject to the existing limits on the value of the chattels in question.*
- (5) *Emergency orders under part 3 of the Child Care Act, 1991.*

Keeping Cases Out Of Court

7.35 If the resolution of family disputes through means other than adversarial court proceedings is to be encouraged, there are a number of pre-requisites. We

set these out in summary form before going on to deal with some of them in more detail.

- (1) Services must be available on a countrywide basis to support alternative methods of dispute resolution. For example, adequate mediation services should be available on a countrywide basis, ideally located within or proximate to the regional family court centres, and staffed by properly trained personnel. Also, lawyers around the country, practising in the field of family law, should by their training be made aware of the importance of avoiding adversarial conflict, they should be versed in negotiating skills appropriate to the resolution of family conflicts, and they should be aware of the alternative services.
- (2) The road to litigation should be marked at every step with sign posts indicating the alternatives to court proceedings and the advantages of negotiated settlements.
- (3) Pre-trial procedures should avoid, where possible, pre-disposing the parties to take confrontational positions which reduce the chances of negotiation and agreement.
- (4) The legal context in which alternative mechanisms operate need to be favourable. Special rules giving privilege to statements made in the course of mediation or negotiation are an example. The rules giving legal effect to agreed outcomes are another example, though these must necessarily be balanced by rules and procedures designed to prevent exploitation, to protect third parties and to cater for unforeseen circumstances.

The substantive family law which forms the backdrop to negotiations may also influence attitudes towards out-of-court agreements. For example, the substantive rules governing the ownership of matrimonial property, and its distribution on separation, annulment or death, which constitute the legal parameters within which negotiations take place, influence the bargaining position of the parties.

Mediation

7.36 It is not within our brief to make comprehensive recommendations concerning the manner in which mediation services should be made available. It is appropriate for us to examine the role of mediation in the context of a reformed legal process for dealing with family cases, which emphasises the avoidance of adversarial conflict and the promotion of dialogue and agreement. If mediation is to form an integral part of the family law system, there must exist a professional mediation service with adequate numbers of trained mediators and proper facilities for consultation, and a supporting administrative framework. It is important that mediation services should be available in all parts of the country. We would suggest that plans should be made to link the development

of mediation services with the establishment of the regional family courts which we have provisionally proposed. We recognise that the development of mediation services is likely to involve a combination of public and private initiatives.

7.37 In considering the appropriate linkage between mediation and the legal process we have borne in mind a number of factors, in addition to the primary consideration which is that of promoting agreed solutions.

- (a) Mediation is unlikely to be successful unless both parties are agreed that it should be used.
- (b) It is important to avoid placing any unreasonable restrictions on the parties' right of access to the courts.
- (c) There are some cases, in particular those in which there is a history of matrimonial violence, where attempts at mediation are usually inappropriate.

With these factors in mind we provisionally recommend as follows:

- (1) *Where proceedings for judicial separation have been instituted, the parties should be required within two weeks to attend a family court centre (which should be attached to each regional family court), if they have not already done so,*
 - (a) *to receive information as appropriate concerning the various family support services available, including welfare services;*
 - (b) *to receive information and advice concerning the availability and purpose of mediation.*

This information and advice should be given by an official who has appropriate knowledge and counselling skills and who would act under the auspices of the court. It might be augmented by an appropriate video, and by the provision of a full information pack. There should be emphasis throughout on the need to give priority to the interests of any dependent children and on the importance of avoiding any damage or distress to them.

- (2) *In relation to other family law proceedings before the family court, including custody, access, maintenance and barring applications, the opportunity should be presented to the parties to attend the family court centre to receive similar information and advice. This should not be compulsory, but the judge should be obliged to consider at the beginning of the hearing whether to adjourn proceedings, if appropriate, to require the parties to attend the centre to receive the appropriate information and advice. The judge should not, however, adjourn proceedings for this purpose unless he or she is satisfied that no additional risks are involved*

in respect of any family members whose safety or welfare is in issue.

- (3) *Given that the jurisdiction of the District Court will be, primarily, to provide interim and emergency relief, there may be few cases in which an adjournment would be appropriate. Nevertheless, subject to the same caveat concerning the protection of family members at risk, we recommend that a District Judge should have a similar power of adjournment in custody, barring and maintenance cases.*
- (4) *In all family proceedings before the regional family court, it should be open to the judge, at any time during those proceedings, to recommend that the parties attempt to resolve any outstanding issue through negotiation or mediation and, in exceptional cases, to require that they attempt to do so, and to grant an adjournment for that purpose.*

Fairness And The Mediation Process

7.38 As we have seen, while mediated agreements have many advantages, it is important, nevertheless, that there be safeguards to ensure fairness in the bargaining process. Factors which can distort the mediation process include unequal bargaining strengths between the parties, deriving from economic or psychological causes. The full disclosure of assets, necessary if there is to be a fair bargain on matters of finance and property, cannot always be guaranteed. Nor is it possible for the parties at the time of mediation to foresee all the possible risks and changes in circumstances which may subsequently occur. The following, in our provisional view, are measures which may help both to strengthen the mediation process and to ensure fairness.

- (1) It is essential first that mediators themselves should, through their training, be able to identify inequalities in the bargaining strengths of the parties, and that they should be aware of techniques for redressing obvious imbalances. As a last resort, where for example it becomes clear that one party is concealing vital information, or where one party is exercising a dominant role, the mediator should be prepared to advise that mediation should cease. All this points to the need for an agreed code of practice for family mediators.
- (2) It is important, and indeed it is the usual practice, for mediated agreements, before being set in binding legal form, to be reviewed by the parties' respective legal advisers. The role played by the legal adviser is a subtle one. On the one hand he or she must advise the client thoroughly on the legal implications, long and short term, of the various terms of the agreement, and give warning where it appears that the client is waiving or prejudicing his or her legal rights. On the other hand, there must be recognition of the compromise that is a necessary feature of many mediated agreements. It is important that in the training of family lawyers, these skills are addressed.

- (3) *In every case where an application is made to a court to have an agreement, which affects the parties' financial or property relationships, recorded or made a rule of court, there should be an obligation on the court not to grant the application unless it is satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of the parties and of any dependent children. A similar rule already applies where application is made to have an agreement made a rule of court under s.8 of the Family Law (Maintenance of Spouses and Children) Act, 1976, and this has already prompted some judicial comment on the question of what constitutes a fair and reasonable agreement (see for example *JD v BD*²). It is reasonable to expect that judicial scrutiny of such agreements will be that much more intense where either party has not had the benefit of legal advice.*

7.39 Agreements concerning custody of, or access to, children are not strictly binding in law. Their existence does not preclude a parent from making an application under s.11 of the *Guardianship of Infants Act, 1964* for an order which runs counter to the agreement. The matter will be decided with the welfare of the child as the paramount consideration. The general principle in Irish law has been that agreements as to custody and access are allowed to stand unless and until one of the parents invites the intervention of the court. There is no general requirement that the courts should review such agreements in all cases. An exception was created by s.3(2) of the *Judicial Separation and Family Law Reform Act, 1989*, which requires a court, before granting a decree of judicial separation, to review provisions made for the welfare of children. Commenting on this new power, Duncan and Scully³ comment:

"... for reasons of principle and of practicality the courts are unlikely, except on rare occasions, to disturb arrangements which have been freely negotiated and agreed between the parents. The reasons of principle derive from article 42.1 of the Constitution in which the State guarantees to respect the inalienable right and duty of parents to provide for the education (in the broadest sense) of their children. It would also usually be impractical for the courts to make an order which goes against the wishes of both parents."

We see no practical advantage in extending the courts' powers to review agreed custody and access arrangements. We regard the parental right to proceed under s.11 of the *Guardianship of Infants Act*, in circumstances where agreed arrangements appear to have failed, as an adequate safeguard.

7.40 Our courts have very limited powers to vary the terms of an agreed settlement on financial and property matters. Many agreements will themselves provide for periodic review, particularly in relation to the level of maintenance

2 [1985] I.L.R.M. 688.

3 *Marriage Breakdown in Ireland, Law and Practice* (Butterworths, 1990), at p.350.

payments. In the absence of such terms, there is no general power in the courts to order variations, even where the agreement has been made a rule of court under s.8 of the *Family Law (Maintenance of Spouses and Children) Act, 1976*. However, a number of factors ameliorate what might at first appear to be an unfair situation. The court probably does have power to vary the terms of such an agreement in the context of proceedings for judicial separation. (See the *Judicial Separation and Family Law Reform Act, 1989*, s.15(10)(c) and (d)). A court may refuse an application to make an agreement a rule of court under s.8 of the 1976 Act on the basis that the absence of an appropriate review clause may render the agreement unreasonable or unfair. Moreover, it is, in practice, not possible to enforce payment of agreed maintenance in circumstances where the liable spouse has insufficient means to make the necessary payments. By contrast, a spouse who believes that he or she has been short changed by an agreement may always apply for maintenance under the *Family Law (Maintenance of Spouses and Children) Act, 1976*.

7.41 The question remains, however, whether the courts should be given wider powers to review and, if necessary, vary the terms of mediated agreements concerning property and finance, even where those agreements have been finalised with the benefit of legal advice? On the one hand, some flexibility is clearly needed to deal with cases of blatant unfairness and because, when such agreements are entered into, it is generally not possible for the parties to anticipate all their future needs and liabilities and all future changes in circumstances. On the other hand, if agreements are subject too easily to alteration by the courts, the incentive towards negotiation and agreement may be reduced.

We provisionally recommend that there should exist a more general power in the courts to review and, if necessary, vary, on the application of either party, the terms of agreements concerning maintenance and property on the following grounds:

- (a) *that facts have come to light since the agreement was entered into which, had either party been aware of them at the time, could reasonably be expected to have effected a material change in the terms of the agreement,*
- (b) *that the economic circumstances of the parties have altered since the agreement in a manner which could not reasonably have been anticipated by the parties at the time of the agreement, and which makes it unreasonable to insist on the application of the original terms of the agreement.*

7.42 *We provisionally recommend also that, in the above circumstances, the court should have the power to confirm, cancel or vary any terms in the agreement, but should not disturb transactions which have already been concluded under the provisions of the original agreement.*

Access And Publicity In Respect Of Family Proceedings

7.43 We have given careful thought to the arguments for and against the retention of the present rules under which most family law proceedings are to be conducted otherwise than in public. Family law cases are as a class different from other cases in that they frequently involve detailed discussion of personal and usually private relationships at a time when the parties concerned may be feeling hurt and vulnerable. It is rightly felt that family members should as far as possible be protected from the further distress which may be occasioned by publicity and by exposure of their personal lives to those having only a prurient interest. Even more so, where children are involved, there is a strong desire to maintain what O'Higgins CJ described in *Re McCann v Kennedy*⁴ as "a decent privacy", this being regarded as necessary to prevent harm or distress to the child. It should also be recalled that in *McGee v Attorney General*⁵ the Supreme Court recognised that a right to marital privacy is constitutionally protected.

7.44 However, we are conscious of dangers, outlined in the Report of the Oireachtas Joint Committee on Marriage Breakdown, which arise when a whole area of the law is administered behind closed doors, with scarcely any scrutiny by press or public. Apart from the obvious dangers inherent in the absence from the legal process of a salutary check on idiosyncratic or wayward judicial conduct, there is the danger that false rumours or inaccurate assumptions about the conduct of family proceedings may gain currency, and that confidence in the legal process may be thereby diminished. The fact that family law cases are heard behind closed doors has also prevented the light of publicity from falling on the many serious deficiencies in the family law system which are described at the beginning of this chapter. Finally, it is unfortunate that access to family proceedings has become almost impossible for students who are preparing to practice in the area of family law, and for persons having a genuine research interest.

7.45 Our provisional view is against allowing access by members of the public or of the press to the proceedings of the proposed regional family courts. Nevertheless, there should be some change in the existing rules to make possible at least some minimal scrutiny of family court proceedings. *One possibility would be to permit access by an independent person or persons, nominated by the Family Lawyers' Association and approved by the President of the Circuit Court, whose function it would be to monitor family court proceedings, gather statistics and report publicly from time to time on the functioning of the courts. Such reports should not contain information tending to identify particular cases or the parties to them.* We would welcome observations on this tentative suggestion. *In addition, we provisionally recommend that bona fide researchers and students of family law should, on application to and at the discretion of the judge, be permitted to attend family proceedings.*

7.46 *The rules relating to the reporting of family proceedings should remain*

4 [1978] I.R. 326.

5 [1974] I.R. 284.

strict, and there should in particular be a general principle, applying to all family proceedings, prohibiting the publication of information which tends to identify the parties and members of their families.

The Conduct Of Family Court Proceedings

7.47 The model of a family court on which our recommendations are based is one in which emphasis is placed on the diversion away from formal proceedings of cases in which negotiated and agreed solutions are appropriate and possible. Under this model, the cases which will continue to find their way into the family court would fall into three categories:

- (a) cases where the law does not allow the parties to achieve their objective through private ordering, as for example where the parties seek an annulment of their marriage or the adoption of a child,
- (b) cases where it is not possible or appropriate for solutions to all or some issues that divide the parties to be achieved through agreement,
- (c) cases where the court's role is to review agreements reached by the parties, whether by operation of law or by reason of the fact that one of the parties has applied to set aside or vary the terms of an agreement.

It is possible to further subdivide the above cases into those in which a remedy or outcome is being sought on a consensual basis, and those which clearly involve a dispute of some kind.

7.48 There is much to be said for the court operating on an inquisitorial basis in those cases which do not involve a dispute, for example an undefended nullity petition, or an application for a judicial separation made with the consent of the respondent. Indeed, where applications are based on consent, it is difficult to see how the courts can exercise a review function without to some extent taking on an active role in the proceedings. However, in the more usual case where a dispute between the parties survives, despite all attempts at settlement by agreement, we are not in favour of any radical departure from the existing mode of trial, though we are in favour of extending specific inquisitorial powers in the court. Our reasons for taking this view are as follows. We would emphasise the need, in all cases involving a dispute *inter partes*, to respect the requirements of a fair hearing, adhering fully to the principles of constitutional and natural justice. A party should, in particular, have a full opportunity to state his or her case and to hear, test and respond to the opposing case. (We would include here disputes relating to custody of, or access to, children, despite the fact that in some cases such disputes have been characterised as not being *inter partes* but rather *in re* the child).

7.49 There are special features of family disputes which justify some modifications of, or departures from, the strict adversary approach. First and foremost the court has a special duty to protect the interests of dependent children where they are the subject of the dispute or where they may be otherwise affected by its outcome. This may justify the court in taking special measures either to ensure that the child's interests are fully represented within the trial process or to secure from independent sources information relevant to the future welfare of the child. There is also justification for giving the court some independent powers to assist in obtaining a full picture of the relative assets and financial position of the spouses where there is a dispute concerning matters of finance or property. This is because there is a public interest in ensuring that those who can should meet their family support obligations, and because of the inherent imbalance of power between the parties where one is economically dependent on the other.

7.50 In addition to those powers of an inquisitorial nature which already exist and are outlined in paragraphs 4.04 to 4.06, we provisionally recommend the following:

- (a) *The power which the court has, in proceedings under s.11 of the Guardianship of Infants Act to procure a report on any question affecting the welfare of an infant, (see the Judicial Separation and Family Law Reform Act, 1989, s.40) should be extended to any proceeding in which the welfare of a dependent child is relevant.*
- (b) *The family court should be given a discretionary power, in any proceeding in which application has been made for a maintenance or other financial order, or a property order, to procure a report from a suitably qualified independent person (for example, an accountant) on the financial or property status of the parties. The Report should be furnished to the parties and their legal representatives before the hearing. The Report should be received in evidence provided that its author is available for cross examination by the parties. Where the author is not available, the reception of the Report in evidence should be at the discretion of the court.*

Representation Of Children

(a) **Legal representation**

7.51 The idea that a child may sometimes require separate legal representation in proceedings in which decisions concerning his or her welfare are to be taken has now been accepted in the context of care proceedings. (*Child Care Act, 1991*, section 25). We see good reason for extending this principle to parental custody disputes and other family proceedings. The formula

we used in our *Report on Child Sexual Abuse*⁶ serves as a basis for the following provisional recommendations:

- (i) *Provision should be made for the appointment by the judge of an independent representative for a child who is the subject of guardianship, custody or access proceedings, or whose welfare is otherwise in issue in family proceedings, where, in the opinion of the judge, this appears to be necessary in the interests of the child.*
- (ii) *The person providing representation should be legally qualified. He or she should be appointed by the court from among lawyers who by reason of training and experience are competent to represent children. A panel of such lawyers should be established. The criteria for appointment to the panel, including the possibility of specialist training, are matters which should be considered by the two professional bodies.*

(b) Guardians Ad Litem

7.52 It remains unclear how precisely the system of guardians *ad litem*, introduced by section 26 of the *Child Care Act, 1991*, will work in practice. It may well be that a similar provision should apply to other family proceedings which involve consideration of matters affecting the welfare of a child. *We would welcome views on the necessity for this.* For the present, we confine ourselves to two cautionary remarks. The first is that careful consideration should be given to the precise role of the guardian *ad litem* and in particular to whether the guardian *ad litem* should be primarily an *amicus curiae* or an advocate for the child. (See para. 4.34). Second, careful consideration needs to be given to the question of who may be appointed as a guardian *ad litem*. Should health board personnel be available for such duties? Should the Probation and Welfare Service be involved?

The Probation And Welfare Service

7.53 It is clear to us that the Probation and Welfare Service are performing an essential task in certain family law cases. Where disputes concerning custody of, or access to, children reach the courts, judges do in many cases rely on reports prepared by Probation and Welfare Officers and we are aware how much the judiciary have come to value this service. It has also become obvious that there is some uncertainty within the Probation and Welfare Service as to the future direction of its work in family law cases. There are insufficient staff available to provide anything approaching a comprehensive service for the courts. Case-loads are high and waiting periods for reports so long, particularly in Dublin, that there is a real danger that judges may be forced to make less and less use of the service.

