

FOCUS ON THE
IN CAMERA
RULE

*Papers on the
European Convention
on Human Rights
and
Irish Family Law*

About this document

The papers contained in *Focus on the In Camera Rule* were first delivered at a Parental Equality seminar in Buswell's Hotel, Dublin, on October 2000.

Other publications from Parental Equality:

The In Camera Rule in Irish Family Law (Revised February 2001)

Are Judgments Enough? The Case for Reporting of In Camera Hearings (November 2001)

Behind Closed Doors – Abuse of Process in the Irish Family Law Courts (November 2001)

Joint Statement on Reporting of Family Law Cases (with other voluntary organisations)

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Otherwise than in public

Dr Bob McCormack
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***In camera*: what does it mean?**

Let me begin with a question. If you were trying to find out the meaning of some legal term such as *in camera*, where would you start? You might go down to O'Connell Street and go into Easons and look for a Dictionary of Law, such as that published by Unwin Hyman for only £9.99. When you look up *in camera*, it says:

“In camera: In chambers. A most perplexing phrase for litigants who suspect they may be about to be photographed. Actually it indicates the case, or the rest of the case, is to be heard in the Judge’s private chambers, excluding the public.”

When I mention *in chambers* it might ring a bell with you, because you will recall the Judge O’Buchalla affair where the Catherine Nevin license was transferred into her sole name at a hearing in chambers.

You might also recall that in the Sheedy affair, the report of the Chief Justice raised two issues in relation to meetings or hearings in chambers. The first was when Hugh O’Flaherty, the ex-Supreme Court Judge, invited the County Registrar to meet with him in his chambers. The second was when Cyril Kelly, the ex-High Court Judge, and Judge

In camera hearings are the exception and should only happen for good reasons.

Matthews met in chambers to discuss the case. Both of these meetings were raised as issues by the Chief Justice.

You will also recall the Judge Patwell affair in Kanturk District Court where, during a family law hearing, the issue of the conduct of the solicitor and the threat of contempt of court arose. As a result, 400 solicitors for the Southern Law Association boycotted Judge Patwell’s Court for about two weeks.

I mention these in passing because it demonstrates the concerns that are there in relation to anything that takes place behind closed doors. We have a strong emphasis in recent years on transparency and accountability and people knowing what is going on.

Article 34 of the Irish Constitution

So having got hold of a legal dictionary, your next step in exploring the *in camera* rule might be to go to that primary source of Irish Law, the Irish Constitution. Article 34 of the Constitution, subsection 1, says:

“Justice shall be administered in courts established by law, by judges appointed in the manner provided by this Constitution and, save in such special and limited cases as may be prescribed by law, shall be administered in public”.

What the Constitution is establishing is that hearings in public are the norm and are the protection that is there for the citizen. And *in private* or *in camera* or *in chambers* hearings are the exception and should only happen for good reasons.

Varied applications of the *in camera* rule

The first reference we have in law to the *in camera* rule after the passing of the Constitution, was two years later in the Emergency Powers Act of 1939. Section 7 of the Act sets out a range of controls or limitations that might be placed on a public hearing.

What is the meaning of *otherwise than in public*?

What's interesting is that it offered a range of options. Even though it was concerned with the security of the State at the time of the Second World War, it didn't actually say that all of the restrictions had to be imposed. The judge has discretion to impose the level of restriction that he felt was necessary.

This is important because in many cases there is a tension between competing Constitutional rights between, for example the right to free speech and the right to privacy – so the Court may often be balancing the two. The issue in relation to Family Law is that sometimes that balance doesn't seem to be there.

For example in the X-case, one of the most reported cases in the media, there was that issue of a balance between the right to privacy and freedom of the press.

Another example of the application of the *in camera* rule is the 1990 Criminal Law (Rape) (Amendment) Act where it sets out, in Section 11, a number of constraints in relation to publicity but equally there is some allowance made for public scrutiny. So for example, a reporter may be present throughout – in fact there is an entitlement for the press to be present for the hearing. There is protection of privacy in avoiding using people's names or any identifying details. And the judgment must be announced in public. Obviously the judgment would again avoid using names and identifying details.

The 1961 Courts Act set out four areas where the *in camera* rule or restrictions on the press or public might be applied: family law; cases involving children or mental illness, cases involving a secret manufacturing process; or urgent applications for *habeus corpus*, bail or injunction.

When we come to family law – for example, the Judicial Separation Act of 1989 – it specifies that the proceedings under the Act must be held otherwise than in public, and it uses the words 'shall be heard otherwise than in public'. But what is the meaning of otherwise than in public?

To understand this phrase, let's look at the Judge Anthony Murphy case. This was a drugs case in the Cork Circuit Court and the Judge decided that, because of some concerns about mis-reporting that had previously arisen, he would not allow the press or the media to report the court proceedings contemporaneously. Now they were allowed to attend, and the public was allowed to attend, and it was announced that the hearing was going ahead. The only restriction, in effect, was that the trial couldn't be reported at the time – it could be reported at the end of the trial but not during the trial.

That decision was appealed by the *Irish Times* and other media organisations to the High Court before Mr Justice Frederick Morris who decided it was not a public hearing, though he decided the restriction was justified. They further appealed it to the Supreme Court. The Supreme Court unanimously decided it was not a public hearing - it was being held *otherwise than in public* - and the restriction was not justified in the circumstances.

It is clear from this judgment that any restriction on a public hearing meets the statutory privacy requirement in family law, and that the Court has discretion in deciding what restrictions are to be applied.

The same wording as found in section 34 the Judicial Separation Act applies to the Divorce Act – it basically activates the same section.

Why should the Constitution set the hearing of cases in public as an over-riding principle? It is because the State provides certain protections for the individual citizen, including protections in relation to coming to Court, in relation to allegations against people and the giving of evidence and so forth. The protections are stronger in the case of criminal cases because the person's liberty is more at risk, but some level of protection still exists in civil cases.

Balancing personal privacy with public scrutiny

I mentioned the 1990 Rape Act as an example of where the balance between the public's right to know and the privacy of the individual is balanced very carefully. Mr. Justice Paul Carney who is the most experienced High Court Judge in this area, suggested recently in a paper to the Trinity Law School that the level of restriction in Family Law cases was being overdone. What he said was:

"The media could in my view be trusted to responsibly report Family Law."

And in comparing it to his experience in rape cases, he said that:

"It seems to me that the complete absence of reporting of Family Law cases is damaging to our understanding of the nature of our society."

Brian Doolan, in his book *Constitution Law and Constitutional Rights in Ireland*, raises the same issue – whether we have the Constitutional balance right. He said:

"For example, all our Family Law is now heard in private. This has given rise to the false impression that there are no, or at least not many, disputes in this vital area. Surely as an exercise in information it is possible for the facts of the case to be disclosed without identifying the parties. The public would then be in a better position to appreciate what, if any, reforms of the law are necessary."

Dr. Gerry Byrne, a child psychiatrist who regularly gives evidence in family law cases was speaking in Mallow at the Family Law Association conference when he raised the issue about the risks involved with the present level of secrecy. He said that the secrecy in Family Law cases should be modified:

"...for the protection of children, for the maintenance of professional standards, and for the common good".