7.54 There are no doubt many issues facing the Probation and Welfare Service concerning the use of scarce resources and the directions in which the Service should develop, upon which we are not competent to comment. What we do wish to emphasise is that, if family judges are to make informed decisions in cases concerning disputes over children, they need to have readily available a pool of experts capable of supplying to the court, within a reasonable time, objective reports and recommendations in the cases in which the evidence adduced by the parties is excessively partisan or otherwise insufficient. There are different ways in which this service can be provided. For example, the Health Boards, as well as the Probation and Welfare Service, have relevant expertise.

7.55 It is not for us to comment on how exactly the service should be provided, but we would provisionally suggest that the following general principles should be observed:

- (a) *The service should be readily available to every court which has jurisdiction to determine issues of child custody or access.*
- (b) *The service should be adequately staffed and resourced so as to avoid unnecessary delays; time is of the essence in cases concerning children.*
- (c) *The persons providing the service to the courts should have appropriate training and should operate within an appropriate professional supporting structure.*
- (d) *While it is understandable that in some cases the process of family assessment may indirectly lead on to an element of counselling or even mediation, it should be clearly understood by all parties that the primary role of the expert is to make an assessment for the purpose of reporting and making recommendations to the court.*

Family Court Judges

(a) **Assignment**

7.56 Our provisional view is not in favour of the appointment of judges to deal exclusively with family law cases. The main reasons are that recruitment may be difficult, there is a danger of "burn-out", and there are advantages in having some degree of rotation. On the other hand, judges who are assigned to sit on the new regional family courts should be selected on the basis of their suitability to deal with family law cases. *We therefore provisionally recommend that:*

- (i) *The selection and assignment of judges to preside over the regional family courts should be made by the President of the Circuit Court.*

(ii) *Only those judges should be selected who by reason of training, experience and personality are suitable persons to deal with matters of family law.*

(iii) *Any one period of assignment should be for not less than one year.*

7.57 *We also provisionally recommend that the Government, when considering appointments to the Circuit Court, should be required to take into account the need to ensure that there are sufficient judges qualified to sit on the regional family courts.*

(b) **Judicial studies**

7.58 We do not favour compulsory "training" for family court judges, provided that their selection is made on the basis suggested above. *However, we provisionally recommend that measures should be taken as a matter of urgency to enable the judiciary to organise judicial studies on a systematic basis.* In the context of family law, this facility might be used for a number of purposes, for example:

(i) To enable family court judges to be kept abreast of broad developments in knowledge of the family and child development emanating from related disciplines, such as psychiatry, psychology, sociology and social work.

(ii) To enable the judges to familiarise themselves with new developments in legislation and case-law.

(iii) To help to ensure a reasonable degree of uniformity in decision-making, especially in those areas (for example, financial provision and property adjustment following judicial separation) where the law allows for a high degree of judicial discretion.

(iv) To provide a means whereby newly appointed Family Court judges may be supplied with information and advice concerning the operation of the Family Courts system.

7.59 *We would envisage the key elements in the organisation of judicial studies to be the following:*

(a) *Management by a Board, chaired by the Chief Justice (or nominee) and comprising a majority of judges.*

(b) *Adequate funding on the basis of an annual budget.*

(c) *Proper administrative and logistical support.*

Family Lawyers

7.60 In our opinion, lawyers who deal with family law cases require special skills and expertise, over and above those normally acquired in the course of general legal education and training. First, they need to be sensitive to the special features of family cases which have been noted above. Second, they need to understand something of family dynamics and of the processes involved in the breakdown of family relationships. Third, they need to know something about child development, and to be able to communicate with a child in the language appropriate to his or her particular stage of development. Finally, the new approach to the resolution of family disputes, with its emphasis on negotiation and agreement, requires to be understood especially by lawyers more familiar with the traditional adversarial approach. Appropriate negotiating skills need to be developed, and family lawyers should become familiarised with the practice and objectives of mediation. It would be unfair not to recognise that there are many family lawyers who have developed the appropriate skills and who deal with this demanding area of practice with great sensitivity. It should also be noted that it is often clients, rather than their legal advisers, who determine whether the approach to a family law dispute is to be confrontational or conciliatory. Nevertheless, we cannot stress too strongly the damage that may be caused by the intervention into a family dispute of a lawyer who lacks the necessary sensitivity and specialist knowledge.

7.61 We have considered the possibility of specialist training and certification as a pre-requisite to practice in the family law area. We are not prepared at this stage to make such a recommendation (though, see para 7.51 for our provisional recommendation concerning children's representatives), but would welcome views on the matter. We do however make the following provisional suggestions for consideration by bodies concerned with the education and training of lawyers:

Courses of professional legal education should address the special features of family law practice noted above so that future practitioners should, as a minimum, become aware of the need for special skills and expertise. (We recognise the efforts already made by the Law Society towards this end). Specialist courses should be made available to practising lawyers, perhaps under the aegis of the professional bodies and the Family Lawyers' Association, in conjunction with appropriate third level institutions, offering training in the special skills and expertise appropriate in family law practice. Such courses should be interdisciplinary, involving inputs from areas such as psychiatry, psychology, sociology, and social work. Heightening awareness of alternative methods of dispute resolution would be one purpose of such courses. Up-dating courses should be available for those already practising in family law. Once appropriate courses have commenced, and their effectiveness has been assessed, consideration might be given to a form of certification based, in part, on successful completion of the course and attendance periodically at up-dating courses.

Miscellaneous

7.62 *There should be systematic gathering, and timely publication, of statistics*

relating to family proceedings. As a matter of routine these should include numbers of applications for each order in the different courts, numbers of orders made, the grounds upon which orders (such as judicial separation and annulment) are granted, and details concerning enforcement applications and outcomes. There is also a need for systematic research and information-gathering in relation to orders involving the application of judicial discretion. (See para. 5.16).

7.63 *There is a need for further study of the effectiveness of enforcement mechanisms in family law. (See Para. 5.03).*

**CHAPTER 8: SUMMARY OF PROVISIONAL
RECOMMENDATIONS**

Regional Family Courts

1. A system of Regional Family Courts should be established, functioning as a division of the Circuit Court. The Regional Family Courts should have a unified family law jurisdiction, they should be located in approximately eight to ten regional centres, they should be presided over by specially nominated Circuit Court Judges and they should operate in the context of a range of support and family services.

(Paras. 7.15 and 7.21)

2. The Regional Family Courts should have jurisdiction in the following matters:
 - (1) Legal separation and ancillary relief under the *Judicial Separation and Family Law Reform Act, 1989*;
 - (2) Child custody, access and other guardianship matters under the *Guardianship of Infants Act, 1964*;
 - (3) Maintenance proceedings (without upper limits on awards) under the *Family Law (Maintenance of Spouses and Children) Act, 1976*;
 - (4) Barring (without limit of time) and protection orders under the *Family Law (Protection of Spouses and Children) Act, 1981*;
 - (5) Proceedings under the *Marriage Act, 1972*;
 - (6) Proceedings for matrimonial injunctions;

- (7) Proceedings under the *Family Home Protection Act, 1976*;
 - (8) Proceedings under the *Married Women's Status Act, 1957*;
 - (9) Proceedings under the *Succession Act, 1965*;
 - (10) Proceedings (between family members) under the *Partition Acts, 1868 to 1876*;
 - (11) Wardship proceedings;
 - (12) Proceedings under the *Legitimacy Declaration (Ireland) Act, 1868*;
 - (13) Proceedings under part six of the *Status of Children Act, 1987*.
 - (14) Nullity proceedings together with ancillary relief, as proposed in the *Family Law Bill 1994*.
 - (15) Proceedings under section 3 of the *Adoption Act, 1974* and section 3 of the *Adoption Act, 1988*.
 - (16) Proceedings, other than emergency proceedings, under the *Child Care Act, 1991*. (Paras. 7.32-7.33)
3. The District Courts' jurisdiction in family matters should remain confined to the granting of emergency and certain specific remedies, viz:
- (1) Barring and protection orders, as at present (i.e. barring orders up to a maximum of one years duration).
 - (2) Orders under s.11 of the *Guardianship of Infants Act, 1964*, i.e., principally orders for custody of and access to children.
 - (3) Maintenance orders under the *Family Law (Maintenance of Spouses and Children) Act, 1976*, subject to existing maxima (£200 per week for a spouse, and £60 per week for a dependent child).
 - (4) Orders under section 9 of the *Family Home Protection Act, 1976*, subject to the existing limits on the value of the chattels in question.
 - (5) Emergency orders under part 3 of the *Child Care Act, 1991*. (Para. 7.34)
4. (i) The selection and assignment of judges to preside over the Regional Family Courts should be made by the President of the

Circuit Court.

- (ii) Only those judges should be selected who by reason of training, experience and personality are suitable persons to deal with matters of family law.
 - (iii) Any one period of assignment should be for not less than one year. (Para. 7.56)
5. There is a need to appoint additional judges to the Circuit Court. The Government, when considering appointments to the Circuit Court, should be required to take into account the need to ensure that there are sufficient judges qualified to sit on the Regional Family Courts. (Paras. 7.30 and 7.57)

Advice, Information And Diversion

6. Attached to every regional family court, and operating under the auspices of the court, should be a family court advice centre. This would provide an information and referral service, offering information to clients about counselling and mediation services, social welfare entitlements and services, legal aid and advice services, as well as basic information about the operation of the family court and the remedies available in it. It should have available various information packs, carefully designed and consumer friendly. One of the underlying themes in the provision of all these services should be the need to place the interests of children uppermost. This emphasis, as well as the provision of information, might be reinforced by the production of appropriate short video films. (Para. 7.17)
7. Where proceedings for judicial separation have been instituted, the parties should be required within two weeks to attend a family court advice centre, if they have not already done so,
- (a) to receive information as appropriate concerning the various family support services available, and
 - (b) to receive information and advice concerning the availability and purpose of mediation.

This information and advice should be given by an official who has appropriate knowledge and counselling skills and who would act under the auspices of the court. There should be emphasis throughout on the need to give priority to the interests of any dependent children and on the importance of avoiding any damage or distress to them.

(Para. 7.37)

8. In relation to other family law proceedings before the family court,

including custody, access, maintenance and barring applications, the opportunity should be presented to the parties to attend the family court advice centre to receive similar information and advice. This should not be compulsory, but the judge should be obliged to consider at the beginning of the hearing whether to adjourn proceedings, if appropriate, to require the parties to attend the centre to receive the appropriate information and advice. The judge should not, however, adjourn proceedings for this purpose unless he or she is satisfied that no additional risks are involved in respect of any family members whose safety or welfare is in issue. (Para. 7.37)

9. Subject to the same caveat concerning the protection of family members at risk, we recommend that a District Judge should have a similar power of adjournment in custody, barring and maintenance cases. (Para. 7.37)

10. In all family proceedings before the Regional Family Court, it should be open to the judge, at any time during those proceedings, to recommend that the parties attempt to resolve any outstanding issue through negotiation or mediation and, in exceptional cases, to require that they attempt to do so, and to grant an adjournment for that purpose. (Para. 7.37)

The Court's Powers In Respect Of Agreements

11. In every case where an application is made to a court to have an agreement, which affects the parties' financial or property relationships, recorded or made a rule of court, there should be an obligation on the court not to grant the application unless it is satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of the parties and of any dependent children. (Para. 7.38)

12. The courts should be given a power to review and, if necessary, vary, on the application of either party, the terms of agreements concerning maintenance and property on the following grounds:

(a) that facts have come to light since the agreement was entered into which, had either party been aware of them at the time, could reasonably be expected to have effected a material change in the terms of the agreement,

(b) that the economic circumstances of the parties have altered since the agreement in a manner which could not reasonably have been anticipated by the parties at the time of the agreement, and which makes it unreasonable to insist on the application of the original terms of the agreement. (Para. 7.41)

13. In the above circumstances the courts should have the power to confirm, cancel or vary any terms in the agreement, but should not disturb transactions which have already been concluded under the provisions of the original agreement. (Para. 7.42)

Access And Publicity

14. Family proceedings should continue to be heard *in camera*. However, provision should be made for access to family proceedings by an approved independent person or persons, whose function it would be to monitor family proceedings, gather statistics and report publicly from time to time on the functioning of the family courts. Such reports should not contain information tending to identify particular cases or the parties to them. (Para. 7.45)
15. *Bona fide* researchers and students of family law should, on application to and at the discretion of the judge, be permitted to attend family proceedings. (Para. 7.45)
16. The rules relating to the reporting of family proceedings should remain strict, and there should in particular be a general principle, applying to all family proceedings, prohibiting the publication of information which tends to identify the parties and members of their families. (Para. 7.46)

Powers To Procure Reports

17. The power which the court has, in proceedings under s.11 of the *Guardianship of Infants Act*, to procure a report on any question affecting the welfare of an infant, (see the *Judicial Separation and Family Law Reform Act, 1989*, s.40) should be extended to any proceeding in which the welfare of a dependent child is relevant. (Para. 7.50)
18. The court should be given a discretionary power, in any proceeding in which application has been made for a maintenance or other financial order, or a property order, to procure a report from a suitably qualified independent person on the financial or property status of the parties. The Report should be furnished to the parties and their legal representatives before the hearing. The Report should be received in evidence provided that its author is available for cross-examination by the parties. Where the author is not available, the reception of the Report in evidence should be at the discretion of the court. (Para. 7.50)
19. In considering how best to provide family courts with a service for providing reports in respect of children, the following general principles should be observed:

- (a) The service should be readily available to every court which has jurisdiction to determine issues of child custody or access.
 - (b) The service should be adequately staffed and resourced so as to avoid unnecessary delays; time is of the essence in cases concerning children.
 - (c) The persons providing the service to the courts should have appropriate training and should operate within an appropriate professional supporting structure.
 - (d) It should be clearly understood by all parties that the primary role of the expert is to make an assessment for the purpose of reporting and making recommendations to the court.
- (Para. 7.55)

Representation Of Children

20. Provision should be made for the appointment by the judge of an independent representative for a child who is the subject of guardianship, custody or access proceedings, or whose welfare is otherwise in issue in family proceedings, where, in the opinion of the judge, this appears to be necessary in the interests of the child.
- (Para. 7.51)
21. The person providing representation should be legally qualified. He or she should be appointed by the court from among lawyers who by reason of training and experience are competent to represent children. A panel of such lawyers should be established. The criteria for appointment to the panel, including the possibility of specialist training, are matters which should be considered by the two professional bodies.
- (Para. 7.51)
22. Views are invited on the question of extending the guardian *ad litem* provisions of section 26 of the *Child Care Act, 1991*, to all family proceedings which involve consideration of matters affecting the welfare of a child. Views are also sought on the role and method of selection of guardians *ad litem*.
- (Para. 7.52)

Judicial Studies And Legal Training

23. Measures should be taken as a matter of urgency to enable the judiciary to organise judicial studies on a systematic basis.
- (Para. 7.58)
24. We would envisage the key elements in the organisation of judicial studies to be the following:
- (a) Management by a Board, chaired by the Chief Justice (or

nominee) and comprising a majority of judges.

- (b) Adequate funding on the basis of an annual budget.
- (c) Proper administrative and logistical support. (Para. 7.59)

25. Courses of professional legal education should address the special features of family law practice so that future practitioners should, as a minimum, become aware of the need for special skills and expertise. Specialist courses should be made available to practising lawyers, perhaps under the aegis of the professional bodies and the Family Lawyers' Association, in conjunction with appropriate third level institutions, offering training in the special skills and expertise appropriate in family law practice. Such courses should be interdisciplinary, involving inputs from areas such as psychiatry, psychology, sociology, and social work. Heightening awareness of alternative methods of dispute resolution would be one purpose of such courses. Up-dating courses should be available for those already practising in family law. Once appropriate courses have commenced, and their effectiveness has been assessed, consideration might be given to a form of certification based, in part, on successful completion of the course and attendance periodically at up-dating courses. (Para. 7.61)

Miscellaneous

26. All documents initiating family proceedings should, as far as possible having regard to the relevant substantive legal principles, be non-confrontational. They should also contain information about the family court advice centre, and should highlight the requirements concerning the parties attendance at the advice centre. (Para. 7.19)
27. There should be systematic gathering, and timely publication, of statistics relating to family proceedings. As a matter of routine these should include numbers of applications for each order in the different courts, numbers of orders made, the grounds upon which orders (such as judicial separation and annulment) are granted, and details concerning enforcement applications and outcomes. There is also a need for systematic research and information-gathering in relation to orders involving the application of judicial discretion. (Para. 7.62)
28. There is a need for further study of the effectiveness of enforcement mechanisms in family law. (Para. 7.63)

APPENDIX 1

MEDIATION SERVICES IN SOME OTHER JURISDICTIONS

Australia¹

The Australian Family Court has attached to it a counselling service, the scope of which extends to issues of finance, matrimonial property, child custody and access, as well as counselling of a more general nature. The service provides both counselling and conciliation services, but its main focus is conciliation. The court counselling service is supported by the availability of independent counselling services in the community at large.

Parties to, or children of, a marriage can seek the services of a court counsellor² at any time, even before litigation is contemplated. After the commencement of litigation, the court can advise and sometimes even direct parties to attend counselling. It can also promote a resolution of the differences between parties by ordering a conference under Order 24, rule 1 of the *Family Law Rules*. Only if these procedures fail or are considered inappropriate will there be a formal trial. In certain circumstances, counselling or an Order 24 conference is required before the court is able to make particular orders. If agreement can be reached by the parties attending an Order 24 conference, the court may be asked to make a consent order in the terms of the agreement.

The service is funded by Parliament. Counselling organisations in the community

¹ References to "the Act" are to the *Family Law Act, 1975*, as amended at 25th January, 1990.
² Section 4 of the *Family Law Act, 1975*, defines a 'marriage counsellor' as:

- (a) the Principal Director of Court Counselling, a Director of Court Counselling or another court counsellor appointed under section 38N;
- (b) a person appointed under a law of a State as a counsellor in relation to a Family Court of that State;
- (c) a person authorised by an approved marriage counselling organisation to offer marriage counselling on behalf of the organisation; or
- (d) a person authorised under the regulations to offer marriage counselling.

may also be approved by the Attorney General under the Family Law Act³ and if so, are funded by Parliament.⁴ These organisations operate mainly through voluntary part-time workers, usually without professional skills in psychology or sociology, but supervised by a small professionally trained staff. The role of these organisations has been largely confined to the stage of marital distress before legal proceedings are instituted.⁵

However, the Act adds to the voluntary organisations and counsellors acting on behalf of such organisations by appointing a welfare staff to the court itself. Section 37(8) authorised the Australian Attorney General to appoint a Director of Counselling and Welfare, and such other counsellors as are necessary as officers of the Family Court. The relevant provisions are now contained in section 38N which provides that there will be, *inter alia*, a Principal Director of Court Counselling, Directors of Court Counselling and other court counsellors as officers of the court. The services of these persons are not confined to persons who have instituted proceedings in the Family Court.

Counselling

Part III of the Act deals with counselling and reconciliation. Section 14(1) provides that where proceedings for a dissolution of marriage have been instituted, or financial or custodial proceedings have been instituted by a party to a subsisting marriage, it is the duty of the judge and of every legal practitioner representing a party to give consideration from time to time to the possibility of a reconciliation of the parties.

Subsection (2) provides that if it appears at any time to the Judge from the evidence or the attitude of the parties or either of them that there is a reasonable possibility of reconciliation, the Judge may (a) adjourn the proceedings to afford the parties an opportunity to consider a reconciliation; or (b) with the consent of the parties, interview them in chambers, with or without counsel with a view to effecting reconciliation. If the judge adjourns proceedings, he or she may advise the parties to attend upon a marriage counsellor or an approved marriage counselling organisation, or may request the Principal Director of Court Counselling of the Family Court, or an officer of a Family Court of a State, to nominate some other suitable person or organisation to assist them in considering a reconciliation.

3 Section 12 allows the Attorney General to approve a marriage counselling organisation where he is satisfied that the organisation is willing and able to engage in marriage counselling and marriage counselling represents the whole or major part of its activities. The organisation must supply the Attorney General each year with an audited financial report and a report on its marriage counselling activities, and approval may be revoked if the organisation does not adequately carry out its functions or does not engage in marriage counselling. The scheme is, therefore, based upon the assistance with public funds of voluntary organisations engaged in marriage counselling.

4 Part II of the Family Law Act continues the successful experiment of the *Matrimonial Causes Act, 1959*, by referring to marriage counselling (marriage "guidance" under the 1959 Act). Section 11 empowers the Attorney General to grant sums of money to approved marriage counselling organisations out of moneys appropriated by Parliament.

5 Nygh, *Guide to the Family Law Act, 1975*, p.30.

The hearing must be resumed as soon as practicable after a party, after such an adjournment, requests that the hearing be proceeded with. No minimum period is prescribed before either party may request a resumption of proceedings. Subsection (6) enables the court to advise the parties to attend upon a marriage counsellor or an approved counselling organisation if it considers that counselling might assist parties to a marriage to improve their relationship with each other and with their children, and it may adjourn any proceedings before it to enable this attendance. The counselling which may be directed under this provision need *not* be directed at reconciliation of the parties.

Special provision is however made in respect of marriages of short duration. Section 44(1B) provides that an application for dissolution of a marriage shall not, without leave of court, be filed within 2 years of the date of the marriage unless a certificate is filed with the application, stating that the parties to the marriage have considered a reconciliation, with the assistance of a specified person or organisation (being a marriage counsellor or an approved marriage counselling organisation or other suitable person or organisation nominated by the Principal Director of Court Counselling of the Family Court). The certificate must be signed by that person or on behalf of the organisation. The court may grant leave for the application to be filed or declare that it is satisfied that there are special circumstances by reason of which the application should proceed.⁶

Section 15 enables a party to a marriage to file in the Family Court of Australia or in a Family Court of a State a notice stating that the party wishes to have the assistance of the counselling facilities of that Court. This is designed to encourage parties whose marriages are in difficulty to take advantage of the court counselling facilities whether or not proceedings have been initiated or are even contemplated. Filing of a notice has no legal significance. Counselling under this section is voluntary and is not limited to reconciliation. Where such a notice is filed, the Principal Director of Court Counselling, or an appropriate officer of the Family Court of a State, must arrange for the parties to be interviewed by a marriage counsellor with a view to reconciliation or the improvement of their relationship with each other or their children.

Section 16 enables the Principal Director of Court Counselling of the Family court to advertise the existence and availability of the counselling and welfare facilities of the Family Court. The counselling facilities may be availed of by a party to a marriage or to proceedings under the Act. The Principal Director is under an obligation, subject to availability of staff, to provide counselling services.

In short, where spouses realise that their marital relationship is unhappy and wish to be counselled, they may at any time go to any of the recognised marriage counselling organisations or apply to the Director of Counselling of the Family Court who may refer them to a member of his own staff or to an appropriate

⁶ These provisions replaced section 14(6) of the *Family Law Act, 1975*, (now repealed) where there had been different approaches to the meaning of the phrase 'special circumstances', and perhaps some indications that certain judges did not take the earlier provision very seriously.

organisation. Counselling is voluntary, although the Act offers the opportunity from time to time to suggest reconciliation through counselling to the parties.

Conciliation

Section 16A was inserted by the *Family Law Amendment Act, 1983* and deals with Conciliation Counselling. It provides that the Family Court and any legal practitioner acting in proceedings under the Act or consulted by a person who is considering instituting proceedings under the Act, shall have regard to the need to direct the attention of parties to such proceedings and persons considering such proceedings to (a) the facilities of the court for counselling to assist parties and their children to adjust to the consequences of marital breakdown; and (b) the procedures available for the resolution by conciliation of matters arising in the proceedings.

A 1988 Report by the Family Law Council of Australia describes conciliation counselling in the Family Court as follows:

"The primary role of the Family Court Counselling Service is to provide the conciliation counselling referred to in section 16A of the Family Law Act. Conciliation counselling is conducted by a third person who counsels parties with a view to resolution of disputes. The conciliator acts both as a mediator and "inventor of solutions" offered with a view to getting the parties to agree about the resolution of the dispute. This is usually confined to non-financial disputes i.e. disputes as to custody and access Mediation is a structured approach to problem-solving. The parties are assisted by an even-handed third party to formulate their respective positions. Mediation proceeds to identify pathways and outcomes that are available to the disputants and the consequences that flow from these alternatives. The focus is on co-operative bargaining and negotiating an agreement, not necessarily on improving the relationship."⁷

The general provision in section 16A is buttressed by provisions concerning two further types of conciliation: the section 62 conference and the Order 24 conference.

(i) The Section 62 Conference

Part VII of the Act deals with children. Sections 61, 61A, 61B and 61C were inserted by the *Family Law Amendment Act, 1987*. They provide for notices seeking court counselling, for court counselling facilities to be provided, for conciliation counselling and for certain documents to be provided. They repeat, in relation to Part VII proceedings, in essence sections 15, 16(2), 16A and section 17. Section 62 provides for conferences with court counsellors or welfare

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Family Law Council, *Arbitration In Family Law*, March 1988, at p. 6.

officers. It provides that in any proceedings under the Act where the welfare of a child under 18 years is relevant, the court may at any stage of the proceedings, of its own motion, upon the request of a party to the proceedings or upon the request of a person who is representing the child, make an order directing the parties to the proceedings to attend a conference with a court counsellor⁸ or welfare officer to discuss the welfare of the child, and, if there are any differences between the parties as to matters affecting the welfare of the child, to endeavour to resolve those differences. Evidence of anything said or of any admission made at such a conference is not admissible in any court or in proceedings before any person authorised to hear evidence. These conferences are variously termed "welfare conferences" and "family conferences", and differ from conferences under O24, r.1 in that they involve only the parties and a court counsellor and do not include the parties' lawyers.

To ensure that welfare conferences are always held in proceedings with respect to custody, guardianship, welfare or access, section 64(1B) provides that the court cannot make a permanent order with respect to these matters, other than with the consent of all the parties, unless the parties have attended a conference with a court counsellor, or unless the court is satisfied that it is appropriate to make an order for reasons of urgency or some other special circumstance, or that it is not practicable to require the parties to attend a conference having regard to the counselling facilities of the court.

Although the functions ascribed to court counsellors can be fulfilled by other qualified persons not formally associated with the Family Court, such as the staff of approved marriage counselling organisations or State welfare officers, lawyers and courts most frequently turn to court counsellors for assistance.⁹ Section 64(5) provides for the supervision by welfare officers of custody and access orders.

(ii) The Order 24 Conference

To assist parties to proceedings under the Act to resolve their differences and also to avoid the time, cost and strain involved in a trial, O.24, r.1 of the *Family Law Rules* provides that a court or Registrar may order the parties to confer together and make a *bona fide* endeavour to reach agreement on the matters in issue between them. These are variously called "Order 24 conferences" or "pre-trial conferences". They are usually attended by the parties and their lawyers. They usually take place in the presence of the Registrar or a Deputy Registrar who acts as chairperson of the conference. If agreement can be reached by the parties, the court may be asked to make a consent order in terms of the agreement. If agreement is not reached, the matter proceeds to trial.

⁸ A "court counsellor" as defined in section 4(1) of the Act means (a) the Principal Director of Court Counselling, a Director of Court Counselling, or another court counsellor, (b) a person appointed under a law of a State as a counsellor in relation to a Family Court of that State.

⁹ Anthony Dickey, *Family Law*, 1985, p.81.

Although Order 24 conferences differ from conferences with a court counsellor under section 62(1) in that lawyers are present and the atmosphere tends to be more formal, the aim of both types of conference is similar in attempting to enable the parties to resolve their differences themselves. No evidence of anything said or of any admission made at Order 24 conferences shall be admissible in any court,¹⁰ except in respect of any criminal offence or contempt of court that may be committed at, or on application for costs arising out of, such conferences.¹¹ While custody and access disputes tend to be successfully conciliated by court counsellors under section 16A, financial matters are usually conciliated through Order 24 conferences.

Under section 79(9), the court cannot make a permanent order with respect to an alteration of property interests, other than with the consent of all the parties to the proceedings, unless the parties have attended a conference under 0.24, r.1, or unless the court is satisfied either that it is appropriate to make the order for reasons or urgency or some special circumstance, or that it is not practicable to require the parties to attend such a conference.

In general, the Australian provisions on conciliation are exhortatory rather than coercive.¹² Exceptions are the provisions described above forbidding the court to make a final order with respect to certain matters until a particular type of conference is held.

The Family Law Council Annual Report 1988-89 indicated that there had been concern by practitioners and judges that the respective roles of the court and the court counselling service were likely to be confused by the average litigant. In response to this, the Council set up a joint committee to consider the issue receiving submissions from Chief Justices, judges, registrars and counsellors of the Family Courts of Australia and Western Australia. Most submissions favoured the existing situation whereby the court counselling service operated as part of the Family Court. The Council recommended unanimously that the present situation continue.

In 1987, the Family Law Council published a report entitled *Access - Some Options for Reform*. The Council expressed its view that every encouragement should be given to have access disputes dealt with by mediation or conciliation rather than by proceeding immediately in the courts, except in cases where a

10 Section 18 accords a privilege to admissions and other communications made by parties to a marriage in the course of marriage counselling or other efforts at reconciliation. Evidence of anything said or any admission made at a conference with a marriage counsellor or any other person in relation to whom the same privilege applies, acting in that capacity, is not admissible in any court or in proceedings before a person authorised to hear evidence. The privilege is absolute. The evidence is not admissible even if the counsellor and both parties are willing to give it. Under section 19, a marriage counsellor entering into the performance of the functions as a counsellor must make an oath or affirmation of secrecy.

11 Order 24, rule 1(8) and (9).

12 Writing in 1985, Mr. Justice Fogarty of the Family Court said: "[I]t has long been recognised that the Court has been a pioneer in the successful development of early conciliation processes in litigation. The Order 24 Conference ... in financial matters and the confidential conciliation conference in child matters have a very high settlement rate at a very early stage in the proceedings. It has been developed by the Family Court to an art form and has been adopted in more recent times and applied by a number of State courts in other areas of civil litigation": *Family Court - Possible Future Directions*, (1985) 8 U.N.S.W.L.J. 205, 207-208.

child is potentially at risk or involving violence. It emphasised that access disputes should be speedily resolved. It noted that the Family Court Counselling Service provides some follow-up counselling and post-court information services. The Council recommended that additional resources be provided for supervised or assisted access either directly through the Family Courts or through other agencies in the community in liaison with the Family Courts.

New Zealand

Background And Legislative Provisions

In 1978, a Royal Commission on the courts produced a report which recommended the creation of a family court system. Paragraph 484 of the report stated that:

"the family court concept demands that the family court should be essentially a conciliation service with a court appearance as a last resort, rather than a court with a conciliation service."¹³

The recommendations of the Royal Commission were translated into legislation in 1980 by the *Family Court Act* and the *Family Proceedings Act*, and the new Family Courts came into being in 1981. The reader will recall that Family Courts are divisions of every District Court, and that Family Court judges are selected on the basis of suitability to deal with matters of family law by reason of training, experience and personality.

Before examining the relevant legislative provisions, we may note some preliminary observations about the New Zealand system:

"The conciliation model chosen in New Zealand does not resemble those most familiar to ... or most frequently debated in Britain; being neither an in-house service nor based on a formal independent conciliation service. Referrals for conciliation are managed by a key position, that of counselling co-ordinator, a person trained in conciliation and based permanently in the District Court, the equivalent of the British County Court. The co-ordinator's responsibilities include matching divorcing families with the most appropriate counsellor, conciliator or mediator as quickly as possible"¹⁴

Section 5(1) of the *Family Proceedings Act, 1980* provides that the Minister for Justice may from time to time, by notice in the Gazette, approve any body of persons (whether incorporated or unincorporated) as a marriage guidance organisation or counselling organisation for the purposes of the Act. Section 5(2) provides that any such approved organisation may nominate any person to act as a counsellor under the Act.

13 *Report of the Royal Commission on the Courts (1978).*

14 Hipgrave, *Family Courts: New Zealand's Other Anti-Nuclear Policy*, [1988] Fam. Law 109.

Section 8 of the Act places on lawyers the responsibility for ensuring that all parties are aware of facilities existing for promoting reconciliation and conciliation.¹⁵ Where a barrister is briefed by a spouse's solicitor, there must be satisfactory liaison between them concerning the obligations imposed by the section.

When the Act was first passed, the counselling facilities made available and the duties imposed on the court and lawyers to promote reconciliation and conciliation were available only to partners of a legal marriage. However, they are now available also to partners "in a relationship in which the parties are or have been living together as husband and wife, although not legally married to each other". This was achieved by the passing of section 7A which extended the definition of "marriage" for the purposes of sections 9 (voluntary counselling), 10(4) and (5) (discretionary counselling) and 19(1) (whereby the Court has a duty to promote reconciliation and conciliation).

Voluntary Counselling

Section 9 of the 1980 Act allows the parties in dispute to refer themselves for counselling before any formal papers are lodged with the court. This is usually spoken of as the voluntary counselling phase. Either party to a marriage may request a Registrar of a Family Court to arrange counselling in respect of the marriage. Where such a request is made, the Registrar is bound to arrange for the matter to be referred to a counsellor. The services of the counsellor are free to the spouse seeking them. Fees charged by the counsellor are paid out of the Consolidated Account from money appropriated by Parliament. There is no precondition to using this procedure. The applicant need not necessarily be thinking of seeking maintenance or a separation order or a divorce. He or she may simply hope that counselling will restore a marriage which is showing signs of failing. There is nothing to prevent a spouse seeking counselling entirely on his or her own. However, the section 9 procedure is an effort by Parliament to pay for a counselling facility, operated upon a formal request, to stand alongside other counselling services in the community.

The counsellor must file a written report on a section 9 counselling. This is seen to provide direction to the counselling. The counsellor's interest is not only in the resolution of legal issues but also in helping clients to deal with their emotions. So, counselling may be considered quite successful even where none

15 Subsection 8(1) provides that in all matters in issue between a husband and wife that are or may become the subject of proceedings under the Family Proceedings Act or the *Guardianship Act, 1968*, every barrister or solicitor acting for the husband or wife shall

- (a) Ensure that the husband or wife is aware of the facilities that exist for promoting reconciliation or conciliation; and
- (b) Take such further steps as in the opinion of the barrister or solicitor may assist in promoting reconciliation or conciliation.

Section 8(2) provides that every barrister or solicitor must certify that she or he has carried out these responsibilities under the above subsection.

of the legal issues are resolved, since the parties may be able to cope more effectively with the demands and decisions made of them to resolve issues at mediation or in Court.

Compulsory And Discretionary Counselling

Once proceedings have begun, parties will normally be referred for conciliation under section 10 of the 1980 Act, unless exceptional grounds, usually extreme violence, are found for dispensation. On the filing of an application for a separation order, the Registrar must arrange for the matter to be referred to a counsellor. This rule is inapplicable where (a) the Registrar is satisfied that, not more than 12 months before the date of the application, either (i) the applicant or respondent has requested counselling in respect of the marriage under section 9, or (ii) the applicant and respondent have attended counselling before a counsellor without a request under section 9 having been made, or (b) a Family Court Judge gives a direction that the matter be not referred under section 10(1) or that a reference made by a Registrar be revoked. Such a direction may be given if the Judge is satisfied that:

- (a) the respondent has used violence against or caused bodily harm to the applicant or a child of the marriage or has threatened to do so;
- (b) delay in the hearing of the application for a separation order would be undesirable or would serve no useful purpose; or
- (c) other reasonable cause exists to dispense with a reference to counselling.

Dispensation will not be given lightly. Allegations of violence and the like must be to the point that they suggest to a sufficient degree of proof that counselling would be ineffective.

Discretionary Counselling In Other Types Of Proceeding

Upon an application for a maintenance order or for an order with respect to child custody, a Family Court Judge may direct the Registrar to arrange for the matter to be referred to a counsellor. This does not affect the Judge's power to make an interim maintenance order. On receipt of such a direction, the Registrar must refer the matter accordingly (section 10(4)). If, not less than 28 days after the date on which the Registrar has arranged for a matter to be referred to a counsellor under section 10(1) or 10(4), either party to the marriage requests, the hearing must be commenced or resumed unless the Court otherwise orders. Also, the hearing may commence or resume before the expiration of 28 days if the Court, upon application to it, so directs.¹⁶

¹⁶ Curiously, the provisions of section 10 extend neither to custody applications between parties other than parties to a marriage (legal or *de facto*) which produced the child, applications for access nor disputes between guardians.