No information, no debate

There have been concerns raised in relation to the privacy or secrecy surrounding Family Law cases, and in relation on how Family Law is being administered. If we go back a few years there was very widespread concern in relation to the judgments given in rape cases, and there was widespread debate concerning appropriate jail terms. The problem in Family Law is that when there is no information, there can be no debate. People who have personal experience of family law, or lawyers working in the family law courts are not free to discuss cases, even though they don't disclose names or identifying details of the parties. Willie O'Dea, a solicitor, and Minister for State in the Dept. of Education raises this issue in relation to a perception that in family law cases, men may be getting the rough end of the stick:

"Anyone who has been involved in the court case will have been struck by the personality calculations made by their legal team before they have begun the case, or even begun to examine the evidence. 'Who is the judge?' is the first question posed by most lawyers when the case is put down for hearing. In Family Law cases the hope of most lawyers acting for men is that they can strike on one of the small number of judges who do not have an unfair attitude towards the male of the species."

It's an interesting point, given that most judges are men.

The Final Report of the Denham Working Group on a Courts Commission had a substantial chapter on Family Law. They looked at the *in camera* rule, and noted that:

“... criticism of the undiluted operation of the in camera rule is becoming more and more widespread”.

It would seem that this is an issue that is not going to go away.

One of the reasons why public scrutiny of the operation of family courts is important is because, as Lord Denning noted in his memoirs, the public is there to scrutinize the judge, to see that he knows his business and knows the law, that he acts fairly and comes up with a fair judgment. As Mr Justice Ronan Keane stated in the *Irish Times v Judge Anthony Murphy*:

“The most benign climate for the growth of corruption and abuse of powers, whether by the judiciary or the legal profession is one of secrecy.”

So we are talking about protection. The concern also is wider in relation to issues around families, issues around children and so forth. Psychologist and counsellor Patricia Redlich, in an article in the *Sunday Independent* entitled ‘Still in the Dark on Marital Breakdown’ concluded:

“Ireland therefore is left in the dark on a very fundamental issue, namely the fate of the family when couples no longer live in harmony. There are no hard statistics from the legal profession, the public or the government to tell us how the laws we passed to deal with marital difficulties are working.”

Quite simply, there is a lack of information about what is going on in the family law courts.

So far my argument is that within the present legislation we could have more discretion in relation to Family Law, without any change taking place in the legislation. The requirement of hearings *otherwise than in public*, leaves discretion for the judge to determine the level of secrecy, the level of privacy, the level of protection that should be there.

The *in camera* rule and the European Convention on Human Rights

The second major argument that I have relates to the European Convention on Human Rights. The 19th amendment to the Irish Constitution bound us to honour the Belfast Agreement under Article 29.7. Under Section 6 of the Belfast Agreement, we here in the Republic are bound to ensure “at least an equivalent level of protection of human rights” as pertains in Northern Ireland. We committed our state to match the protections afforded in Northern Ireland. The UK 1998 Human Rights Act became effective from the 2nd October this year in Northern Ireland. So we are now in a position where we should be matching, and under Constitutional Law are obliged to match, the protections being offered in Northern Ireland.

One of those protections is the European Convention on Human Rights. Article 6 of the Convention says that:

“In the determination of his civil rights and obligations, everybody is entitled to a fair and public hearing. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial, in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or protection of the private life of the parties so require, or to the extent strictly necessary, in circumstances where publicity would prejudice the interests of justice.”

Again you have the same idea that only the level of restriction that is strictly necessary should be imposed. However, the requirement that the “judgment shall be pronounced publicly” is unqualified. You cannot vary that just because it is a family law matter. And so it would suggest that the Family Law courts at the moment are in breach of that requirement.

The Irish Human Rights Act is about to be enacted here which will make the Convention part of Irish domestic law. But I would argue that, as of now, because of the constitutional requirement, all judgments in family law cases should be pronounced publicly while omitting identifying details of the parties and their children. And there are a series of cases that will support that in the European Court. *Werner v Austria* (1997) is probably the most interesting one in that regard, where the Court copperfastened this public pronouncement requirement very strongly:

“...in view of the fact that no judicial decision was pronounced publicly and that publicity was not sufficiently ensured by other means, the Court, like the Commission, concludes that there has been a breach of Article 6-1 in this respect.”

In summary

Finally there are three conclusions that I draw from this paper in relation to the *in camera* rule in Irish family law:

- ~~///~~ The first is that the present absolute secrecy is not mandated by present statutory provisions.
- ~~///~~ Secondly, if you want a model that will protect the privacy of the parties while ensuring public scrutiny of the courts, then we already have it in the criminal rape legislation.
- ~~///~~ Finally the European Convention on Human Rights requires judgments to be pronounced publicly. We are now bound by the 19th Constitutional Amendment to fulfill that requirement.

Legislating for the rights of children

Deputy Dan Neville, TD
Spokesperson for Children, **Fine Gael**

Children in crises: a recent example

I am going to speak from two viewpoints. Firstly, I am speaking for my party on the rights of the child, and secondly, from the point of view of a legislator.

Mr Justice Kelly in the High Court took the unprecedented step of ordering the Ministers for Health and Children, for Education and Science, and for Justice, Equality and Law Reform, to find a secure place for a girl who is on the run from a therapeutic unit, and if they failed to do so, he would find them in contempt of Court.

The seventeen year old girl at the centre of this case has profound needs. She did not have a chance in life. She was sexually abused at two years of age, at seven years of age and

In the application of our Law, I don't know if the rights of children are being upheld and given equal status to the rights of both parents or either parent

was raped at eleven. I learned of the case on the RTE 6 o'clock news. The information given was a full and detailed account of the child's needs, her terrible life experience, and how Justice Kelly had stated in the Court on the previous Monday that he might shortly have to take unprecedented and dramatic action to secure the welfare of disturbed children, because the Juvenile Justice System has been reduced, as he said, to a farce. How much longer must this go on? he asked. When will the situation come to an end?

At 8.30 pm the same evening, I introduced an adjournment debate in Dail Eireann in which I raised the issue of the seventeen-year-old child with the Minister for State with responsibility for Children, Mary Hanafin TD. The Minister placed on the record of the House and informed the citizens of Ireland of the government's position. This received comprehensive coverage

by the media over the next four hours.

I would not have known of this and other children who are in profound need of service from the State, if the *in camera* rule applied to cases of children in crises.

I do not know the name of the girl or where she is from, but I know the issue in detail. What is important is that I, as spokesman on children for my party, was informed. It was important that we the members of the Dail raise our concern with the Minister, and have the Minister respond. We could not have done so only for the fact that the media informed us. If these cases were *in camera*, the plight of these children would continue indefinitely, and the action the Government are proposing to take to provide secure places would not, I believe, happen.

Public scrutiny of the justice system

Children have rights – rights under the Constitution, rights as human beings – and the State has a duty to uphold those rights. I do not know if the rights of children are vindicated in Family Law cases. I am not in a position to evaluate the situation. I am extremely concerned from discussions I have had with many people, but I don't know if the rights of children are being upheld and given equal status to the rights of both parents or either parent in the application of our Law.

I am not in a position to use information coming from the Courts to formulate policy, to introduce legislation and to create political debate to vindicate the rights of children as exercised by our Courts in family law cases.

I have to accept that justice is being applied according to the Law. I am satisfied that it is. But I am not in a position to evaluate if these laws are adequate responses to the needs of children in modern society.

A key part of our justice system is the fact that it is open to public scrutiny, and that it can be evaluated by the citizens of Ireland.