Conciliation

At any point in the proceedings, a judge may adjourn matters and refer the parties for conciliation under section 19. Section 19(1) provides that in all proceedings under the Family Proceedings Act between a husband and wife, and in all proceedings under the *Guardianship Act, 1968* between a husband and wife for any order relating to custody or access, the Court is bound (a) to consider from time to time the possibility of a reconciliation between spouses or of conciliation between them on any matter in issue and (b) to take such further steps as in its opinion may assist in promoting reconciliation or conciliation if the former is not possible.

Section 19(2) provides that in all proceedings under the Act between a husband and wife for the dissolution of their marriage, where it appears to the Court from the nature of the case, the evidence, or the attitude of either spouse, that there is a reasonable possibility of a reconciliation between them or of conciliation between them on any matter in issue, the Court has a discretion (a) to adjourn the proceedings to afford the spouses an opportunity for reconciliation or conciliation, and (b) to nominate a counsellor or any other suitable person to explore the possibility of reconciliation or conciliation. Where not less than 28 days after such adjournment, the husband or wife so requests, the hearing must be resumed unless the Court otherwise directs. Where the Court considers that special circumstances exist, it may on the application of either spouse, resume the hearing before the 28 day period expires.

Counsellors' Functions (Section 11)

When a matter is referred to a counsellor under sections 9 or 10, the counsellor must arrange to meet the husband or wife or both of them at such times and places as the counsellor thinks fit. As soon as reasonably practicable after the matter has been referred by the counsellor, the counsellor is required to submit a written report to the Registrar stating whether the spouses wish to resume or continue the marriage and if not, whether any understandings have been reached between them on matters of issue. The form of report is prescribed and provides for details of those understandings to be disclosed. A copy of the report is given by the Registrar to each party or to each party's barrister or solicitor. The duty of the counsellor is to explore the possibility of reconciliation and if this does not appear possible, to attempt conciliation.

Mediation Conference

The above intervention tends to be known as either counselling or conciliation. If these procedures have been exhausted without agreement on all issues in dispute, a *mediation conference* may be held. This conference is chaired by a Family Court Judge and attended by the parties, their children, if appropriate, their legal advisers and a counsel for the child if one has been appointed. If a person fails to comply with a request to attend a mediation conference, a District Court Judge may, on request of a counsellor or Registrar, issue a summons requiring the person to attend before the counsellor or to attend a mediation

conference at a specified time and place. The mediation conference is intended to be a further step in the conciliation process, although a judge may make any orders following agreements arrived at during the mediation conference that could normally be made in full court. Only if all these interventions still leave issue unresolved will the case come to a full hearing.

Under section 13(1), where an application is made in a Family Court for a separation order or a maintenance order (including one in respect of a child) or an order for the custody of or access to the child, either party or a Family Court Judge may ask the Registrar of the Court to arrange for the convening of a mediation conference. The Registrar then appoints a time and a place for the conference and requests the parties to attend. The objects of the mediation conference are to identify the matters in issue between the parties and to try to obtain agreement between the parties on the resolution of these matters (section 14(2)).

The mediation conference is held in private and attended by the parties outlined above. An absolute privilege backed by criminal sanction applies to any information, statement or admission made in the course of a mediation conference. The Chairman of the conference must record in writing the matters in issue at the conference showing (a) matters on which agreement is reached and (b) matters on which no agreement is reached. This record must be filed in the District Court in which the relevant proceedings are filed.

The Chairman of a mediation conference has wider powers than those of a counsellor. A counsellor explores the possibility of reconciliation and if this fails, conciliation, and may assist the parties to come to certain understandings and reports to the Registrar. The Chairman of a mediation conference may, by consent of the parties, make any orders that could have been made by a Family Court and that relate to an application by either party for a separation order, custody or access, maintenance of a spouse or child(ren), the possession or disposition of property.¹⁷ The Chairman is likely to contribute to the discussion at the conference, partly to reassure the parties as to what the law is and also to advise the parties of some of the realities of what they would expect at an adversarial hearing. Although a Family Court Judge chairs the mediation conference, she or he does not act in a judicial capacity. The idea of the presence of the Judge is to invest the mediation conference with an authority and purpose which would be lacking from a counselling session. The conference is essentially between the parties and the Judge. A lawyer representing a child will normally play an active role but the legal advisers of the parties will generally

17 However, where a party has no barrister or solicitor or the barrister or solicitor is not present at the conference, a consent order is not to be made unless that party states expressly that he or she does not wish the conference to be adjourned to provide an opportunity for legal advice to be taken.

take little part in the actual negotiations.¹⁸

If some or all matters remain outstanding after the mediation conference, the case may proceed to trial. Section 16 deals with whether the Chairman of the mediation conference may preside at the trial. It provides that the Family Court Judge who presides over a mediation conference between the parties is entitled to hear subsequent proceedings unless in all the circumstances he decides, on his own motion or on the application of either party, (a) that it would be inappropriate for him to do so, or (b) that there is some other sufficient reason for the application to be heard by another Judge. In practice a Family Court Judge will rarely hear the proceedings if that Judge chaired the mediation conference.

It may also be noted that the court has powers in relation to counselling under the *Domestic Protection Act, 1982*. The Court may recommend counselling of a nature specified by the Court for either party or both of them or may direct the respondent to participate in counselling of a nature specified by the Court. Such a direction may be given on making an order under the Act.

How successful are the New Zealand procedures in diverting cases away from a formal hearing? In an article on the New Zealand conciliation service, Hipgrave observes that while research is somewhat scanty, popular opinion appears to be that the family courts are a major success.¹⁹ Furthermore, of contested custody cases about 90% are resolved without the need for a formal hearing, 67% during the counselling and conciliation phases and the rest at the mediation conference. There is also a greater move towards early counselling.

England

There is as yet no national mediation service in England. Local initiative has resulted in the establishment of a number of different types of mediation service, both in-court and out-of-court. Out-of-court services are now headed by the National Association of Family Mediation and Conciliation Services (NAFMCS).

Existing services tend to deal mainly with child issues. Experimentation with new forms of service (especially "comprehensive conciliation" i.e. dealing with property and finance matters as well as child issues) are ongoing under the supervision of the NAFMCS. The fate of mediation services in England must hinge to some

18 Referring to the lawyers' role at a mediation conference, Priestly has commented: 'The role of lawyers at a mediation conference is extremely limited. There is no evidence or cross-examination. Intervention by a lawyer for a party is usually only appropriate if it helps to clarify an issue or make progress towards resolution of a dispute. Counsel appointed to act for children who are subject to custody and access disputes may play a more active role informing the Chairman and the parties of his investigations and recommendations. On occasion the parties' lawyers may not be present either by design or because the Chairman has, with the parties' consent, asked them to leave. The request of a party that his lawyer be present will always be respected. With the exception of counsel acting for the children, the Family Court Judges have made it clear that they expect the role of counsel at mediation conferences to be largely passive.': *Mediation Conferences - The New Zealand Family Court's Alternative to Litigation* in Eckelart and Katz eds., *The Resolution of Family Conflict, Comparative Legal Perspectives*, 1984, p.101.

19 Hipgrave, *Family Courts: New Zealand's Other Anti-Nuclear Policy*, [1988] Fam. Law, 109, at p. 109.

extent on the outcome of the debates on divorce currently in progress with respect to the Law Commission's Report on the Grounds For Divorce,²⁰ and will also no doubt be influenced by the emergence of the *Children Act, 1989*.

Background

The first step in England towards conciliation as distinct from reconciliation was the Practice Direction on Matrimonial Conciliation, issued on 27 January, 1971 by the President of the Family Division of the High Court, with the concurrence of the Lord Chancellor. This Practice Direction provided that divorce courts could refer contested cases to probation officers (initially in the Greater London area) for "conciliation".²¹ Conciliation here was clearly distinguished from reconciliation, and from the preparation of a welfare report to assist the court.

The Direction was ahead of its time in a number of respects: in distinguishing between conciliation and reconciliation, in separating the reporting and the conciliation functions of probation officers, in envisaging privilege for the conciliation itself in that nothing other than the matters agreed would be reported to the court.²² However, very little use appears to have been made of the Direction.

The next major step in the English conciliation movement was the blessing given by the Finer Committee to the concept of conciliation. The Finer Committee's definition of conciliation continues to be widely quoted,²³ and it asserted a crucial distinction between conciliation and reconciliation:

"Two propositions command general assent. First, that reconciliation procedures conducted through the court at the stage where parties are presenting themselves for decrees that will formalise their marriage breakdown have small success. Secondly, that conciliation procedures conducted through the court at this same stage have substantial success in civilising the consequences of the breakdown."²⁴

20 LAWCOM. No. 192.

21 The procedure was as follows. Where the Court thought there was a reasonable possibility of reconciliation or that there were ancillary proceedings in which conciliation might serve a useful purpose, the Court could refer the case to the Court Welfare Officer. The Court Welfare Officer would decide whether there was any prospect of reconciliation or whether conciliation might assist the parties to resolve the disputes or any part of them by agreement. If she or he decided that there was potential for reconciliation or that conciliation might be useful, she or he either continued with the case or referred it to one of the following: (i) A probation officer, (ii) a fully qualified marriage guidance counsellor, (iii) some other appropriate person or body indicated by the special circumstances e.g. denomination, of the case. The person to whom the parties were referred then reported back to the Court Welfare Officer, who reported in turn to the Court. The report would state whether or not reconciliation was effective, or to what extent, if at all, the parties had been assisted by conciliation to resolve their disputes or part of them by agreement.

22 Parkinson, *Conciliation in Separation and Divorce: Finding Common Ground*, 1986, p.64. .

23 See above, page 5. However, it has been argued by Parkinson, *op. cit.*, at p.65, that it is an unsatisfactory definition of conciliation. The phrase 'established breakdown' is misleading, because the breakdown may be strenuously denied by one partner. The definition could apply to conciliatory advice from solicitors or other professionals, rather than to a formal process of conciliation by a neutral conciliator. It could confuse conciliation with settlement. It also is imprecise enough to be taken for separation or divorce counselling, since although the issues listed in the definition suggest that practical legal issues are addressed only, this is not spelt out.

24 *Report of the Committee on One-Parent Families*, 1974, Cmnd. 5629, para. 4.311.

The Finer Committee envisaged that conciliation would be developed in the context of a unified and comprehensive family court and stated as one of its six major criteria for a family court that "it will organise its work in such a way as to provide the best possible facilities for conciliation between the parties in matrimonial dispute". However, it envisaged that the work in respect of conciliation would form one part only of the responsibilities of the family court and that it would also need investigative, reporting and supervisory services.

It examined a number of possibilities for the composition of this overall service. It rejected the idea that the probation service should constitute the court's welfare service, partly because of the extreme pressure under which the probation service currently found itself, and partly because of the association between the administration of family law and criminal law which it would entail. It favoured the idea that the court would be served by a specialised group of welfare officers, drawn from the ranks of the local authority social workers. It thought that it would be beneficial to the public image of such a service that it be seen to be independent from the court.

Another suggestion favoured by the Finer Committee was that there should be an entirely new welfare service attached to the court. One reason for this was that the members of this service would need an understanding of family law and legal procedures in addition to the normal areas of competence of a social worker. Faculties of law and of social administration might start to train persons especially for this field. Another reason was that at the time of writing there was considerable upheaval in the existing social services and local governments.

Official objections to the Finer Committee's proposals were that they were too costly to implement. As it came to be realised that major reform in the area of procedural family law was not immediately foreseeable, small groups of professionals in different parts of the country began to plan improvements at local level. In this respect, the history of conciliation services in England is quite different from that of, for example, New Zealand, Canada, Australia or Japan, in that conciliation services mushroomed from a number of local groups without official support or funding.

*Development Of In-Court Counselling*²⁵

In September 1976, the Presiding Judge of the Western Circuit, Lord Justice Dunn, called a meeting of local county court registrars to consider ways of reducing the number of defended divorces set down for a High Court hearing. Following this meeting, a registrar at Bristol County Court suggested the introduction of a new system of preliminary appointments in defended divorce cases. This suggestion coincided with an initiative by the Avon Probation Service to establish a separate team of welfare officers who would specialise in civil work, especially in the divorce court. It was agreed that these welfare officers would

staff the preliminary court appointments in defended divorce cases. These appointments became known as "conciliation appointments". Both parties and their solicitors were asked to attend before the registrar, and after clarifying the issues in dispute, the registrar could suggest that the couple should hold private discussions with the welfare officer to see if agreement could be reached on specific issues.

This procedure proved so successful in reducing the number of defended divorces set down for hearing that it was extended in 1978 to undefended divorces in which there was a dispute over custody or access to the children. The procedure here was termed "mediation". In 1978-79, 27 cases (about a quarter of the number of custody and access cases in the Bristol County Court) were selected for preliminary appointment and 56% settled at this appointment. The following year, 51 cases were selected for the mediation appointment and 65% of these were settled.²⁶

A number of other county courts introduced an in-court conciliation system based on the Bristol in-court appointments system, the most important of which is that introduced in the Principal Divorce Registry in London.²⁷ This scheme became operative on the 1st January, 1983. It was extended by a Registrar's Direction in September, 1983, and by further Direction in October, 1984, to include contested custody and access applications in guardianship and wardship proceedings (other than those in which a local authority is involved). It also lowered the age at which children could attend from 11 to 9 years.

Development Of Out-of-Court Conciliation Services

Again, the first area to put in place an out-of-court conciliation service was Bristol, and the service was called the Bristol Court Family Conciliation Service (BCFCS). As we shall see, this proved to be inspirational to other areas and many other such services were established. The Bristol scheme continues to be the most well-known and is considered to be the best, so we will examine its

26 After three years of this system, the registrar principally concerned reported the advantages thereof as follows: "First, the experiments show conclusively the validity of the proposals set out in the *Finer Report* for conciliation as part of the family court process. Secondly, there are very clear benefits to the litigants arising from much speedier resolution of their problems as well as the elimination of bitterness. Thirdly, there are very clear and substantial benefits to the parties and their children. Fourthly, there are very clear advantages to solicitors and savings to the legal aid fund. Solicitors are, I believe, aware of the pressure to keep down rates per hour and anything which can be done which leaves more of the available fund to pay better rates per hour in the more deserving cases is, I suggest, to be preferred to spreading the available cash ever thinner. Fifthly, there are substantial savings to the welfare service which are desperately needed if present delays in welfare officer reporting are to be contained": Parmiter, *Bristol In-Court Conciliation Procedure*, Law Society's Gazette, 25 February, 1981, 196, quoted in Hoggett & Pearl, *The Family, Law and Society: Cases and Materials*, 1983, at p. 650.

27 In November, 1982, a Practice Direction was issued by the Senior Registrar, explaining how the new procedure at the Principal Registry would operate. It makes use of the preliminary appointments procedure and operates in proceedings for custody and access. No affidavit may be filed or exchanged until after an unsuccessful appointment or until the registrar has so directed. The parties and their legal advisers must attend. The nature of the application and the matters in dispute are outlined to the registrar and the welfare officer to attempt to reach agreement. If the conciliation appointment is successful, the registrar makes such orders as are agreed between the parties. If the appointment does not result in agreement being reached, any other subsequent application to a registrar will be dealt with by a different registrar and any further enquiry by a court welfare officer will be made by a different officer.

operation in some detail.

The Bristol Courts Family Conciliation Service

After some local initiative in 1975, the Steering Committee of the BCFCS was formed, the title reflecting the fact that the scheme was operating with the blessing of the courts, although it has no formal connection with them. Initial efforts were frustrated by lack of money, but eventually funds were obtained from a number of trusts. It was subsequently additionally funded by the legal aid fund.

A small pilot scheme was undertaken in 1978-79. The conciliators used were qualified social workers or marriage guidance counsellors. From 1979, the BCFCS became full-time and employed a full-time co-ordinator who also undertook conciliation, a full-time secretary/receptionist, and five part-time conciliators each working an average ten hours per week. Conciliators must have a social work qualification or marriage guidance training, and considerable experience in family work. Familiarity with the various agencies is also valuable. Training with regard to legal matters is provided to new conciliators.

The procedure is optional. Referrals are received from solicitors and from the parties themselves before application to court on a contested issue and often before a divorce petition is filed. It differs, therefore, from the suggestion of the Finer Committee that the service be court-based and would be resorted to after application to court. The rationale for early referral is that the period during and immediately following separation is critical, when long-term decisions are often taken at a time of maximum stress. Conciliation is not offered by the BCFCS after application to a court on a contested issue nor if a divorce court welfare officer is already involved.

The pre-court service provided was designed to complement the in-court conciliation at Bristol County Court in a number of ways:

- (a) in its early availability, before an application was made to court and even before a divorce petition had been filed;
- (b) in its quick accessibility in crisis situations, without the delay of waiting for a court appointment or for legal aid to be granted;
- (c) in its acceptance of self-referrals from couples anxious to avoid court proceedings;
- (d) in its independence from statutory authority; and
- (e) in its availability to unmarried as well as married couples.

Referrals are accepted on the basis of the following conditions.

- (1) that one or both parties believe that their relationship or marriage has

broken down irretrievably;

- (2) that there is an actual or incipient dispute arising from separation or divorce; and
- (3) that both parties are willing or might be willing to accept conciliation.

Solicitors are supplied with referral forms and information to give to their clients. They are asked to fill out the referral form so that the service can know the stage of any legal proceedings or any court order made. Joint referrals from both solicitors with the consent of both parties are generally a good starting point. Self-referral proved increasingly popular over the years.

The out-of-court service in Bristol maintains a strict boundary of confidentiality between conciliation and the work of the welfare service, so that information learned during conciliation may not be divulged to an officer preparing a report for the court.²⁸ The privilege can be waived only on the joint authority of the parties.