A key part of our justice system is the fact that it is open to public scrutiny, and that it can be evaluated by the citizens of Ireland. I do not believe that in Family Law cases, intimate details of the difficulties or of the names of the parties should be published. Information should only be published to assist the public and we, the legislators, to evaluate the effectiveness of our legal system.

I do not see why the situation, which already happens in rape trials – details and judgments which maintain the confidentiality of the parties involved – cannot apply in family law cases. The right to know arises, not from idle curiosity, but to see that the law is being administered fairly. I, as a public representative, need to know what is going on, to see that legislation which has been passed by the Oireachtas is working, or if new or amending legislation is required.

Supporting mothers and fathers equally

Let us examine the rights of the child. I believe that children should have the automatic right of access to both parents. I believe that children have a right to know and have access to all elements of his or her family tree including genealogy and medical information. I

As a public representative, I need to know that legislation which has been passed by the Oireachtas is working.

believe that society and the State should support all parents, mothers and fathers equally, for the benefit of the community and society as a whole, in seeking to be equally involved in the shared parenting of children, both within relationships and marriage and through the promotion of the concept of joint custody of children, as the normal expectation in the cases of separation and relationship breakdown.

I cannot judge what role our family courts play in this. I believe the state should establish the equality and dignity of both mothers and fathers in the parenting of their children. The state should promote and emphasise the awareness and importance of both mother and father as parents, guardians, carers and custodians of the children, and the state and its laws should reflect this position in every aspect of parental and child legislation and its practice. I believe this approach will at all times place the welfare of children in a position of paramount consideration.

Recognising twenty years of social change

I am concerned that our legal framework has not recognized or identified the changes in society which are profoundly changing the experience of childhood for many children. I do not know, but I am deeply concerned that the Courts may not be responding in a way which vindicates the rights of children, or if the Courts examine or reflect on the position of children. Are children consulted in such situations?

In the past twenty years we have seen major social changes. We have seen a greater involvement of women in employment which is to be welcomed. There is no doubt that changes affect family and family life. The old community and family supports which were there in the past in urban and rural Ireland are diluted. There is not the same family support.

There is also a disappearance of the support of the extended family. In former times the members of the family had access not only to immediate parents and siblings, but to the grandparents, uncles, aunts, and first cousins – they were regarded as part of the family.

We have now evolved into a society where the nuclear family proliferates. Most children are reared in a situation where they have little access to close relatives outside their parents. This has led to less opportunities for children to communicate their difficulties, stresses and concerns outside their immediate family circle.

Children have a right to know and have a relationship with both parents.

The change has resulted in growing awareness of the need to reconcile family life and work opportunity, and the state has a duty to reconcile competing demands of work and family. The rearing conditions in the educating of children is vital to future generations; parents must always have a key role in this.

Legislating for the role of fathers

We must urgently examine and legislate for the role of the father in a changing society. The state does not facilitate single fathers who wish to fulfill their role, obligations and responsibilities as a parent. Single parents as of right should have an entitlement to a relationship with their child or children. Children have a right to know and have a relationship with both parents.

Today the presumption in law is that single fathers do not have the right to parent, and must seek agreement to obtain that right. The law facilitates the right of the mother to access and rearing of the children, but hinders the role of the single father in carrying out his rights and obligations. Custody or guardianship cannot be arranged without first being agreed by the mother. The State does not facilitate a single father to establish guardianship or joint guardianship without the mother's agreement. Under the law as it stands, children of single parents are discriminated against in comparison to those of married couples in their relationship with their father, the relationship having an inferior status in the eyes of the law and the eyes of society in general.

If we continue to promote the principle that parentage is solely tied up with marriage, we are not recognising the manner in which society is re-forming and being reshaped.

We must have a deep examination of the role of the father in a changing society. It is important that a child has knowledge and influence of both parents and the acquaintance and friendship of both parents – that is a right that the state should uphold. Of course there could be special circumstances when that should not be the case, but that would be the exception. We must recognize that families are now very different than they were in the past. If we continue to promote the principle that parentage is solely tied up with marriage, particularly in the case of the father, we are not recognizing the needs of the child, those of the parents, or the manner in which society is re-

forming and being reshaped. I believe the law should ensure that the Courts apply, in the event of marital or relationship breakdown, joint custody. Continual shared parenting should be the norm.

Damaging effect of adversarial family law system

The state should support and promote research into the effect on children and their parents, of shared parenting, marriage relationship breakdown, joint custody, absent parents, and so on, and support state funding for the operation of support groups. We must recognize the damaging effect to all parents and their children in terms of future animosity and mutual mistrust of each other, of the present practice of adversarial family law enforcement operating in Ireland. I am not aware of how this works in practice because I don't read the outcomes. I believe I should be aware, to do my job as a legislator effectively. The State must advance an increased involvement of trained personnel and approach education and training in psychology, social and emotional coping skills and in the possible mediation and consistence building towards agreed solutions to marital breakdown. In the event of a broken relationship the wellbeing of the children deserve this.

Parental alienation syndrome

Finally, I will just touch on what happens in some parts of the United States. Increasingly the US courts are holding the conduct of one parent that tends to alienate the child's affection from the other as inimical to the child's welfare, and among the grounds for a denial of custody or a change of custody from the parent guilty of such conduct. In some States *Parental Alienation Syndrome* is now a criminal offence for which parents could be jailed.

All issues relating to child custody have the best interest of the child at their base. Children are not responsible for the misconduct of their parents towards each other, and should not be uprooted from their home merely to punish a wayward parent. And in most cases I believe it is not misconduct anyway, it is a breakdown of relationship, and in most cases I believe nobody is to blame in those situations. But our system, immediately there is a breakdown, begins to proportion blame on each other because of the way the system works. In the United States, the Courts believe that attention should be directed to the needs of the child rather than to the actions of the parents, and that this is the basis of all child welfare legislation.

Nevertheless a child's best interest are plainly furthered by nurturing the child's relationship with both parents, and a sustained course of conduct by one parent designed to interfere with the child's relationship with the other, casts serious doubt about the fitness of the offending party to be the custodial parent. A growing body of case law in the US relates to what is now known as Parental Alienation Syndrome.

One of the Courts declared that the desire of young children subjected to this manipulation by a bitter or even well-meaning parent, do not always reflect their long-term best interest. Although stability is important, the short-term disruption caused by a change of custody may be more than compensated for by the long-term benefits of a healthy human relationship with both parents. Courts are inclined to be wary of an over-reliance on the child's emotional attachment to or expressed preference for the offending parent. When the evidence discloses that the conduct by a custodial parent is designed to poison the child's relationship with the other parent, a change of custody from the offending parent may well be in the child's interest in the long term.

False allegations of abuse

Another phenomenon in contentious court cases takes the form of a persistent allegation of physical and sexual abuse. A US Appeal Court reversed an order of custody to a mother where the trial court had inexplicably ignored uncontradicted evidence that the mother had filed numerous false accusations of sexual abuse by the father. As the court observed:

"These repeated and uncollaborated and unfounded allegations of sexual abuse brought by the mother against the father, casts serious doubts about her fitness to be a custodial parent".

We have a long way to go to bring this state's law to be responsive in a era of unprecedented social change. We need every assistance to do so. I as a public representative cannot judge how effective the legislation in place is, as interpreted by our Courts. Without interfering with personal confidentiality, this inhibitor should be removed.

The family law roller-coaster

Henry Abbot, Senior Counsel

Called to the bar in 1972, Henry Abbot became Senior Council in 1992. Between 1987 and 1989 he was Fianna Fail TD for Longford-Westmeath, and was a member of various rights committees. He was on the Dail Select Committee for the Judicial Separation and Family Law Reform Act, 1989.

Twenty years of listening to public concerns

I come with varied experience – you could say that I am a jack-of-all-trades and perhaps a master of none. I am certainly not an expert at Family Law. I come here with some experience inside the profession, practising as a Junior in Family Law to a certain extent and sometimes as a Senior. My role as a Senior Council would have been as a trouble-shooter and negotiator, with the Junior Council having reached a stage of no return and facing particularly difficult negotiations or where the cases have been fought for. I went in there with a particular negotiation skill, gained in other areas rather than as a thorough-going expert in Family Law, and I was glad to operate in that way.

But I have been a County Councillor for twenty years, and I have held clinics almost on a weekly basis, barring holidays. And I had a particular bird's eye view of the public – men and women and children coming in to me over that long period telling me about their woes, arriving from the operations of the Family Law Court. None of the stories, of course, were the same; there were contradictory interests being represented to me. But the thread that was going through the stories was:

Why didn't we hear that it would be like this? It was a completely new and daunting, alien experience for us going into Court and we didn't think it was like that.

Their impression was based on Family Court on television. But they found the actual system in Court particularly upsetting and offensive, and it didn't seem to serve their interest either because of their not knowing what happened – even though they were represented by solicitor and counsel – or because they didn't get a hearing, or because they didn't get any representation at all.

And that was a major role that I used to have to play as a public representative – by one means or another to get legal representation for constituents. I am sure that Dan Neville as a continuing politician will find that that is a regular occurrence in his constituency activities.

The roller-coaster of family law

A couple of summers ago I had an experience on holiday in France when one of my children took my wife and I to Disneyland. I never had any experience of these things before – I must have had a neglected childhood myself! But I found myself on this great roller-coaster they have out there. And it is preceded by a very long queue – it reminded me of the pictures of people being sent to the gas chamber in the war where they were queuing waiting at railway stations – but we were all holiday makers. We queued for perhaps two hours to get into this thing that consisted of some sort of a Bord an Mona-type

railway running around the countryside. When we got on to the thing and got strapped in tightly, there was a period at the start where you were lulled into a false sense of security ... and then suddenly into a dark tunnel at ferocious speed, not knowing where you were, losing all your sense of orientation. And as soon as you took a grip of yourself, you were turned quickly to the right inside the tunnel, so that you were wondering what's going to happen next? And then suddenly you are out of this fright. At that stage the whole place is screaming and disorientated.

And they give you another little confidence booster by getting you out in the light and then straight for a little while, and then suddenly a big turn around in a circle, and there's nothing holding you up except centrifugal force as you look down about three hundred feet into a valley. And the experience goes on and on! And you are brought up very slowly to the top of the hill and then finally let down at vast speed, and suddenly round a slight corner you are facing a lake – apparently a bottomless lake! But of course the railings are only six inches under the water and you are safe, but you feel that you have met your end and you are going to drown.

I said to myself coming here: That has been the experience of many of my constituents when they have gone into the Family Courts. Because there is a great deal of unpredictability. There is a massive amount of change in the proceedings and things don't seem to run to a plan, to anyone's particular plan, because of the way things are structured.

Without any fault on anyone's part – most of all without any fault on the part of the judiciary who have been entrusted with a system which is not working, and which very few of the public know is not working that well, if they are not directly involved. And unfortunately, as Dan Neville said, the legislators don't have an opportunity to know how it is not working. And that ignorance, lack of knowledge on the part of legislators and planners arises from the fact of the inadequate reporting of what actually goes on.

A husband can be frightened of the whole position, and have very little faith in any further active participation in the family law procedure.

I think that we all owe Dr McCormack a debt of gratitude in pointing out how the *in camera* rule can be modified without actually being abolished. I don't think there is anyone here who could say that the *in camera* rule should have to be abolished outright and that we would have some sort of situation where the Press and the voyeurs and the Peeping Toms would have a field day every day in the Family Law Courts, I don't think that would ever arise but there is a clear need for reporting to show how the system works.

On the one hand, you have the apparently unhindered operation of various small applications in the roller coaster operation of a Family Law case before the actual final hearing to determine the final result. On the other, you have all the aspirations of legislators that you are going to have settlement of family law disputes, that the Family Courts would not harm families and would encourage the solution of dispute by an amicable settlement.

In my experience both within the Courts and as a public representative, by the time you have gone through an initial dark-tunnel application of a Barring Order – very often being brought without great grounds – a Barring Order being made, and perhaps an appeal being turned down, a husband can be frightened of the whole position, and have very little faith in any further active participation in the family law procedure. But that might be only the start of a substantial family law case leading to a separation or, in the modern day, a divorce.

Abuse of applications for discovery

Similarly you have a situation where very often applications for discovery will be made to get disclosure of means in cases where perhaps at the end of the day the discovery might not have been that relevant because the two parties would be self-sufficient economically. And that's a feature of very many family cases now where both parties to the marriage are employed and would have assets in their own right.

Yet you have an unrestricted application for discovery – and I have had experience of this myself as a practitioner – being used as a means whereby the ante will be upped, long before there is any question of getting a hearing for the case, long before people face up to the real issue in the case. Up to a stage where one party is saying: Well, the other party is hiding money somewhere in some bank account in the North or in England or in Kerry or Westmeath or Dublin or whatever. And in certain instances situations are build up where there is a disobedience for an Order for Discovery and there is an immediate application for putting the party away for Contempt of Court.

And instead of an adversarial system, you end up with a gladiatorial system – it's lions and Christians all the way from there. It's gone away from the roller coaster, because there might be a few screams but there is plenty of laughter on the roller coaster. It reaches a stage where the family law case develops an impetus on its own where it becomes what Family Law cases should not become – divisive and destructive. At the same time it has become very costly to the parties – or whatever parties are going to pay for it or for the Legal Aid Board – and has become very costly in Court time and facilities.

Reporting of family law

The announcement that there is going to be limited reporting of proceedings on a pilot basis is helpful. I think one of the first things that will come out is the frequent use and misuse of time in these preliminary skirmishes that are used, in my view, for tactical

An aspect I would like to develop is the particular requirement that reasons would be given in family law judgements.

reasons by practitioners or by parties to gain an advantage on the other. It would seem to me from my experience that they are used far more than the normal type of commercial or personal injury litigation and that is something that is of concern to me. I remember mentioning it as far back as 1988 when a number of us family law practitioners met with the Women's Rights Committee in the Oireachtas at that time. The fact that this problem continues, twelve or thirteen years later, after enormous changes in Family Law legislation is proof that there has been a bad reporting system. If it had been improved, this type of problem could have been addressed.

Turning to the argument introduced by Dr McCormack about the *in camera* system and the question of a public judgment under Article 6 of the Convention of Human Rights, I think that while that judgement will have to be phrased very carefully so that the rights of privacy, the rights of juveniles will be protected, I see no great difficulty in that.

Reasons for the judgment

One aspect I would like to develop is the particular requirement that reasons would be given in the judgement. There is an enormous requirement from the public and from the parties in family law disputes, that they would know the reasons why they either went up or down or why various things happened. Due to improvements in legislation, family law decisions and settlements have become very complex social and economic documents and arrangements. The reasons for these decisions need to be known so that people are going to settle down to them and say these are final decisions made on our lives. I think it is the least we might expect that they would know the reasons. It is very strange that on the one hand, people assert that the family is the building block of society, and on the other hand the requirement that reasons be given is a requirement that has been enforced by various Court decisions in the recent past on administrators.