The BCFCs deals with the following issues: (a) divorce, (b) custody, (c) care and control, (d) occupation of the matrimonial home, (e) access, (f) property and maintenance, (g) marital violence. Conciliation is however less frequently invoked with respect to (f) and (g).

Effect Of The BCFCs Nationwide

The two Bristol schemes' struggles to obtain funding were observed by the Lord Chancellor's Legal Aid Advisory Committee. This Committee wrote in its *32nd Annual Report 1981-82*:

"As we said last year, we believe that a decision is long overdue on how such initiatives should be directed and funded. We continue to believe that the development and extension of appropriate conciliation arrangements and their incorporation as far as possible into matrimonial procedure are vitally important measures necessary to reduce the expense of litigation in this area and the amount of unhappiness which at present results from it."²⁹

The Bristol schemes also attracted attention from other parts of the country and other conciliation schemes began to spring up from about 1980 onwards, with differences in organisation, staffing and funding. Many of the schemes were run by an independent management committee composed of lawyers, senior probation officers, and social workers and chaired by a circuit court judge.

28 In the Bromley Family Conciliation Bureau, and out-of-court service staffed, *inter alia*, by welfare officers, the same welfare officer is not permitted to undertake the functions of conciliation and the statutory function of reporting in the same case.

29 Para. 105.

The pilot scheme learned from each other's experiences and it came to be recognised that a co-ordinated conciliation movement would be more effective than fragmented schemes in publicising conciliation services and putting pressure on the government for funding. There was also concern to set good standards of professional practice. At a national conference in October 1982, a steering committee was elected and the association was named the National Family Conciliation Council. It was formally inaugurated in March 1983. In 1983, a working party composed of representatives from the N.F.C.C., the Law Society's Family Law Committee, and officials from the Law Society met to draw up a Code of Practice for family conciliation services.

In April 1993, NFCC changed its name to the National Association of Family Mediation and Conciliation Services (NAFMCS). The activities of NAFMCS include:

- (a) Providing a national framework for protecting uniform high standards of professional practice by means of affiliation criteria for services and selection criteria for all mediators followed by a national core training programme and accreditation procedures based on competence and a solid body of supervised work experience.
- (b) Ensuring adherence to the Code of Practice.
- (c) Acting as a central reference point through which services can pool their collective experience.
- (d) Providing a national voice on issues connected with separation and divorce, especially where children are concerned.
- (e) Liaising with other professional and voluntary bodies in the family field.
- (f) Promoting research into the principles and practice of mediation.
- (g) Campaigning for recognition of the important part mediation can play in the legal, social and economic process of divorce.
- (h) Contributing to government studies relating to divorce law.
- (i) Publishing a quarterly journal.
- (j) Responding to requests from the public and the media for information about local services, the work of the NFCC and mediation in general.

In 1981, the Law Commission recommended that

"the availability and scope of conciliation and similar services should be systematically investigated, everything possible should be done to

encourage recourse to conciliation rather than litigation.³⁰

The Robinson Committee

The Interdepartmental Committee on Conciliation (the Robinson Committee) reported in 1983 that there were over 50 conciliation services of all types in existence in England. It grouped these services into the following categories: (1) Independent voluntary services, (2) Out-of-Court Conciliation services based on Probation Service, (3) In-Court Mediation, (4) Magistrate Court services.

Independent or out-of-court voluntary conciliation services constituted less than one third of the total number of schemes. They dealt primarily with issues relating to children. In some, both parties were required to attend together, and in others the parties could be seen both separately and together during the process. The conciliator was usually a trained social worker. Meetings would be held over many weeks, and if agreements were reached, the parties and their solicitors would normally receive a letter setting out the agreement. Subsequent difficulties could be referred to the service for further meetings. Services sometimes charged fees to the parties and sometimes the fee could be charged to the legal aid fund. The conciliators often worked for little or no remuneration. A notable feature of such schemes was that they were available to couples earlier than in-court schemes.

Out-of-Court conciliation services based on the Probation Service tended to be organised by divorce court welfare officers. They accepted referrals mainly through solicitors and from the parties themselves, like other out-of-court services. The conciliators were full-time probation officers, sometimes members of a special unit organised to meet the needs of the family work of the courts. The procedure was similar to other out-of-court services except that an agreement could form the basis of a court order by consent. No fees were charged for these services.

In-Court mediation services were staffed by members of the Probation Services, in particular divorce court welfare officers. Some schemes were initiated by county court registrars, others by divorce court welfare officers. Some magistrates courts operated a court-based conciliation service in conjunction with the divorce court welfare officers, since the latter prepared reports for the magistrates in the same way as for divorce courts.

The Committee accepted that the "success" of conciliation services had to be measured in terms of social benefits as well as costs. It pointed out the difficulties of assessing whether conciliation in fact achieves agreement in cases where no agreement would have been reached without it.³¹ Subject to the necessary limitations of the reliability of data, it found that the success rate of conciliation generally, defined by reference to court orders subsequently made

30 *The Financial Consequences of Divorce*, LAWCOM. No. 112, para. 46.
31 Paras. 3.19-3.20.

by consent, varied between 25% and 35% (up to 38% at the Bristol Court Family Conciliation Service). It found that conciliation by welfare officers appeared to produce a success rate of up to 50% of referrals. However, it accepted that most schemes were very new and that the future development of skills would be a key factor to the success rate.

On the issue of costs the Committee concluded that out-of-court schemes are less cost-effective overall than in-court schemes, as a result of which there could be no justification for central government funding of out-of-court schemes.³²

The Committee recommended that a number of different types of in-court conciliation schemes should be set up and monitored over a period of time.³³ It thought this should be done by creating a small unit outside the government, guided by an advisory committee, to plan and initiate and compare schemes.

The Booth Report (1985)

In 1985, the *Report of the Committee on Matrimonial Causes Procedure* chaired by Mrs. Justice Booth recommended that formal provision should be made for conciliation in divorce and other matrimonial proceedings and that the court should initiate a referral for conciliation "where it is thought appropriate".³⁴ Unlike the Robinson Committee, the Booth Committee was dominated by lawyers rather than civil servants. The Committee emphasised early intervention, but nonetheless stated that under its proposals "the obvious place for conciliation is at the initial hearing".³⁵ Accordingly, the organisation proposed by the Booth Committee as regards conciliation was based on an in-court model.³⁶

Both parties would be required to attend the initial hearing within ten weeks of the filing of proceedings, with their legal advisers if so required. The Committee estimated that these hearings would last only fifteen minutes on average and expected then to accomplish a great deal in that time. The registrar would be able to exercise increased powers at the hearing, including the power to grant a decree, power to express satisfaction with the arrangements for the children, power to make interim or final orders on financial and property matters, and

32 "A national out-of-court conciliation service could not be funded by savings generated by its own activities. It is far from clear that in-court services could be so funded. Our evidence shows that there may, however, be scope for the development of in-court services within existing resource planning as they do not need to have an independent existence with the attendant costs of accommodation and administration. They may prove to consume the time of the judiciary and of the divorce court welfare service, but savings to compensate for this might well be found elsewhere. Schemes run by the divorce court welfare service may save the time of the divorce court welfare officers and possibly reduce the number of welfare reports ordered ... It therefore seems to us that the way in which conciliation services might best be developed within existing resource planning is through in-court schemes with an adaptation of court procedures ... We conclude that out-of-court schemes do not save money overall and appear to be less cost-effective than in-court schemes. We have therefore not been able to establish sufficient grounds to justify central government funding out-of-court schemes": para. 4.25-4.26.

33 Para. 5.19.

34 H.M.S.O. (1985), para. 3.6.

35 Para. 3.12.

36 The Committee acknowledged that in many cases conciliation was likely to be most effective before court proceedings were started, but felt that its terms of reference confined it to making recommendations as to the role of conciliation in matrimonial proceedings only.

power to refer the parties to a welfare officer for the purpose of discussing the nature of conciliation and its relevance to the nature of the dispute in which they are engaged. An important point is that the conciliation itself would be carried out by a court welfare officer from the probation service.

The Committee's recommendation that the court should refer contested cases to welfare officers for conciliation was closely in line with the 1971 Practice Direction on Conciliation referred to above. Referral for conciliation would consist of a two-stage process - explanation of the nature and purpose of conciliation followed by actual conciliation where both parties agree to it. This two-stage procedure was designed to avoid the objections to a mandatory procedure. The decision to undertake conciliation would rest with the parties. The initial discussion with the welfare officer could quickly develop into conciliation itself, and the Committee was agreeable to this, provided all the necessary facilities and time were available and each party was acting freely, with full knowledge of what was involved and without pressure from any source. The Committee proposed that conciliation would be legally privileged and that this privilege should be absolute.

The Committee recognised that solicitors would have to undertake significantly more preparation for the initial hearing, since, for example, a claim for financial relief would have to be supported by detailed information. It therefore recommended an increase in the initial limit for legal advice and assistance.

As regards the findings of the Booth Committee, Lisa Parkinson has commented:

"The Committee's proposals were designed to increase divorcing couples' participation in and control of the legal process, but the structure and brief duration of the initial hearing would result in professionals steering bemused people into rapid decisions which might receive no more than fleeting scrutiny from a hard-pressed registrar".³⁷

The Newcastle Project

Following the Robinson Committee's recommendation that a research unit be established to monitor a number of different types of conciliation scheme, the Lord Chancellor's Department issued an invitation to tender for a research contract in 1984. The contract was awarded for the Conciliation Project Unit at the University of Newcastle Upon Tyne. The Report of this Project Unit was published in March 1989.³⁸

For the purpose of its findings, the Unit classified the conciliation services examined into four categories:

37 Parkinson, *Conciliation in Separation and Divorce: Finding Common Ground*, 1988, pp.207-208.

38 Conciliation Project Unit, University of Newcastle Upon Tyne, *Report to the Lord Chancellor on the Costs and Effectiveness of Conciliation in England and Wales*.

Category A	-	Court-based conciliation with high judicial control
Category B	-	Court-based conciliation with low judicial control
Category C	-	Independent Conciliation with Probation Control
Category D	-	Independent Conciliation with No Probation Control

Effectiveness Analysis

The Unit divided its findings on the effectiveness of conciliation into quantitative findings and qualitative findings. Its quantitative findings were as follows:

- (i) Reduction of Disputed Issues - The largest reduction in the number of issues of disagreement occurred in categories B and C.
- (ii) Agreed Arrangements - Generally, users of conciliation reported agreements on some issues in 71% of cases, and 74% of these described themselves as satisfied with the agreements reached. However in reaching agreements, category A conciliation did less well than the other three categories.
- (iii) Satisfaction with Arrangements - Users of category A conciliation were significantly less satisfied with access arrangements than users of the other types of conciliation. No significant differences in terms of satisfaction emerged between the remaining categories.

The Unit's qualitative findings were as follows:

- (i) Relationships - An improvement in the quality of relationships was divided among parties who attended conciliation in categories A, B and D, but there was no significant differences between *conciliated* and *non-conciliated* cases. Thus, there was no evidence that conciliation had an impact on relationships.
- (ii) Well-Being - Users of conciliation in categories C and D experienced significant improvements in psychological well-being.
- (iii) Satisfaction with Conciliation - Only 15% of parties were dissatisfied with the process of conciliation. Satisfaction was less apparent in relation to category A conciliation than other categories.
- (iv) Aims of Conciliation - Category D conciliation was generally accepted as the most successful in achieving the various aims of conciliation.

- (v) Helpfulness of Conciliators - Conciliators in independent schemes were regarded as the most helpful, although most conciliation users thought that conciliators were helpful in enabling them to reach agreements.

The Unit concluded that court-based services in category A were less successful than conciliation in other categories. Although there were few significant differences in the effectiveness of services type B, C and D, independent schemes in category D seemed to be the most successful. It was also pointed out that there were no significant differences between conciliated and non-conciliated cases, but the Unit thought that this was attributable in part to the fact that the most difficult cases were referred to conciliation, and in part to the fact that even where no conciliation proper was availed of, the probation service adopted a style of investigation which was similar to conciliation, or "conciliatory".

The Unit has been asked to express views on the desirability of a national conciliation service. It said that it would have been possible for it to recommend the establishment of a particular type of national service only if the findings had shown that one or more categories of conciliation had proved both to be effective and to generate a net savings in cost. Since this was not the case, the decision was a political rather than a scientific matter, in that the policymaker would have to balance the costs of the different types of intervention against their effectiveness. However, it said that the case for a national service clearly could not rest solely upon economic considerations.³⁹

However, the Unit went on to identify factors which its findings had shown to hinder the effectiveness of conciliation,⁴⁰ and suggested in consequence that if a national conciliation service were to be created, it should have the following features:

- (a) it should not be mandatory for all couples;
- (b) it should not focus exclusively on child issues;
- (c) it should not be surrounded by ambiguous terminology;
- (d) it should not overlap with other legal and welfare processes.

The Unit felt that category C and D models came the closest to the most effective forms of conciliation, but thought that they needed improvements. In addition to security of funding, they should not deal exclusively with child issues, they should not overlap with other social agencies and there would require to be some institutional adjustment to the court and clarification of the court welfare officer's role. The Unit was not in favour of a model involving both court-based and independent conciliation. The Unit, therefore, favoured most a service which would (i) be independent of the courts and the probation service, (ii) offer counselling as well as conciliation, (iii) offer advice and information regarding

39 'Crudely put, if the policy maker is to conclude that conciliation is, on balance, a worthwhile form of social intervention to underwrite, it would be necessary to demonstrate that its other (non-economic) effects are socially 'worth' the £150 to £250 net resource cost per case that it appears to entail': para. 20.13.

40 Para. 20.18.

marriage, divorce, children and the legal system, and (iv) incorporate all the desirable features referred to above.

After the Newcastle Report

In September, 1990, the National Association of Family Mediation and Conciliation Services issued a policy paper in which it described options for the setting up, organisation and cost of a National Family Conciliation Service. It approved the Newcastle Unit's views that there should be no ambiguous terminology or overlapping with other legal and welfare agencies; that there was a need to safeguard the characteristics of conciliation that were most favoured by consumers; that the parties should be in control of the outcome; and that the service should not focus exclusively on child issues. The NAFMCS suggested that two entities were necessary to ensure the provision of conciliation of high quality on a national basis:

- (1) A professional body to lay down, monitor and maintain high standards of conciliation.
- (2) A financial and administrative organisation for the National Service.

It envisaged that the professional body would set down standards of performance, oversee staff selection, provide basic and additional training, set up an accreditation system to offer a recognised mark of professional qualification in conciliation, set up criteria for appointing supervisors and consultants to develop good practice, and to effect liaison with other professional bodies and government bodies. The NAFMCS pointed out that it already performs the tasks outlined and would like to do this in cooperation with associations of mediation services in Scotland and Northern Ireland.

The functions of the proposed financial and administrative body would include ensuring the availability of conciliation in all geographical areas; ensuring a fair distribution of resources around the country; ensuring a fair professional remuneration of staff; ensuring a consistent structure to enable financial planning (targeting and costing); and ensuring an administrative structure to provide for the accountability and management of staff. The NAFMCS examined a number of options but concluded that the NAFMCS itself should carry out the functions of administration as well as being a professional body.

Mediation - England - The Future

At present, English mediation services are largely self-funded. NAFMCS, for example, receives its funding from private trusts and charities. With the publication of the *Partnership Paper on Dealing with Offenders in the Community: A Position Document by the Home Office* in 1992, the situation as regards funding has been slightly ameliorated. The probation service is encouraged to spend 5% of its overall budget on partnership agreements with "independent" bodies, but it is made clear that the criminal field has priority. In any case the amount of

direct funding for family mediation services from local chief probation officers is at their discretion and is anyway likely to be small. However this development is felt to be a promising start.

There is no doubt that mediation in England is on the increase. More services are being formed, e.g. in Hackney, Dudley, North Staffs and Cumbria. Also, despite recurring financial insecurity, family mediation services are increasingly employed. 1991 saw a 58% increase in referrals and a 25% increase in cases completed. As demand grew in some places by a further 30% in 1992, the strain on the system, and on NAFMCS itself, increased.

The fate of mediation services in England must hinge to some extent on the outcome of the debate on divorce currently in progress and on the Law Commission's *Report on The Grounds for Divorce*.⁴¹

The Government plans to publish a Green Paper on the advantages and disadvantages of mediation as reflected in empirical research. It is felt that the main advantage would be reducing the great cost, in the macro-economic sense, of divorce. In addition to this the reduction of acrimony and of the burden on the legal aid scheme would be welcomed.

However the time-scale of any divorce reform proposals is not yet known nor is the likelihood of any financial help for mediation. NAFMCS has provided information on costing and current availability and has argued that the public interest in a national family mediation service is strong because of its capacity to assist separating and divorcing families in such a way as to reduce parental acrimony and harm to their children.

The Children Act, 1989 has also given a great impetus towards mediated solutions in relation to children. *The Children Act* offers a new world of shared "parental responsibility" with the minimum of imposed court orders. As a result mediation need no longer necessarily be an adjunct to legal proceedings because a court order will only be required if an order is thought to be in the interests of the child.

The *Child Support Act, 1991* may also have implications for the future of mediation. From the 5th April, 1993, parents who are not operating maintenance agreements or orders and who are in receipt of income support, family credit or disability working allowance, *have* to use the child support agency for the calculation according to a rigidly applied formula of child maintenance. Couples (whether or not on benefit) who are operating maintenance agreements or orders pre-dating the 5th April, 1993 will be phased in. It is uncertain whether the operation of the Child Support Agency will result in more work for lawyers and the courts or whether there will be a net reduction in conflict as one of the issues becomes non-negotiable.

41 LAW.COM. No. 192 (1990).

Taking into account all of the above it would appear that the Government has rejected the idea of itself setting up local mediation services in every town and city in the land, paid for centrally by the State. It would also appear that a means-tested "national" mediation service has been rejected. It appears that the preferred option would be to use the existing local mediation services under the umbrella of a new agency. This could be financed using the existing legal aid system. In addition national selection criteria and training standards as well as a standard costing basis will need to be developed.