If I ask Diarmuid McDiarmada why he is not going to keep repairing the Sligo Courthouse – if he tells me he is not going to do it – he has to give me good reasons and in writing. In the Planning Act, if you don't get planning permission, reasons must be given. In the Valuation Act, if you appeal the valuation of your hotel or your house or whatever, the Valuation Tribunal, which is the body of final appeal, is required by law to give reasons for every judgement. Now some of these cases can be very small indeed. A person's own dwelling house can be the subject matter of a decision like that. So I am not asking for something that doesn't exist at the present time. I am just pointing out that, human rights convention or no human rights convention, normal practice in all areas of administrative and quasi-judicial decision making at a very low level, is to give an argued reasoned decision.

The time has come now, whereby the *in camera* rule should be changed as a first step to ensure that a reasoned judgement is required by law to be given by the judge assigned to the case. Whether that judgement is disclosed in public in whole or in part will be a matter for legislative arrangements to be made by the likes of Deputy Neville, who followed me into the Dail. I would like to congratulate him on his contribution and the fact that he took up the cudgels where I left them down in this area along with many others.

The 1989 Separation Act

The manner in which the Houses of the Oireachas were divided on issues relating to the 1989 Separation Act had very little to do with how that Act was actually administrated and worked out in practice in the following years. We as legislators, certainly had different perceptions and very different expectations than what turned out to actually happen. Despite the fact that we were thinking that it would work out in different ways, that piece of legislation has worked out reasonably satisfactory. It has been a very positive piece of legislation and was the basis of the further legislation that followed in the subsequent years. But there remains work to be done in so far as closing the loops to allow the system to report back into it so that it can be reformed in the years to come by legislators and by planners.

The role of the Courts Service

Diarmaid McDiarmada

Director of Operations, Circuit & District Courts,
The Courts Service

Facilities for family court users

The Courts Service was set up in November 1999. The functions of the Courts Service are set out in the statute under which it was set up, and they are essentially to manage the courts, to provide support services for the judges, to provide information on court systems to the public, to provide, manage and maintain court buildings and to provide facilities for the users of the courts.

The Courts Service has no function in relation to the performance by a judge of his or her judicial functions. The Act makes it quite clear that the administration of justice is solely an act for the judiciary and not for the Courts Service. The only things that I can actually talk about today are those matters for which the Courts Service is responsible, and I will talk about some of those which impact in particular in the Family Law area.

One of the key statutory management functions of the Courts Service is the provision of facilities for court users.

One of the key statutory management functions of the Courts Service is the provision of facilities for court users. This function is being pursued by the Service in the context of a courts building policy, and its capital programme. We are committed to providing modern first class facilities that respond to the wide range of needs of all court users. As part of the Courts Service building program, a range of facilities are being provided in all new court buildings. Our refurbishment projects are taking place or will take place in major urban centres. Family law facilities are being provided in all these new places, allowing family law cases to be heard in a suitable setting. Improved waiting and seating areas are being provided, including refreshment facilities.

A dedicated family law centre for Dublin

In Dublin a dedicated family law centre to incorporate all family law courts – District, Circuit and High – serving the Dublin area is under way. The plans for the building have been prepared and the consultation process has already commenced. Interested groups are invited to view these plans and to put forward any views that they might have. The building will house ten courtrooms, consultation rooms and other facilities and will include a supervised child waiting area. Construction on this family law building should commence early in 2001, and it is estimated that it will take approximately two years to complete.

This facility will replace the present unsuitable facilities in the Riverbank Courthouse where Circuit Court cases are heard and Dolphin House where District Court cases are heard. It is also intended that child care proceedings will be dealt with at this location and not as at present in the children's court in Smithfield. This project and building will centralise all family law courts serving the Dublin area. The constructive participation of voluntary groups and the specialised agencies is most welcome and will greatly assist in putting in place facilities which are fully responsive to the needs of their clients in a courts context.

A national program

It is planned in the short-to-medium term, to have one such facility in each county where family law can be dealt with by all the courts, including the High Court and Circuit Court, on separate days from other business. In all these centres it is envisaged that we have information desks when information can be dispensed. The Courts Service has prepared an interim five-year building program which deals primarily with projects which are presently under construction and those venues (which in the main are situated in County towns) are those locations where both Circuit and District Courts sit.

In Dublin refurbishment of the Family Law Office for the District Court in Dolphin House has taken place in an attempt to increase the privacy which members of the public have in transacting their business. Within the next twelve months the Courts Service building programme will also see major refurbishment work at Cork, Limerick Circuit Court, and Castlebar, Dundalk, Ennis, and Longford Courthouses.

Training of staff

The Courts Service is also responsible for the training of the Courts Service staff and in that regard the Courts Service Training Centre has undertaken a number of training initiatives with regard to the staff. A range of seminars have been organised in respect of various aspects of family law legislation. Training was provided for staff in the Circuit Court when the Divorce Act was introduced to assist them in the implementation of the act.

The Family Law Development Committee

In respect of family law courts, special consideration is also being given to enable family law cases to be heard in a suitable court setting. In this its first year of operation, the Board of the Courts Service has signalled its commitment to providing appropriate modern facilities for family law business by the establishment of a Family Law Court Development Committee of the Board. The Family Law Development Committee is chaired by Mrs Justice Susan Denham and includes judges of all the courts and a representative on the Courts Service Board representing court users will assist the Courts Service in developing the Family Law Courts Services and review, among other matters, development of Regional Family Law Centres. The terms of reference of the committee include specific references to court buildings and facilities, the *in camera* rule, and the development of regional Family Law Centres. The establishment of Family Law Centres is under active consideration by the committee at present.

The *in camera* rule: a pilot scheme

The Working Group on a Courts Commission in its Sixth Report acknowledged that the *in camera* rule resulted in an absence of knowledge of the workings of the family law courts. To address this problem the working group recommended that a pilot scheme be established whereby a qualified solicitor or barrister record and report on family law decisions and assemble family law statistics for publications on a regular basis. The reporter/researcher will attend hearings only with the consent of the parties and publication of any identifying material would be prohibited. The Courts Service is currently putting in place arrangements for the establishment of a Family Law Report on a pilot project as set out by the working group. Its two months ago applications for the provisions of such a service were sought in the national press and at present those applications are being assessed.

A spirit of equality and respect

Deputy Jan O’Sullivan, TD
Spokesperson for Equality & Law Reform, **Labour Party**

Equality for women – and men

This seminar is noteworthy in that it is being held on the day when the Equal Status Act is coming into force. While the Equal Status Act isn’t specifically covering issues that we are talking about today, nevertheless what we are actually talking about here is very much equal status and I do believe the Equality Authority, which was set up under the two recent pieces of equality legislation (the Employment Equality Act and the Equal Status Act), should have a role with regard to the issues we are raising here today and I would certainly welcome some interaction with that body in relation to these issues.

I would, first of all, congratulate Parental Equality on the work they have been doing in recent years in highlighting the issues of equality with regards to family law.

A lot of the equality issues over the years have been about equality for women, particularly in areas of the workforce, in areas of access to public representations and so on. But it is equally important that equality issues that have negative effects on men are addressed and are addressed in a spirit of equality and respect, and in a spirit of valuing the work of organisations like Parental Equality and Amen. I want to say that as somebody who will pass no apology for campaigning also in relation to rights of women in other areas where that needs to be done. So that’s the spirit, I think, in which we need to address these issues.

Family law: legislators excluded from the process

The word ‘prejudice’ is about pre-judging. These issues should be addressed in an atmosphere of no prejudice – not pre-judging. This is one of the problems that has been

I want to put my full backing behind the campaign to modify the *in camera* rules that are there at the moment

highlighted in relation to family law where in many cases we are talking about a pre-judging of who is right and who is wrong in cases of family law. As has been well enunciated here by previous speakers, part of the problem at least, is that we don’t actually know what’s going on. And people like Dan Neville and myself who are in a position of making legislation simply don’t know, and the public doesn’t know. I want to put my full backing behind the campaign to modify the *in camera* rules that are there at the moment, and I welcome the pilot scheme to modify that - as

confirmed by Mr MacDiarmada - at least to have some reporting. From information conveyed to me, most of the time in family law cases there isn’t even an accurate stenography or recording of what goes on. So there is no information. I am sure a lot you know more about it than I do because you have been in the process. I have been excluded from the process as have other people who aren’t involved in specific cases so I would certainly bow to the superior knowledge of many of you in the room with regard to that.

I do want to stress the fact that the welfare of the child or the children in all these cases has got to be paramount and has got to be the pre-eminent issue.

Fairness, consistency, and the principles of justice

I would like to address the whole question of the *in camera* situation in so far as we need to see that there is fairness, that there is consistency, that principles of justice and non-prejudice are clearly there. I would have to say that there seems to be very little re-training of judges or re-appraisal by judges of changes in society and what's going on generally.

A changing world, inside and outside the domestic sphere

We are in a hugely changing situation. Changes in the world outside the domestic sphere has comparable changes within the domestic sphere. The old traditional idea that the man is outside earning the bread and the woman is at home minding the children has clearly changed in this society. I'm not sure whether the updating or upgrading of judges is actually happening. I don't think it is. I'm not sure how much either legislators or anybody else can influence that, because of the separation of powers. Nevertheless I think it has to be a principle that we would uphold and support. There has got to be some way in which this issue can be addressed.

The EU Convention

Regarding the implementation of the EU Convention into Irish Law, I was present in the Dáil where this was raised recently. There was a parliamentary question put down and I have the answer to it here. In relation to how its going to be implemented, the Minister said the Government at its meeting on 21st September 2000 authorised the drafting of a bill to give an effect compatible with the European Convention on Human Rights. He said he expects the legislation will be published during the present Dáil session. He also said that

The old traditional idea that the man is outside earning the bread and the woman is at home minding the children has clearly changed in this society.

the method will be the indirect or interpretive model of incorporation, mirroring the UK Human Rights Act 1998.

So the method of introduction is going to be that indirect way, by legislation rather than incorporating it fully into the Constitution. In the invitation you referred to Article 6, the article which gives the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. But the 7th Protocol, Article 5, probably offers more scope in terms of the issues that we are addressing here today, because it's a specific article dealing with the issue of family law and the right to fairness.

That is the article that needs to be looked at and clearly this is going to be implemented through legislation. Therefore we, as legislators, will have an opportunity and you as members of the public and as pressure groups should have an opportunity to influence how the convention is implemented into Irish law. I think it is very important that we do focus on those areas where equality with regard to family law will be incorporated, or should be incorporated at least, into how this is interpreted into Irish legislation. So I think there is definitely an issue here that needs to be addressed and needs to be addressed in the near future, as soon as this legislation is going to be debated.

There is another matter that I want to bring to the attention of the seminar as well. I have a copy of a draft Charter of Men's Rights of the European Union which is dated 28th September 2000. The third part of Article 24, which is on the rights of the child, says:

“Every child should have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents unless that is contrary to his or her interests”.

This is in draft form – it hasn't been adopted. But that is another legal instrument we should be aware of, and it may facilitate the achievement of the aims that have been enunciated here today. So that is also welcome.

One other possibility in addressing the issues that have been raised is the Judicial Committee that is examining Judicial Conduct and Ethics. It was appointed back in April 1999 and in response to a Parliamentary question in the Dáil on 5th October this year the Minister said:

“I understand the Committee has almost completed its work and it is hoped that this report will be available before the end of the year”.

I note that there were many submissions made to that committee in relation specifically to family law and the operation of the family law courts. I was in the Dáil when this oral question was put and I took the opportunity to ask the Minister if it was intended that the issue of *in camera* hearings would be addressed by that Committee. I will read what he said:

“It may well be the case that there is a need for an overhaul or a review of our Family law Courts. I will ask officials in the Department of Justice, Equality and Law Reform to look at the Commission’s Report to see if there are some proposals which we could move forward at this point”.

Now obviously he’s not making any specific promises but again I think that is another method by which this issue can be addressed. Also the Law Reform Commission published a comprehensive set of recommendations on the reform and structure of the family law courts a couple of years ago. I presume that is also sitting on a shelf somewhere and hasn’t been responded to.

The political will to implement reform

So there is a myriad and in some ways a confusion of instruments that can be used. There is the Court Service’s announcement today that they intend to set up a pilot project that

I want to fully put my backing behind the campaign to modify the *in camera* rules that are there at the moment.

will provide statistics and information with regard to what goes on in the family courts. There is the European Convention. There is the Judicial Committee. There is a Human Rights Commission, which will be set up shortly - the name of the Chairperson has been announced but the members haven’t so far. There are a number of instruments but these are only the instruments and what we really need is the political will to make this happen and to actually have a real equality in terms of family law. As a woman who has campaigned for women’s rights in other areas, I do want to say that I fully support this and that I believe that in many cases there are injustices done to men in family law courts because of certain prejudices that are there. This needs to be addressed and it needs to be addressed in a

non-political way, in a way that is fair and open and is non-judgmental in advance of the evidence that’s given.

So again can I congratulate you for this seminar today and I hope that there will be positive results.

The *in camera* rule and domestic violence

Mary T. Cleary
National Co-ordinator, AMEN

Male victims of domestic abuse

In December 1997 I set up AMEN. It is a national organisation for men who are victims of domestic abuse and their families. Since then we have heard from hundreds of men. They tell us that they have been doubly abused, first by their wife or partner, and secondly by the family law courts. It is extremely difficult for them because they have been told you cannot speak about what happened outside of these courts.

Many of the men who have contacted us have been evicted from their homes with Interim Barring Orders. In many cases false allegations of domestic violence or sexual abuse have been made against them - and this is without any evidence being offered, particularly in the case of Interim Barring Orders.

Many of the men who have contacted AMEN have been evicted from their homes without any evidence being offered.

Human rights issues are central to the work of AMEN. Whilst legislation is worded in gender neutral terms, corrective legal remedies often are not available to men. In many instances, men who have had Barring Orders and Safety Orders and Interim Barring Orders made against them, are not advised by their legal team that they can actually appeal these Orders. Some men, in fact, have been told by their solicitors that they would be wasting their time if they went into court and sought any sort of protection against their wives – simply because she is a woman.

Interim barring orders

In May 1999, the Law Society issued a document called *Domestic Violence: A Case for Reform*. We set out our comments on this document and we circulated our comments to the Law Society, to judges and to the Minister for Justice, John O'Donoghue. I would like to focus on some of our recommendations here.