The Government admits that there is a problem of reasonable access in certain areas of the country particularly, for example, the North East Midlands. This could be tackled either by making regional mediation centres operate in an itinerant manner within, for example, a 15 mile radius, or by establishing local call-in centres which could be opened for visits twice a week.

The Government believes that just as important as making these services available to the public is the precipitation of a cultural change. At the moment it would seem that if a couple are thinking of a divorce their disposition would be to go to a solicitor. English statistics indicate that less than 10% of couples will have recourse to mediation of their own free will.

Comprehensive Conciliation In England

Until recently mediation services in England tended to deal exclusively with child issues. Therefore NAFMCS set up a two-and-a-half year project funded by the Joseph Rountree Foundation which aimed to develop comprehensive mediation in NAFMCS services and to make it available to those on low or moderate incomes.

Five experienced services, each using the same comprehensive mediation process, constructed different models for introducing into it the required legal and financial information. What distinguished the different models was the way in which the information was introduced:

1. by the addition of a lawyer mediator at certain points *within* the process;
2. by joint appointment with a solicitor to give legal information to the couple *prior* to the process;
3. by legal consultancy for the mediator *outside* the process;
4. by a welfare right specialist to inform the couple about benefit entitlement *inside* the process.

The questions asked of the project were as follows:

Could mediators carry out the comprehensive mediation process? How could legal and financial expertise be included? How could full disclosure be ensured?

Would the focus on children be affected? How successful would the mediation be? What would be the demand? How long would it take? What would it cost? What should be charged to clients and how could it be provided to those on low or moderate incomes? How could a good climate of co-operation with solicitors be created? Should all clients have solicitors? What would be the service delivery implications for NAFMCS services? What form would future training take?

Some of the answers found were as follows:

1. Not only could the services' mediators provide comprehensive mediation, but they became enthusiastic about the process and about interdisciplinary teams.
2. All the different models were successful in introducing legal and financial information into the process. The model is less important than the conduct of the process.
3. The information-gathering procedures were effective in ensuring full disclosure.
4. The focus on children was not obscured, and planning for the future needs of children was in fact more thorough in that it covered all aspects of their care - financial support and housing as well as contact and residence.
5. About 65-70% of those who entered the process completed it either in full or as far as they wished, i.e. the same level of agreement as in child-related mediation.
6. Between 20% and 30% of all mediation clients entered the process. The services developed further their intake skills to include a wider range of information-giving and assistance.
7. Each case took on average 12.7 hours, including administration.
8. The cost depends on the overheads and client base of each service. It cost an average of £600 per case during the project. It could have cost £500 without the grant and the project development work. It could cost £550 if mediators were paid GAL rates. (£16 per hour). The start-up cost for a Service could be approx. £3,400.
9. The way of making comprehensive mediation available to the poorer client comprised subsidising them either by collecting client fees on a sliding scale or by discretionary rates. The scale of the need for subsidy (e.g. Cambridge reckoned that 58% of their clients were in the low or moderate income bands) indicates the necessity for some subsidy from government sources.

10. Seminars with role-plays help to inform solicitors, who, however, were not the main source of referrals.
11. Most clients had solicitors by the end of the process - a paper setting out the role of solicitors was produced.
12. Management criteria can help services to know when and whether to participate.
13. Training for all mediators in comprehensive mediation is recommended in a stage introduction throughout the services; the pilot training was highly evaluated by participants.

There is no indication at the time of writing that any one model of comprehensive mediation is clearly preferable. The take-up by clients varies between 12% and 30% from service to service. NAFMCS is awaiting the research report to see what factors most determine their choice.

Bristol's model, for example, has incorporated the involvement of a group of four lawyer mediators one of whom typically joins the "anchor" mediator midway through the mediation process in order to provide the clients with legal information and to assist them develop options. The process is completed by the preparation of a "memorandum of understanding" in which the decisions made by the couple in relation to children, property and finances are set out.

To date in Bristol some twenty-six couples have taken advantage of the Bristol comprehensive mediation project of whom roughly two-thirds have completed the process up to the memorandum stage. Now that the experimental phase of the project has ended in Bristol, the Bristol service is anxious to build on what has been learnt over the past two years and integrate comprehensive mediation into the main stream of the service. It appears that the demand for such a facility exists and that clients are willing to pay for this in preference to using their traditional solicitor-led approach.

BFCS has taken the decision to offer comprehensive mediation on a fee-paying basis with a flat rate fee, at present £250 per person, which covers the actual cost of providing the service which is felt not to be prohibitive for the majority of clients. In addition this fee will, it is felt, generate sufficient funds to enable BFCS to offer a reduced rate in cases of genuine hardship.

At a national level, the cost of providing comprehensive mediation is being actively experimented-with, with the expiry of the initial subsidy provided for 15 cases per service. Altogether the five services have worked with over 125 cases during an 18 month period. A working party is now studying the training implications of extending the provision more widely throughout NAFMCS services and examining the relationship of training in comprehensive mediation to training in the core skills of mediation.

Comprehensive mediation has attracted the attention of the Law Society, the Solicitors Family Law Association and the Family Mediators Association. This is due, at least partially, to the contribution of lawyers to the comprehensive mediation process.

One major reason why the Newcastle Report was unable to finally conclude that mediation was a cost-saving process in England was its almost exclusive focus on child issues. The development of comprehensive mediation in England will thus greatly further the cause of mediation generally.

The NAFMCS project therefore recommended that the distinction between child mediation and comprehensive mediation should be dropped. The process should be called "mediation" and clients should be able to introduce into it as many issues as they choose. Training should include the new procedures though not all mediators nor all clients will choose to use them.

The research project unit of the University of Newcastle Upon Tyne is expected to publish a new Research Paper on Comprehensive Mediation in September of 1993.

Canada

In its 1974 Working Paper on the Family Court, the Canadian Law Reform Commission was of the opinion that "conciliation counselling services" should be established in or made available to the Family Court, the function of which would be to clarify and attempt to resolve the problems regardless of whether the marriage survives or disintegrates. It felt that existing community services could not be exclusively relied on, and that adequate counselling and conciliation services should be "guaranteed". Moreover, it considered that "local conditions should determine whether these services are to be established within the court itself, or in special clinics or departments, or secured by a system of purchase of services". It suggested the use of mobile clinics, regional health centres and volunteers to provide a service accessible to rural centres. It was opposed to mandatory counselling. It said that there was very little information on the types, cost and effect of family counselling and conciliation services and recommended the institution of pilot projects to test the demand and requirements of such a service.⁴²

Following this report, several of the Canadian provinces experimented with unified family courts and conciliation services. A brief summary of the available information on conciliation in the provinces is set out. It is indicated at the beginning of each section which courts deal with family matters in the particular province.

Ontario⁴³

Courts: The Ontario Court of Justice (General Division), the Ontario Court of Justice (Provincial Division), the Unified Family Court of the Judicial District of Hamilton-Wentworth.

Mediation for family disputes is made available in Ontario by virtue of three legislative provisions. These are contained in the *Family Law Act, 1986* the *Children's Law Reform Act, 1986* and the *Divorce Act, 1986*.

S.31⁴⁴ of the *Children's Law Reform Act* and s.3 of the *Family Law Act, 1986* both contain provisions, stating that where the parties are involved in proceedings before the court and they have selected a person to mediate a matter, the court will order that the issue be mediated. It is essential that the parties consent to the process. Except in very limited circumstances, the parties themselves pay for the services of the mediator they have selected.

S.9(2) of the *Divorce Act* encourages the use of mediation in a different way. It places a positive duty upon lawyers to advise clients of the advisability of negotiating support and custody issues and of the availability of mediation services in the community. The Act does not include a provision enabling the court to order that mediation take place.

As a result, in directing clients to this new form of dispute resolution, lawyers must be mindful to a number of issues. For example, the fact that under the *Family Law Act* and the *Children's Law Reform Act* the parties must consent to a mediation order being made. He/she should have on hand the names of several experienced mediators and should develop a relationship with local mediators keeping them up to date on developments in family law. There is an obligation on the lawyer to explain the availability of the mediation process and he/she should understand the differences between mediation and the adversarial process in order to explain them to the client. The lawyer should be prepared to screen out clients not suitable to mediation, such as those with a history of violence or a power imbalance which would inhibit real negotiation.

S.3(4) of the *Family Law Act, 1986* states that before entering mediation, the parties shall decide what kind of report the mediator will produce. There are two kinds of reports, "full" reports and "limited" reports. In a full report, the mediator may include any aspect of the discussions and evidence of anything said, and any admission or communication made during the mediation is admissible in the proceedings. In a limited report, no evidence of anything said or any admission or communication made is admissible unless the parties consent to it being admissible. The distinction between the two forms of report has led to the use of the terms "open" and "closed" mediation. Open mediation means that at the conclusion of mediation the mediator prepares a full report on the mediation and evidence of anything said is admissible in subsequent proceedings. Closed

43 Information supplied by the Honourable Mr. Justice Walsh, Supreme Court of Ontario, 4th December, 1990.
44 Enacted S.O. 1981, c.20, s.1; amended by the *Children's Law Reform (Amendment) Act, 1989*, c.22, s.6.

mediation means that at the conclusion of mediation, the mediator prepares a report that either sets out the agreement reached by the clients or states only that the clients did not reach agreement on the matter. In short, mediation may be privileged or non-privileged depending on what the parties agree to at the outset.

Assuming that the clients reach agreement, the question arises as to who should be responsible for drafting the agreement. Practice on this varies, but most mediators who are also lawyers will draft the agreement and then advise the parties to take it to their individual lawyers for execution and independent legal advice. Other mediators produce a "memorandum of understanding" which summarises the agreement between the parties and the drafting is then done by the lawyers at the same time as the independent legal advice is given.

An order to assist parties in understanding the purpose of mediation, the Federal Department of Justice has produced a booklet entitled "Another Way" which gives an overview of mediation.

The Unified Family Court has a conciliation service as part of the court operation, but we have as yet no further information regarding its operation.

Report Of The Advisory Committee On Mediation In Family Law

In February, 1989, a Report was published by the Advisory Committee on Mediation in Family Law (commissioned by the Attorney General of Ontario at that time, Ian Scott). This Report said that existing mediation services in Ontario were a patchwork of models and recommended that mediation services be set up on a province-wide basis, and detailed what form such mediation should take. The main features of the mediation service recommended by the Advisory Committee are as follows:

- (1) Mediation to be an alternative to the court process.
- (2) Mediation to be available on a voluntary basis.
- (3) Mediation to be available on a province-wide basis.
- (4) There would be a mandatory requirement of one-time attendance at a public legal education session to cover such topics as family law generally, the function of mediation, and information about rights and obligations of family members.
- (5) Mediation between family members should be comprehensive.
- (6) Acts of violence would never be mediated.
- (7) Potential users of mediation who have been rendered incapable of mediation by reason of domestic violence would be screened out.

- (8) Persons who do intake for the mediation service would be trained to recognise evidence of domestic violence. Such a decision being subjective, the intake person should err on the side of caution and terminate mediation if domestic violence appears to be disclosed.
- (9) Mediation to be available before, during and after litigation.
- (10) Both "open" and "closed" mediation to be available.
- (11) Mediators not to provide legal advice to clients. Independent legal advice to be encouraged.
- (12) An accreditation and regulation system to be set up regarding mediators.
- (13) Proper data collection service to be established to analyse benefits or otherwise of mediation.

Following the publications of the above Report, the Ministry of the Attorney General set up a 3-year pilot project to evaluate family mediation. The project is located at the Unified Family Court at Hamilton-Westworth.

Manitoba⁴⁵

Courts: The Family Division of the Court of Queen's Bench (which is a unified family court).

The court has attached to it a social arm which is composed of approximately 16 social workers, most with Master's Degrees. Most are in the city of Winnipeg while others are in Brandon and in the northern part of the province.

Family Conciliation is a professionally staffed office of counsellors which assists individuals and families experiencing separation and divorce. The services provided are available at no cost to the participants. Family Conciliation counsellors provide mediation for couples in dispute with respect to the custody and visitation of children. They also prepare reports when requested by the court with respect to the needs of the children and the capacity of each parent. A worker other than the one who had assisted the mediation will prepare such a report.

The provisions of the Act do not specify that the person making the report must be a Family Conciliation counsellor. S.49 of the *Queen's Bench Act*⁴⁶ provides that where a judge or master is of the opinion that a report of a "family evaluator" is required at a hearing with respect to custody, access or a related family matter,

45 Information supplied by The Honourable A.C. Hamilton, Associate Chief Justice, Family Division, Court of Queen's Bench, Manitoba, 15th April, 1991; and Mr. James C. McCrae, Minister of Justice and Attorney General of Manitoba, Xth X, 19XX.

46 (1970) CCSM, c. C280.

the judge or master may by order appoint a family evaluator. A family evaluator must interview the parties and such other persons as may be appropriate and must provide to the court a report containing information and an opinion relevant to custody, access or a related family matter that is in issue in the proceedings. S.50 provides that where a report is submitted by a family evaluator, such person may be called as a witness and may be cross-examined by the parties.⁴⁷

More generally, s.47(1) of the Queen's Bench Act provides that where a judge or master is of the opinion that an effort should be made to resolve an issue otherwise than at a formal trial, he or she may, at any stage of the proceedings, refer the issue to a mediator. S.47(2) provides that a mediator to whom an issue is referred under subs.(1) shall attempt to resolve the issue. The rules of court permit a judge to refer any matter to mediation, and nearly all custody and access disputes are referred to conciliation before they proceed through the court system. Some parents refuse to participate in mediation, but the majority receive the benefit of advice and the opportunity to settle without proceedings to trial.

Regarding confidentiality, s.48 of the *Queen's Bench Act* provides that unless the parties otherwise agree, (a) a mediator who renders services under s.47 or at the request of the parties, or (b) a party to a mediation, is not competent to give evidence in respect of a written or oral statement made by a party during the mediation or knowledge or information acquired during the mediation.

An important practice of the Family Division is that before a case proceeds to trial, there must be a pre-trial hearing before a judge other than the one who will eventually sit on the trial. Counsel for each party and each party must be present at the pre-trial hearing. One of the purposes of the pre-trial hearing is to determine what issues remain in dispute and to see that all relevant information has been exchanged. It also enables the judge to explore with the parties the possibility of settling some or all of the issues. Only if the judge is satisfied that there is no possibility of settlement will a trial date be given. Rule 70.17(2) provides that a pre-trial brief shall set out (a) the issues which have been resolved, (b) the issues which remain unresolved, (c) the position of the parties on unresolved issues, and (d) where support or division of property remains in issue, the current financial position of the parties.

A similar procedure is followed with child protection cases. The worker is present and explains to the parents why the child has been taken into care and why the agency is proceeding to court. The parents are given an opportunity to

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Rule 70.28 of the Queen's Bench Rules provides that the report shall include:

- (a) information which the evaluator considers relevant to the matters in dispute;
- (b) an opinion as to the suitability of each party to have custody or access;
- (c) the wishes of children, if volunteered by them;
- (d) an opinion as to what plan of custody and access would be in the best interests of the children, whether it corresponds with the wishes of the children or not;
- (e) the basis of the opinion; and
- (f) a report upon any particular matter referred by judge or master.

respond to the concerns of the agency and to make alternative suggestions. If new parties appear, they may be added as intervenors and their suitability in caring for the children will be explored by the agency. This may require an adjournment but if this is granted, it is to a fixed date before the same judge.

Alberta⁴⁸

Courts: The Court of Queen's Bench, the Provincial Court (Family Division), the Surrogate Court.

The Court of Queen's Bench has developed a mediation-assessment programme for custody and access issues, sponsored by the Department of Family and Social Services. The Custody Mediation Program has been in operation in Edmonton since 1985, in Calgary since 1989, and was expanded on January 1, 1991, to all Judicial Districts of the province.

Both litigants must agree to participate in mediation (which is closed) and assessment (which is open). Thus, participation is voluntary. Closed or privileged mediation is available free of charge from specially trained mediators who are employed by the provincial government. If mediation is inappropriate or unsuccessful, the parties may go to an open-assessment programme. The assessor is chosen by the parties from an approved list which includes psychiatrists, psychologists and social workers. Each party is responsible for one half of the cost of the assessment, but a party who is unable to pay his or her share of the cost may apply to the government for a special subsidy. If the assessment is not successful, the assessor will be called to give evidence at trial and each party may cross-examine the assessor.

The program applies to the following actions in which custody and/or access are in issue:

- (a) divorce
- (b) guardianship and custody of minors
- (c) applications to vary decree nisi/divorce judgments
- (d) applications to vary guardianship and custody of or minors, provided the proceedings are commenced or continued in the Court of Queen's Bench or the Surrogate Court of Alberta, and both parties to the proceedings reside in Alberta.

It should also be noted that the Family and Youth Division of the Provincial Court has attached to it a staff of Family Court Counsellors. These do pre-intake work, explore the possibilities of settlement and refer the applicants to free counselling if they wish it. Also, at the request of the court the Family Court Counselling Service provides the court with a home study of both parents.

48 Information supplied by The Honourable Madam Justice Joanne B. Veit, Court of Queen's Bench of Alberta; His Honour Walder G.W. White, Assistant Chief Judge, Family and Youth Divisions of the Provincial Court of Alberta; and by Mr. Howard L. Kushner, Director, Attorney General Civil Division, Family Law, Alberta.

British Columbia⁴⁹

Courts: Supreme Court, County Court, Provincial Court (one division of which is called the Family Court), Unified Family Court at Richmond.

(a) *Conciliation in the Unified Family Court at Richmond*

In 1974, a British Columbia Royal Commission on Family and Children's Law recommended the implementation of a unified family court. The Commission was chaired by Mr. Justice Berger of the Supreme Court. A pilot project was established, in which judges of the Supreme Court and Provincial Court were placed under one roof and provisions to ease co-operation between them were passed.