Recommendation 1: *That the District Court Rules be amended to provide an automatic early return date for Interim Barring Orders.*

We hear from men who have been removed from their homes – in one case a man has been out of his home for one-and-a-half years. He is now taking advice because he wants to take a Constitutional challenge. In the meantime he is experiencing great difficulty in maintaining a relationship with his children.

Under the Domestic Violence Act, 1996, a person can be barred from his or her home at a hearing at which they are not present and are not even aware that this is taking place *ex parte*. In many parts of the country it can take months before there is a full hearing and sometimes over a year before they get the chance to prove their innocence and are free to return to the family home. In many cases they are never returned to their family home.

In the context of this unjust, draconian piece of legislation remaining on the statute book, this recommendation should be implemented immediately. It is a sad reflection of the contempt our legislators have for the innocent accused. That this recommendation should have to be made at this stage, shows an utter contempt for civil liberties and human rights.

Fair procedures

Recommendations 2: That the District Courts Rules be amended to require that ex-party applications for a Protection Order or an Interim Barring Order be made on Affidavit; that the Respondent be automatically provided with a note of all the evidence given at the hearing; that personal service on the Barring Summons be required in all cases where the Respondent has been barred ex-parte. These are the fundamental requirements of natural justice.

In many cases the husband is not aware when a summons is posted or delivered to the home, because it is never delivered into the hands of the Respondent. To further compound the injustice of the Interim Barring Order, respondents are not even informed as to what the allegations are that have been made against them.

The Report states that frequently when respondents come into court to defend proceedings, they are not aware of the statement made by the Applicant, which lead to the

The legislation which makes provision for these Orders contains no checks and balances. No penalties are provided for those who abuse – and clearly seen to abuse – these awesome powers.

granting of the Barring Order. Frequently men are told by their solicitor: You will find out when you go into court what the allegations are! And No! You cannot find out before that. This reflects the experience of many of the men who contact our help line.

In fact, respondents can get a copy of the statement of information made when the Interim Barring Order was granted from the court offices when these are available, but members of the public are not aware of this. Some solicitors tell men that they are not entitled to this information! It is also our experience that some courts staff are not aware that they are obliged to provide this information to the Respondent. In this regard, the Department of Justice, Equality and Law Reform have an obligation to issue an instruction telling all court staff that they must give this information to the Respondents in domestic cases on request.

I would also recommend that personal service on summons should be required in all cases. We are aware of cases where the mail has been interfered with, where the parties are still living together in the home.

Abuse of *ex parte* orders

These recommendations will go some way towards minimising the injustice inherent in *ex parte* Orders. However, there are much more serious issues and fundamental questions to be addressed. These Orders impose the most severe and draconian penalties without having to provide any proof or evidence, and in circumstance where the other party does not even have the right to defend himself or herself.

The legislation which makes provision for these Orders contains no checks and balances, and provides no safeguards against abuse. No penalties are provided for those who abuse - and clearly seen to abuse - these awesome powers. In fact there can be no doubt that these provisions involve a serious violation and denial of human rights. For example, the Irish Council for Civil Liberties state that civil liberties include freedom of speech, freedom of movement and freedom from arbitrary arrest. By contrast, the Working Party on Violence against Women and Children promotes proactive and presumptive arrest.

Heavy penalties have recently been introduced for false allegations of sexual abuse, and similar penalties should apply for false allegations of domestic violence.

A judge must listen to both parties

In April 1999, I attended a conference in Dublin Castle organised by Women's Aid. Judge Peter Smithwick addressed this conference. Some of his comments were not well received. He said that it is the duty of a judge to listen to both sides of every case; it is vital that each of the parties be listened to. He said that it is a fundamental principal of law that every judge must follow - that they must listen to both parties - and he said that he himself was happier when a woman applying for an Interim Barring Order can produce collaborating evidence and independent witnesses – yet this does not happen in many cases. He then talked about the application for Orders which comes before him; he said that many of these applications should not and cannot be granted. For instance, a woman is not happy that her husband is not doing his share of the household duties, so she comes into court and she looks for a Barring Order against him.

We have come across many such cases. We support his observations and we feel that in many cases the Domestic Violence Act is used as a weapon of abuse. Judge Smithwick's comments received a very hostile reaction on that day in Dublin Castle as you can imagine.

Need for statutory guidelines

Recommendation 5: The introduction of either detailed statutory guidance or listed material to be considered by the courts in determining whether to grant a protective Order.

The Law Society report refers to evidence of practices differing between different District Court areas. It is inevitable that in the absence of any statutory guidance, there will be

Many judges simply accept uncollaborated allegations. The penalty imposed—being barred from the family home – is in many respects as severe as imprisonment.

considerable divergence amongst judges. In our experience, the gender of the respective parties influence the judges more than the circumstances or the evidence before them. One judge recently refused to give a Protection Order to a man and he told him not only would he not grant a Protection Order against that man's wife but that he would never grant a Protection Order against any wife.

We are aware of men who are being seriously abused. They are being put out of their houses for their own protection! Judges sometimes say: I am going to remove you from your home for your own protection.

Such guidance and material should be clear as to the circumstance in which an Order should or should not be granted and the type of Order appropriate in a particular circumstance. The judge should be required to deal with these cases on the basis of the facts presented, and not on a gender basis.

Obviously there are serious cases where Barring Orders and Safety Orders and Interim Orders should be granted. For instance if the man comes home drunk and he is beating up his wife and his children, I believe that Orders should be granted. But as in the case to which Judge Peter Smithwick referred where the woman is not happy that her husband is doing his share of the household duties, one has to question why an Order would be given in those circumstances.

Standard of proof

Recommendation 7: That further steps and guidance be provided regarding the standard of proof necessary to establish abuse.

The Law Society report comments on a total absence of guidelines as to the standard of proof necessary to establish abuse. Research shows that practices vary widely between judges, with many judges requiring no proof at all - simply accepting uncollaborated allegations. The penalty imposed in these cases – being barred from the family home – is in many respects as severe as imprisonment.

Any society claiming to have certain standards of civil liberties and human rights, would not tolerate imprisonment of its citizens on the basis of uncollaborated allegations in an open public court, and this is why we welcome the relaxation of the *in camera* rule.

The Law Society is right to call for clear statutory guidelines and these should set down minimum standards of proof. If as the advertisement says “It is a Crime to Beat a Woman” then why shouldn’t these cases be dealt with like all other criminal cases – in open court with the normal standard of proof required.

Questions & Comments from the Audience

Audience 1:

When Dan Neville was speaking I had to pinch myself, because this is the first time that an elected representative in this country has something of a feel for the pain and the trauma that we are going through. It is the first time ever that an elected representative (outside of Mary Banotti, who wrote an article in the *Irish Times* about two and half years ago) even mentions Parental Alienation Syndrome. This is something that effects thousands of children in this country.

Bob McCormack presented a clinical demonstration of his ability to research and to come up with facts - not conjectures, but facts. He mentioned a quote by Gerry Byrne who seems to be of the opinion that the Court should be opened up and the *in camera* rule should be somewhat changed. I hope that Gerry Byrne also supports the notion that the fitness to practice committee of the Irish Medical Association will also be opened to public scrutiny.

It is only three years ago that a colleague of Dan's and a constituency representative of my own, Brendan McGahon, said when debating the Children's Bill that he believed that single fathers were feckless runaway wasters who expected the State to pay for their fun. I memorised that because it caused me so much pain and annoyance. Henry Abbott mentioned the fact that in his experience the problems still exist in family law after thirteen years.