From the conciliation point of view, the important post of Family Counsellor was created. The duties of the family counsellor included intake, conciliation counselling, custody investigations, and counselling with regard to problems arising from court orders. The family counsellor was also empowered to act as commissioner for oaths so that out-of-court settlements could be witnessed and filed in the court registry as enforceable documents, and to act as a probation officer, conducting pre-court enquiries and undertaking supervision. Statements made to court counsellors were privileged communications. The *Unified Family Court Act* allowed the court to enforce agreements reached by separating parties with a counsellor. This provision reflected the views of the Commission, which hoped to divert matters away from the traditional in-court litigation.

As one commentator explains, the Commission:

"reversed the prevailing functions of the court and its supportive services. Traditionally counselling had been an ancillary service which the courts made use of if they wanted. In the pilot project the conciliation service took the early initiative, reaching decisions as well as making recommendations, with the court to turn to if necessary".⁵⁰

The Family Counsellor was seen as pivotal figure in the shift away from the adversarial approach towards the conciliatory approach.

In the Fourth Report of the Berger Commission (Feb. 1975), it was recommended that the unified court should be consolidated throughout the province. It also recommended the consolidation of the work of family counsellor. The Berger Commission's involvement with the pilot project was taken over by the Ministry of the Attorney-General, the Report of which found in 1979 that family counsellors played an important role in facilitating out-of-court settlements. This body thought that the unified family court should be

49 Information supplied by Mr. Steven C. Rumsey, Assistant Deputy Minister, Court Services Branch, Ministry of the Attorney General, British Columbia; and The Honourable Mr. Justice J.E. Spencer, Supreme Court of British Columbia.

50 Waterhouse, *Implementing Unified Family Court - The British Columbian Experience*, (1983) 4 Can.J.Fam.L. 154 at 158, quoting from a discussion with Mr. Bernard Vinge, November 1981.

located at lowest court level. However, the establishment of a system of unified family courts throughout British Columbia has not been realised.

(b) Conciliation in the other courts

Conciliation and mediation are not formally part of the general system, although they are encouraged informally. In the Supreme court, proceedings include a pre-trial conference in which the pre-trial Justice attempts to assist the parties to settle. Generally such mediation is directed at the resolution of particular issues in the course of litigation to save time and expense at trial, and includes custody, access, spousal and child support and the distribution of family assets.

In both the Supreme and Provincial Courts of British Columbia, a certain number of matters involving custody, access or spousal and child support are resolved by the directed intervention of Family Court Counsellors at the request of a judge on an interlocutory application.⁵¹ Family counsellors are essentially probation officers, whose qualifications consist of a B.A. degree and four to five months' training in probation.⁵²

Section 3 of the *Family Relations Act (chapter 121, 1979)* provides that the Attorney General may appoint a person to be a family court counsellor. Where a family court counsellor has knowledge of a dispute that has given or may give rise to proceedings in respect of, *inter alia*, adoption, guardianship, custody or maintenance, he may offer the parties to the dispute any advice and guidance which might help to resolve the dispute, and may offer to refer the parties to a public or private family counselling service qualified (in the opinion of the court counsellor) to help resolve the dispute.

Section 3(3) provides that where a family court counsellor receives evidence, information or a communication in confidence from a person party to proceedings or a child and the person who gave this evidence does not consent to the disclosure of the evidence, the family court counsellor shall not disclose the evidence in proceedings in a court or tribunal, and no person shall examine that person for the purpose of compelling him or her to disclose that evidence.

51 The Family Relations Act Rules and Regulations 141/79 which governs procedures in the "Family Court" i.e. Family division of the Provincial Court contains the following provision:

On its own motion or on the motion of a party to the proceeding, the court may, before or during the trial, direct the parties to attend a conference to discuss

- (a) reconciliation or conciliation,
- (b) probable length of trial,
- (c) reduction, clarification or settlement of issues,
- (d) the disclosure and inspection of documents,
- (e) other matters that relate to the proceedings.

52 Sachs, *The Dejudicialization of Family Law: Mediation and Assessments*, in Sloss, ed., *Family Law in Canada: New Directions*, 1985. Quote taken from Hovius, *Family Law: Cases, Note and Materials*, 2nd. ed., 1987, p. 35.

New Brunswick⁵³

Court: The Family Division of the Court of Queen's Bench (which is a nationwide unified family court).

The Court of Queen's Bench, Family Division, (which has exclusive and comprehensive jurisdiction over family matters in New Brunswick) has trained court workers (presently eleven) who provide counselling and mediation services. They provide information to individuals and families concerning separation and divorce. They also negotiate where possible agreements as to custody, access, maintenance and division of marital property.

The mediators in New Brunswick appear to be social workers, with no particular training in the field of mediation.⁵⁴

Quebec⁵⁵

Courts: The Superior Court of Quebec, the Youth Division of the Quebec Provincial Court.

A mediation service has been established by the Quebec government in the cities of Montreal and Quebec. The service is available on a voluntary basis to couples considering divorce. The mediators are authorised to deal with every issue that may arise in the context of divorce: support, property division, compensatory allowance, custody, access, and rehabilitation of the wife in the work force. Mediation is conducted by individuals who have a training in social work, usually a Masters Degree. Mediation is closed, meaning that discussion is confidential and cannot be used in any subsequent hearing. Agreements reached by the parties are reviewed by a lawyer attached to the service.

In addition to this service, there is an increasing number of practising lawyers who are specialist in family law and who act as mediators when mandated to do so by the parties.

Denmark

Just over 1% of the Danish population experience a legal separation or divorce each year either as direct parties in the case, or as their minor children.⁵⁶ According to Judge Svend Danielsen⁵⁷ the prevailing attitude is that society has the responsibility to ensure that no unnecessary disputes arise during separation or divorce proceedings and that disputes that cannot be avoided are decided upon without unnecessary delay. The Government is concerned about the cost

53 Information supplied by Mr. Justice le Blanc, Assistant Deputy Minister, Court Services, Department of Justice, New Brunswick.

54 Sachs, in Hovius, *op. cit.*, at p.35.

55 Information supplied by the Honourable Alan B. Gold, Chief Justice of the Superior Court of Quebec.

56 Although the incidence of divorce in Scandivan is increasing, it is still very low compared with, for example Britain where almost 33% of all marriages now end in legal separation or divorce.

57 Mr. Justice Svend Danielsen (Danish High Court), *Alternative Methods of Dispute Regulation in Family Matters*.

of the cases both for the parties and for the society in general.

In the case of married couples seeking divorces the philosophy is that the involvement of public authorities is a necessary evil but that it should be as informal, rapid and inexpensive as possible. Denmark has opted for an administrative procedure as opposed to a court procedure for the majority of legal separation and divorce cases. This approach is facilitated by the fact that most cases are uncontested both as regards the legal separation or the divorce itself and as regards the ancillary questions of custody, maintenance, the family home and the division of matrimonial property. About 90% of couples reach an agreement concerning these issues.

Couples are encouraged to make their own agreements and in the majority of cases the function of the authority is only to control the agreement between the parties and to a certain extent to evaluate its contents. The agreement then has to be registered and agreed. Divorces in Norway and Denmark are registered with the County Governor's Office. Custody agreements concerning joint custody for one parent or a transfer of custody are dealt with in the same manner.

This informal way of dealing with family cases means that it is often unnecessary to obtain assistance from a lawyer. Legal questions may be asked at a meeting at the County Governor's Office.

In cases where there are issues in dispute the approach differs slightly. There is hardly ever a dispute as to whether a legal separation or divorce should be granted. This is because each spouse has an unconditional right to obtain a legal separation and, after one year of separation, a legal right to divorce. The number of maintenance cases has fallen in recent years, due partly to the decrease in women who are full time housewives. This means that two-thirds of all family cases in Danish courts concern custody disputes. The approach at this stage once counselling or mediation have failed, is once again to abbreviate the proceedings as much as possible. Therefore an effort is made to minimise the evidence brought into the case. Witnesses seldom appear in custody cases and writs and replies are kept short and almost never describe episodes of the past. If in a custody case the judge feels that evidence other than the parents' statement is necessary, it has become a practice to ask a child psychologist for advice. In addition Danish judges write very short judgements in custody cases, two or three pages at most. The philosophy is in line with that behind mediation; as long as neither of the parents is unfit to take care of the child, it is thought undesirable for society to use great resources to establish which parent would be better for the child. In the absence of agreement, legal intervention is kept to a minimum.

United States

Michigan⁵⁸

Six conciliation procedures have evolved in Michigan over the years. These are as follows:

1. marriage counselling;
2. divorce adjustment counselling;
3. mediation of custody and visitation disputes;
4. mediation of property, alimony, and child support disputes;
5. use of impartial child custody experts; and
6. eve of trial judicial mediation.

The courts' Family Counselling Service provides three of these services, namely, marriage counselling, divorce adjustment counselling and custody and visitation mediation. Counsellors have masters or doctoral degrees in social work, psychology, or family counselling and have had at least five years' experience in family counselling. We will not address these services further since we are not concerned with pure counselling services. We will instead focus on the three forms of mediation offered by the Court.

(a) *Mediation of custody and visitation disputes:* Cases for mediation of custody and visitation disputes usually go to the Family Counselling Service by judicial referral and a family counsellor mediates. The counsellor tries to assist the parties to come to their own agreement concerning child custody and visitation arrangements. When the effort is successful, the parties enter into a written proposed custody and visitation agreement. This agreement goes to counsel for review, and if counsel approve, the agreement is presented to the court for approval. The judge can veto the agreement, but does so only on rare occasions and usually approves and incorporates the agreement in a court order. Usually ten to twelve hours are spent in mediation in cases in which agreement is reached. If this type of mediation fails to produce agreement, the Family Counselling Service sends a written evaluation of the problems to the court, which includes the counsellor's recommendation to the judge for an order. This latter aspect of the mediation is controversial.

(b) *Mediation of property, alimony, and child support disputes:* Such cases may be referred by a Judge to the "Friend of the Court" Department. The staff of this department are legally trained, unlike the Family Service Counsellors who have a background in the behavioural sciences. The parties and lawyers are present and the referee tries to get them to settle. The referee has no power of decision, only a power to recommend. Generally judges refer cases to referees for this service where the marital estate is substantial.

(c) *Eve of trial judicial mediation:* Literally on the eve of the trial, twelve to

58

Victor J. Baum, *Alternatives to Litigation*, from Abella and L'Heureux-Dube eds., *Family Law: Dimensions of Justice, Selected Papers Presented at the Judicial Conference on Family Law*, 1981.

eighteen contested divorce cases are sent to each of two or three judges. These judges will not hear the trial. The parties and their lawyers appear before the settlement conference judge who acts as a mediator. If a case is not settled by judicial mediation, it goes to trial the following morning. About two-thirds of the cases coming before the settlement conference judges are settled. When settlement is reached, the judge hears the brief testimony necessary to support a divorce judgement in an uncontested case and grants the judgement.

Los Angeles⁵⁹

There is a custody mediation scheme in the Los Angeles Conciliation Court. This scheme began as a marriage counselling service within the court and expanded to include mediation of custody and access disputes, as well as pre-marriage counselling.

In 1977, mediation became mandatory in custody and access cases as a result of a Senate Bill. Funding was provided through filing fees. Lawyers meet with counsellors first, while the parties attend an orientation programme. Then the parties meet with the counsellor without lawyers and mediation commences. The majority of cases appear to be settled or returned to court after one session of 2-3 hours, while others have further sessions. The Conciliation Court achieves about a 50% success rate in that parties reach agreement in about half of the matters dealt with in mediation. Parties who reach agreement are able to have drawn up an agreement tailored in their needs and this agreement is scrutinised by the court clerk, stamped and sent to the parties and their lawyers. The agreement becomes an order of court unless a party objects within 10 days. The mediation is confidential.

The Los Angeles Conciliation Court is the largest scheme in the United States. It has, in the course of development, made innovations such as establishing a panel of private lawyers to mediate in financial matters.

Connecticut

Mediation services evolved in Connecticut from 1958 onwards. During the 1970's an informal arrangement for conferences became more formally recognised and developed into mediation. Mediation did not, however, replace the more informal methods of settlement and on-the-spot negotiations continue to be conducted in many courts on the day of first appearance.

Custody and access mediation now takes place in the 13 offices of the Connecticut Superior Court. In some courts, referral to mediation is compulsory for all custody/access disputants and in some it is voluntary. The Family Relations Division of the Superior Court supervises and controls procedures, and has established guidelines for cases suitable for mediation. Mediation is

59 Information on the following three mediation services was obtained from Australian Family Law Council, *Arbitration in Family Law*, 1988.

considered unsuitable where there are allegations of child abuse or neglect, where the family has had numerous contacts with social agencies or psychiatrists, where there is bitter conflict and frequent court appearances or where an adult is violent or severely anti-social.

If agreement is reached during mediation, it must be submitted to court as an "interparty stipulation", similar to a consent order. If no agreement is reached, the mediator so advises the court and the case is listed for hearing.

This programme is State-wide. Sometimes a team of mediators are employed.

Minnesota

The Minnesota mediation movement appears to have begun in 1935 in the Hennepin County Probation Office. In 1951, a legislative study committee recommended the establishment of a Family Court. This was not implemented, and instead the Domestic Relations Unit was set up in the Probation Department. This developed to a service which by 1969 was largely engaged in the preparation of custody reports and the counselling of married or divorcing couples. In 1964, a mediation approach began. By 1975, a Custody Resolution Counselling Service has evolved which involved both counselling and problem-solving. The Domestic Relations Division of the Probation Department now formally conducts a mediation service. Until 1982 it was funded by the county, but is now funded by payment of fees. Referrals to mediation are accepted from judges.

Cases are assigned to a counsellor who attempts to solve problems over between 1 and 6 sessions. If an agreement is reached, a lawyer is notified and the agreement entered with the court. There is no policy of confidentiality and the same counsellor who conducts an unsuccessful mediation may prepare a subsequent custody study. Counsellors are required to have a master's degree in a behavioural science or a bachelor's degree plus 2 years' experience. Continuous training is provided.

Japan⁶⁰

The history as well as the practice of conciliation in Japan is quite different from that in Western countries. A number of interesting points emerge from an examination of the Japanese conciliation system by reason of this very difference.

The first feature of interest is the use of conciliation in Japan as a means of

⁶⁰ Sources include: Healy, *The Politics of Informal Justice; The Japanese Experience 1922-1942*, in Abel (ed.), *The Politics of Informal Justice; Comparative Studies*, 1982, Vol. II; Henderson, *Conciliation and Japanese Law; Tokugawa and Modern*, 1965; Kojima, Takeshi and Yasuhel Taniguchi, *Access to Justice in Japan*, in M. Cappelletti, ed., *Access to Justice*, 1978, Vol. I, bk. 2; Satoshi Minamikata, *Kaji Chotei; Mediation in the Japanese Family Court*, in Eekelaar and Dingwall, eds., *The Development of Conciliation in England?*, 1988; General Secretariat of the Supreme Court of Japan, *Justice in Japan*, 1988; General Secretariat of the Supreme Court of Japan, *Outline of a Civil Trial in Japan*, 1988.

avoiding the enforcement of strict legal rights. In the following pages, we shall see an interesting juxtaposition of the concepts of enforcing legal rights, on the one hand, and resolving a conflict, on the other. In the Western tradition, emphasis is laid on the abstract concept of "justice". If a dispute occurs, it is perceived as resulting from an injustice, and the dispute must be resolved by redressing the injustice. In the Japanese tradition, resolving the conflict is the end in itself. This explains in part the increased use of conciliation in this century in Japan rather than reforms of the substantive law. It might be said that the theory underlying Japanese conciliation is that resolution *per se* of the dispute is considered more important than resolution of the dispute in accordance with some objective legal norm of justice.

In contrast, family law in the Western tradition has been seen as a complex of enforceable legal rights and duties. And yet, in certain areas, such as that of child custody, it is arguable that there is little "legal" content in the traditional sense. The question is rather what is best for the child, which is a matter of assessing physical, emotional and educational needs. We noted in Chapter 2 that one of the perceived advantages of mediation is that it affords a practical alternative in precisely the areas of family law where the legal content is at a minimum. In Japan, the two areas where conciliation has proved extremely valuable are those of road traffic accidents and family law. In relation to the latter, it has been observed that:⁶¹

"... [T]he extremely involved nature of family disputes seems to make them also suited to the conciliatory approach. Family relationships are difficult to understand. They are not 'legal' relationships in the same sense as business transactions. There are too many factors to be considered on a case by case basis; and right and wrong not only can rarely be determined, but also such a determination may injure the family relationship".

In Chapter 2 we noted the argument that mediation, at least in some models, was undesirable because it involved the resolution of family disputes without the protection and even-handedness of legal norms, and because parties might come to agreements which would not have been recommended by a legal adviser. This argument is made by the opponents of conciliation in Japan who maintain that a disadvantage of conciliation is that it diverts disputes away from the public judicial sphere and into a private forum where the parties have no legal protection.

The Practice Of Modern-Day Conciliation In Family Cases In Japan

Conciliation or "*Chotei*" is widely used in family law cases as well as other civil cases in Japan. In 1939, the *Conciliation of Personal Affairs Act* provided for family disputes to be dealt with through *Chotei* on the basis of "ethical principles"

61 Kojima Takeshi and Yasuhei Taniguchi, *op. cit.*

and "paternalistic compassion" indigenous to "traditional Japanese culture". When the Japanese Constitution was revised after the defeat and surrender of the imperial regime in 1945, *Chotei* was nonetheless absorbed into the new system of family courts.

The special conciliation laws were codified into two general codes of significance. The first was the *Law for the Adjustment of Domestic Affairs (1948)* (which replaced the *Conciliation Law for Personal Affairs 1939*) and made *chotei* a prerequisite of most lawsuits of an adversary nature regarding family relations. Second, in 1951 the *Civil Conciliation Law* was enacted as a separate statute outside of the Code. This repealed the other piecemeal laws on civil *chotei* and provided for voluntary *chotei* proceedings in all civil matters except domestic relations and labour disputes. Labour conciliation has its own special machinery for settling labour disputes.

The Family Courts of Japan were established on January 1st, 1949, and are specialised courts dealing exclusively and comprehensively with family affairs and juvenile delinquency cases. However, some family law jurisdiction still lies with the District Courts.

There are two ways of resolving family disputes: by way of determination and by way of conciliation. The *Law for Adjustment of Domestic Affairs* provides that certain types of adversary family matters, including divorce, will initially be referred to the family court for conciliation, and will proceed to litigation only after conciliation has failed. The conciliation procedure applies to matters relating to disputes between husband and wife and relatives, such as matters of support, partition of estate, and divorce cases to be resolved by legal proceedings. The determination process applies directly to cases relating to declaration of incompetence, granting permission to adopt a minor, appointment and removal of guardians, probate of wills, questions relating to support, and partition of estate.

Although a judicial divorce may be sought through an action in the District Court, proceedings for conciliation must be commenced first in the Family Court. This mandatory attempt at conciliation is known as *Rikon Chotei*. Only when no agreement is reached and one of the spouses still wants divorce may an action be brought in the District Court.⁶²

Once an application for divorce conciliation is received, a *Chotei* committee is formed. This is composed of at least two lay people, known as *Chotei* commissioners, and a family court judge. The committee conducts the mediation

62 The Civil Code of 1898 introduced the Western legal concept of divorce to Japan and provided ten grounds for dissolving a marriage. These grounds were never rigidly enforced and were in any event replaced by the Civil Code of 1947 which allows a divorce to be granted upon the irretrievable breakdown of a marriage with some qualifications where the court considers that the applicant was responsible for the breakdown. The Code provides two ways of obtaining a divorce: 'divorce by consent' and 'divorce in court'. Divorce by consent has a long history in Japan since there has never been a dominant religious doctrine emphasising the importance of marital unity. Marriage was traditionally regarded as a private, secular arrangement between two families. Divorce continues to be the preferred means of ending a marriage.

in a private room on the court premises. The public are not admitted and both parties are required to attend. If they wish, they may be accompanied by lawyers, relatives or new partners. The purpose of the meeting is to promote the settlement of the dispute by conciliation or reconciliation on the basis of information supplied by the parties, although the *Chotei* committee has the discretion to ask for a report from an 'investigation officer'.

At any stage, the committee may make its own proposals for a settlement which its members could consider reasonable, but in theory the parties are free to decide whether or not to accept this. If an agreement is reached, it is incorporated into a *Chotei* document, which is binding in the same way as a Court document. The agreement is embodied in written form, copies are given to each party, and one copy is filed with the court. The law provides for a summary order to perform the duty agreed to in the conciliation. Non-compliance with the order is punished by a fine.

If an agreement is not reached through *Rikon Chotei*, the judge involved has the power to issue a divorce order. The judge must consult the lay commissioners and the order must be within the scope of the parties' original application. If either party objects to the order, it ceases to be valid. This power is rarely used. More usually, the case will go to the District Court for divorce by decree. If there is no prospect of agreement, or if the agreement reached is regarded as inappropriate by the committee, the *chotei* proceeding may be terminated.

Although "civil conciliation" and "family conciliation" are distinguished and provided for by different laws, both types of conciliation are more or less identical. To apply for conciliation, an applicant must state simply what is being sought and what the controversy is about. Oral applications are preferred. This is regarded as making the process more accessible to the citizen. Accessibility to conciliation is also promoted by lower filing fees. Hearings may take place in the evenings to facilitate the attendance of parties. Night hearings as well as night filings of applications are encouraged and widely practised - another reason why conciliation is accessible.

Recruiting lay members of the *Chotei* commission proved to be a problem, because of the low pay and the difficulty of getting busy persons to serve. As a result, the position came to be monopolised by retired elderly citizens. Because of the widening gap between the traditional philosophy and sense of ethics held by elderly conciliators and the views and way of life of younger parties, elderly conciliators were found to lack persuasive power. This resulted in the adoption in 1974 of a new rule for the selection of conciliators. Among other things, the rule limited the age of conciliators to between 40 and 70. It also emphasised the desirability of selecting lawyers and persons of special knowledge and experience useful for the resolution of family disputes. It also raised the pay of conciliators.

The judge's presence may merely be nominal, since she or he would be too busy with ordinary work and would be absent when the board hears the parties. This defect was not remedied by reform. One writer criticises this aspect of *Chotei*:

"Although a number of judges have consistently devoted themselves to the improvement of the family court, others have been discouraged by the low status which the system appears to attach to this work. Typically, judges are only assigned to the family courts for three to four years in the course of their career, without any consideration of their interest or their understanding of the issues they will have to handle. This development of expertise in family law seems to make only a marginal contribution to a judge's prospects of advancement ... The low regard for the work is reflected in, and reinforced by, the staffing levels which mean that judges are frequently absent from *Chotei* hearings. In busy urban courts, one judge may be responsible for several cases simultaneously, slipping from room to room to monitor their progress".⁶³

Despite the importance of conciliation in the Japanese legal system, the indications are that it is decreasing in popularity. The ratio of conciliations to litigations was 1:1 in 1949, 1:2 in 1957, and 1:3 in 1972. Furthermore, the success rate of conciliated cases is declining. In 1970, 41.6% of matrimonial disputes were settled through *Chotei*, but only 38.9% by 1984. In the same period, the proportion of cases where the parties failed to settle rose from 11.1% to 16.4%. The number of petitions for divorce in the district has also increased; a 250% rise between 1966 and 1983, as against 180% in the same period for the family court. However, a publication by the Supreme Court of Japan⁶⁴ records that in 1984 the ratio of cases received for conciliation to those received by the courts of first instance was about 1:2.

Criticisms of the Japanese conciliation system have been voiced as follows:⁶⁵

- (1) Insufficient attention is paid to the legality of each party's position;
- (2) *chotei* proceedings tend to make mutual concession the goal, rather than aiming to achieve a solution consistent with reason and the circumstances by means of mutual concession;
- (3) compulsory participation is at odds with the idea of conciliation;
- (4) judges who are appointed by law to act as chairmen of the *chotei* committees in fact usually attend only the final meeting or an occasional inspection of the session;
- (5) factual investigations and examinations of evidence including third-party witnesses are seldom used; and
- (6) despite the requirement that conciliators' lists be made up annually, as

63 Minamikata, *op. cit.*

64 General Secretariat of the Supreme Court of Japan, *Outline of a Civil Trial in Japan*, 1988.

65 Henderson, *op. cit.*

a rule the same people serve as conciliators year after year.

On the other hand, the conciliation process has been praised by others as being a necessary and essential approach to the resolution of marital disputes in the modern Japanese context:⁶⁶

"Some of the leading academics have criticised [conciliation] as an irrational dispute settlement device and attributed its popularity to the traditional Confucian frame of mind and inadequate "right-consciousness". However, Japanese conciliation in action today seems to have outlived this kind of total condemnation.

It is true that there have been and still are some objective conditions favourable to the conciliatory device in Japanese society. First, since we live in a highly homogeneous society, the attitude of people is relatively cooperative, and they are eager to reach an amicable mutual agreement. Second, in a stable society where people are woven into longstanding organization, any prolonged dispute tends to develop into an emotional personal conflict, thus causing injury to the future activities of disputants unless harmony is restored in a conciliatory way. These features of a basically agricultural life pattern seem to exist to a certain extent even in today's highly industrialized conditions. For example, most people work for one company for life and regard each other as members of a sort of large family. In such a society it is only natural for sensible people to try to avoid disputes ... Given these social conditions, the conciliation approach is necessary and effective. The institution of conciliation takes advantage of the societal centripetal force to restore peaceful relationships among people".

Coercion

The issue of coercion has been much discussed in Japan. It has been argued, first, that *chotei* only has merit to the extent that it is voluntarily used by the parties and not made an exclusive remedy, either legally or in practical terms. Coercion is defined not simply as mandatory participation in the conciliation process, but also in the sense that conciliators may be coercive in their attempts to obtain a settlement regardless of the wishes of the parties or the legal merits involved. Secondly, there is a feeling that because of the remnants of the Confucianistic family and social system, *chotei* may favour the stronger or traditionally authoritative party at the expense of the legal rights of the weaker. Thirdly, coercion could arise from the fact that the conciliators are selected from the prestigious strata of society and are acting as officials. Fourthly, coercion to settle may arise from ignorance on the part of a party that she or he has a right to terminate the *chotei* without reaching a settlement; or alternatively, she or he may know that the courts might issue a decision settling the dispute in the terms

66 Kojima Takeshi and Yasuhei Taniguchi, *op. cit.*

offered, and that any subsequent lawsuit in the same court would be similarly handled by encouraging such a compromise. Thus, coercion to settle may operate in Japanese *chotei* in several practical as well as legal ways.

APPENDIX 2

SAMPLES OF DOCUMENTS USED IN NEW ZEALAND FAMILY CASES

1. Application For Separation Order
2. Application For Declaration As To Validity Of Marriage
3. Application For Paternity Order
4. Application On Notice
5. *Ex parte* Application
6. Declaration Of Financial Means And Their Sources
7. Notice Of Defence

Form F.P.8

Rule 15(2)(a)

APPLICATION FOR SEPARATION ORDER

Section 20, Family Proceedings Act 1980

F.P. No.

I, [*Full name*], apply for a separation order.

This application is made on the ground that there is a state of disharmony between my marriage partner and me of such a nature that it is unreasonable to require us to live together.

I, say:

1. The state of disharmony arose between my marriage partner and me about [Give year].
2. The general nature of the disharmony is: [Describe in broad terms. Do not give details]
.....
.....
.....
3. My marriage partner and I are living together at the time of the making of this application;

OR

3. My marriage partner and I are not living together at the time of the making of this application.
 - (a) We stopped living together on or about [Give date].
 - (b) We agreed to separate by a written (or oral) agreement.

OR

- (b) We did not agree to separate.

Signature of Applicant:

Date:

Notes

Information sheet. A duly completed information sheet (Form F.P. 7) must accompany this application.

***Counselling.** As a result of this application you and your marriage partner will be referred for counselling. Counselling may be dispensed with only for some good reason. See section 10 of the Family Proceedings Act 1980 and Form F.P.18.

***Delete if counselling has been dispensed with.**

Form F.P.9

Rule 15(2)(b)

APPLICATION FOR DECLARATION AS TO VALIDITY OF MARRIAGE

Section 27, Family Proceedings Act 1980

F.P. No.

I, [Full name], apply to the Court for a declaration whether, according to the law of New Zealand, the marriage between [Full name] and [Full name] is valid (or has been validly dissolved).

I say:

[Set out sufficient information to inform the Court of the facts relied on in support of the application].

Signature of Applicant:

Date:

Notes

Information sheet. A duly completed information sheet (Form F.P.7) must accompany this application.

Marriage certificate. A marriage certificate must, at the time of the filing of this application, be lodged in the office of the Court, unless the Registrar otherwise directs.

Form F.P.14

Rule 15(2)(g)

APPLICATION FOR PATERNITY ORDER

Section 47, Family Proceedings Act 1980

I, [Full name], apply for a paternity order against [Full name] on the ground that he is the father of a child called [Full name of child] born on [Date of birth of child] (or is the father of a child expected to be born on [Expected date of birth of child]).

I say:

1. [Where the application is made by a person other than the mother of the child, that person must state in what capacity and for what reason he or she is making the application. See section 47 (1) (b)-(d) of the Family Proceedings Act 1980].
2. [If section 49 (2) of the Family Proceedings Act 1980 is relied on to bring the application within the period of limitation, the facts are to be stated here].
3. [Set out sufficient information to inform the Court of the facts relied on in support of the application].

Signature of Applicant:

Date:

Note

Information sheet. A duly completed information sheet (Form F.P.7) must accompany this application.

Form F.P.15

Rule 15(3)

APPLICATION ON NOTICE

Family Proceedings Act 1980 (or Guardianship Act 1968)

(General heading - Form F.P.6)

I, [Full name], apply for an order [State precisely the nature of the order sought]

on the following grounds:

[State the grounds on which the application is made, referring to the Act or rule relied on and following closely the wording of the Act or rule].

I say:

[Set out sufficient information to inform the Court of the facts relied on in support of the application].

I request the Registrar to the Court to arrange a mediation conference to discuss this matter. *[Delete if not applicable]*

Signature of Applicant:

Date:

To: The Registrar
District Court
.....

and

To: The Respondent.

This application is filed by, whose address for service is at

Date of Hearing

*I hereby appoint *[Date]* at a.m. (p.m.) at the District Court at for the hearing of the above application.

*Delete if not applicable

.....
Registrar

.....
Date

Notes

Advice

If you need help, consult a lawyer or contact a District Court office immediately.

Office hours

The office of the District Court is open from to on Mondays to Fridays inclusive.

Information sheet

A duly completed information sheet (Form F.P.7) may be necessary with this application. See rule 18.

Form F.P.20

Rules 16(4), 55(1)(b)

EX PARTE APPLICATION

(General heading-Form F.P.6)

I, [*Full name*], apply *ex parte* for an order [*State precisely the nature of the order sought*] on the following grounds:

[*State the grounds on which the application is made, referring to the Act or rule relied on and following closely the wording of the Act or rule*].

I say:

[*Set out sufficient information to inform the Court of the facts relied on in support of the application*].

Signature of Applicant:

Date:

To: The Registrar
District Court
.....

This application is filed by, whose address for service is at
.....

[In cases where an appearance is necessary or required, the Registrar is to complete the following appointment for hearing]:

Date of Hearing

I hereby appoint [Date] at a.m.(p.m.) at the District Court at for the hearing of the above application.

.....
Registrar

.....
Date

DECLARATION OF FINANCIAL MEANS AND THEIR SOURCES

Section 188 (2)(d), Family Proceedings Act 1980

(General heading-Form F.P.6)

I, [Full name], of [Insert place of abode and occupation] solemnly and sincerely declare that my financial means and their sources are as set out below.

1. My income for the 52 weeks immediately proceeding the date of this declaration was as follows: [Use "Nil" where applicable].

Item	Particulars	\$
(a)	Salary, wages, or other personal earnings	

- from [*State employer*]:
- (b) Gross income from business:
 - (c) Amount received from boarders (including children over 16 years of age):
 - (d) Rents from property (including rooms let):
 - (e) Compensation or damages received:
 - (f) Superannuation, pension, or benefit (including any from overseas):
 - (g) Dividends and interest:
 - (h) All other sources of income [*Specify*]:
- Total income in the 52 weeks _____
\$ _____

2. My assets (both in New Zealand and elsewhere) are as follows:

Items	Particulars	\$
(a)	Land and buildings [<i>State address and capital value</i>]:	
(b)	Money in bank accounts [<i>Specify banks</i>]:	
(c)	Money not in bank or invested:	
(d)	Money lent or in hands of any person [<i>Name and address</i>]:	
(e)	Government stock, shares, debentures, or bonds [<i>State details</i>]:	
(f)	Plant and machinery [<i>State details</i>]:	
(g)	Livestock [<i>State details</i>]:	
(h)	Interest in business, stock in trade, or venture of any kind [<i>State details</i>]:	
(i)	Motor vehicles [<i>State details</i>]:	
(j)	Any other property or assets not specified above, including interest in any estate [<i>State details</i>]:	
	Total assets	\$ _____

3. The property specified in items [*Specify*] of clause 2 of this declaration is mortgaged, or otherwise secured to [*Full name*] of [*Address*] for the sum of \$.....

4. My expenses for the 52 weeks specified in clause 1 of this declaration were as follows:

Item	Particulars	\$
(a)	Income tax:	
(b)	Insurance and superannuation:	
(c)	Medical and hospital benefits:	
(d)	Rent:	
(e)	Rates:	
(f)	Mortgage payments:	
(g)	Repairs on home:	
(h)	Food and household supplies:	
(i)	Electricity, gas, and fuel:	
(j)	Telephone:	
(k)	Laundry and cleaning:	
(l)	Clothing:	
(m)	Child maintenance, care, and education:	
(n)	Maintenance for previous marriage partner:	
(o)	Entertainment:	
(p)	Fares:	
(q)	Car maintenance, running, and registration:	
(r)	Hire purchase payments:	
(s)	Other expenses [<i>Specify</i>]:	

	Total expenses in the 52 weeks ...	\$ _____

5. Separate income for the 52 weeks of members of household whose expenses are included:

- (a) [*List full names, ages, and relationship of all such members of household*]
- (b) [*List details of separate income of any such member of household*]

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths and Declarations Act 1957.

Signature:.....

Declared at this day of 19....

.....
Solicitor
Justice of the Peace.
*[Or other person
authorised to take
a statutory
declaration.]*

Form F.P.22

Rules 27(1), 28

NOTICE OF DEFENCE

Family Proceedings Act 1980 (or Guardianship Act 1968)

(General heading-Form F.P.6)

I, *[Full name]*, of *[Address]*, *[Occupation]*, give notice that I intend to defend the application for *[Specify the order(s) opposed]*.

I say, in answer to the applicant,-

1. *[State whether the facts given in the application are accepted or rejected. If any facts are rejected, state reasons.]*
2. *[Set out sufficient information to inform the Court of the facts relied on by the defence.]*
3. *[Set out any other facts relating to the application or to the circumstances which have existed or are existing between the parties which the Court should be told about.]*

I claim, in reply to the application, the following relief: *[Specify orders or other relief sought. See section 168, Family Proceedings Act 1980]*.

I request the Registrar of the Court to arrange a mediation conference to discuss this matter. *[Delete if not applicable]*

Signature of Respondent:.....

Date:.....

To: The Registrar
District Court
.....

and

To: The Applicant.

This notice is filed by, whose address for service is at

.....

THE LAW REFORM COMMISSION

Ardilaun Centre
111 St Stephen's Green
Dublin 2

Telephone: 671 5699
Fax No.: 671 5316

LIST OF LAW REFORM COMMISSION'S PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (Dec 1976) (Prl. 5984) [out of print] [photocopy available]

[10p Net]

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[£ 1.50 Net]

Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (Nov 1977) [out of print] [photocopy available]

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Working Paper No. 3-1977, Civil Liability for Animals (Nov 1977)

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Working Paper No. 4-1978, The Law Relating to Breach of Promise of Marriage (Nov 1978)

[£ 1.00 Net]

Working Paper No. 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (Dec 1978) [out of print] [photocopy available]

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Working Paper No. 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)

[£ 1.00 Net]

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[£ 1.50 Net]

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