One of the services that I provide is going to Court with people, staying with them, physically holding their hand, keeping them together through a very traumatic time. Sometimes I am lucky enough to get into Court and represent them and speak on their behalf as a McKenzie Friend, but this is a very *ad hoc* arrangement where a Judge can make up his mind one day that I can get in to represent one person and on the next day I can't.

When twelve years ago I would go to a Courthouse and I come back again in the year 2000, I see the same faces. The same faces are there with the same issues, the same trauma written all over them - the only difference is that the faces are 12 years older. Think about the damage this does to people, real people. That has to be addressed.

Jan O'Sullivan mentioned the Equality Authority. I attended the Equality Authority some months back when Prionsias de Rossa was there filling us full of Eurospeak. And when some father tried to raise the issue of how fathers were being discriminated against in the *in camera* law courts, we were told that no-one was listening, because we didn't know how to speak Eurospeak and that we should learn to speak otherwise than from the heart. But I am sorry - being a father myself, the only way I know how to speak is from the heart.

I produced a document recently outlining ten reasons why the present *in camera* rule should be replaced. A lot of the reasons have already been touched; one hasn't been and that is that it would highlight the immediate need to either train or replace Judges who are carrying on business on an *ad hoc* basis. One girl I know was told by her female solicitor when she was going into court: "You had better wear a short skirt and a wonder bra"; and she said that all the time that she was in the court, he did not speak to her but to her chest. That is totally unacceptable.

The same judge was presented with two cases on the same day by two different men. One man wanted to present a picture of his child, showing him with his arms around his child on his first communion, as evidence that there was love between him and his child.

The second guy was presented with a photograph in the court and the photograph showed an alleged bruise on his wife's arm taken on holidays some months previously - he was not provided with a copy of this photograph himself, the only time he saw it was actually in the court. This comes back to Mary Cleary's point earlier of the fundamental right to know what you are accused of, to try and prepare your defence to it. But this photo was sufficient to have the man barred from his home.

Now when the first chap went in he was told: No, you can't submit that photograph with your child in your arms - we need to know that you own that photograph, we need to know who took it, we need to know who processed it, we need to know that it has not been interfered with - and it is not admissible.

I am compiling a database about such behaviour by judges in the Courts. There is no consistency, there is no transparency, there is no accountability and there is a situation of self-regulation which is totally unacceptable.

Just as a final point to Diarmaid McDiarmada. Yes, in my experience in sending mainly lay litigants to court service employees, there has been a change for the better in the last year. But you have a long way to go. There are a lot of dinosaurs out there with a God-complex which needs to be addressed.

Audience 2:

I address this question to Diarmaid McDiarmada or Henry Abbott. It's in relation to Court Orders drawn up by the Family Law Courts. Who draws them up? Or who should draw them up?

Henry Abbott SC:

As I understand it, in the District Court the orders are drawn up by the Court clerk and the Circuit Court it is not unusual to have the orders drawn up by the parties. In the District Court it's the Judge that signs the order; I'm not as familiar with the Circuit Court but as far as I understand the orders are drawn up by both sides, agreed by both sides. In the absence of agreement the County Registrar or one of the staff will draw it up in the Circuit Court.

Audience 2:

What happens in the case when you have two orders?

Henry Abbott SC:

I assume it's two orders drafted, one by the wife's side and one by the husband's side, and that there can't be any agreement. In that case the County Registrar or the acting Registrar will probably resolve the difficulty. Or if the difficulty wasn't resolved then, you would have it put back before the Judge to have the Judge clarify it - it's a form of *speaking to the order*; it's known technically as 'looking for further directions'. It happens, but there are means of resolving it. The judge is the decision maker and the thing is to make a decision. If the order is still wrong, it can be appealed or reviewed perhaps in some way.

Audience 3:

Could I ask you to address the question of the guardianship of single fathers not married to the mothers of their children. At present I understand the father has to apply for guardianship. I was just wondering do people think this is something that we should be campaigning on, to ensure that single fathers have the same automatic entitlement to guardianship that mothers currently enjoy.

Henry Abbott SC:

The problem you have there is the common law background. The traditional common law and inherited wisdom of the '50's and '60's was to exclusively and without question give the guardianship to the mother and treat that as an innate right. So it's against that background that you're fighting.

I remember fighting against the father for a mother, an unmarried mother who had a child - it was a very fraught situation - and I remember concluding that the law was completely in my favour and the father hadn't a chance. And I just slapped him out of the way with court orders. Then over the years I became aware - not as a practitioner but through constituents coming to me - where there was this opening up which I regarded as a tremendous leap forward for fathers from the time that I was actively practising either for or against them.

But it seems it is a very uphill struggle. You are still pushing against a very strong wall; I dealt with this in my paper. We got a certain amount of acceptance of that in a Party Document that is being done. It is not as clear cut as I would like it, but at least they are beginning to say that the children have rights to know and be parented by both parents, and to come to that premise. Everything follows from that, the fundamental right of a child to know and be parented by both parents except in exceptional circumstances. If you start coming from that point of view then everything else falls into place - guardianship, access, whatever, and the courts and the law should facilitate that.

Audience 4:

I am totally in favour of equality and I do feel from what I can ascertain there isn't equality in the family law courts. My own personal experience - keeping in with the *in camera* rule, I'll not relate what happened in court - but just before I went into court my barrister said to me: "You better go for a settlement now". When I said "Why?" she said: "Because this Judge always finds in favour of women".

I find that quite appalling that men have to tolerate that type of thing. I have no doubt that it would not have been said to a woman. It is quite outrageous that this type of thing exists in the family law courts.

The question that I have is: What is the position now of the European Charter? Does it mean that I can go into the courts and insist upon the fact that this case is heard in public? Do we have to wait for clarification on the *in camera* rule or can an individual go into the court and sweep that aside and say I want my Fundamental Rights as a citizen and I want this case to be heard in public or the result to be given in public?

Dr Bob McCormack:

I mentioned Article 6.1 of the European Convention. It is not an absolute right to a public hearing - it allows for certain circumstances in which there will be restrictions on the public or the press. It does allow that "Judgement shall be pronounced publicly" or in public, and the case law of the European Court supports that. So the right to a public hearing is not absolute in all circumstances. I would argue that if we look at rape trials as a model, we seem to be able to protect privacy and provide coverage; we seem to be able to do both. So I am wondering why we can't do that in family law.

Audience 4:

Can I just clarify the point: Does it mean that, where there is a crucial family law case that will actually create a precedent, that you can insist that the result is given in public? Because I personally am of the opinion that the way family law stands against men these days, that if the result was given in public you might have a greater chance of getting a fair hearing.

Henry Abbott SC:

You will have to wait, I think, until the Convention is incorporated into Irish Law. But there are a lot of lawyers who have argued this in court in relation to asylum cases - I think one is in appeal at the moment - that because the Convention has been recognised as an obligation in the Good Friday Agreement that at least it now binds the State in relation to Acts of the State in dealing with its citizens, as against binding citizen-v-citizen. In relation to a family law judgement, you are somehow in a grey area between citizen-v-citizen and citizen-v-the-State. It could be argued that the State through the judicial system must deliver the European Convention on Human Rights in the form of public judgement now, because the State itself has committed itself to it in the Good Friday Agreement.

In the case, *Coppinger v. Waterford County Council*, involving a road accident where EU regulations relating to the safety of a lorry were not implemented by the State, the County Council in Waterford was found libellous in damages for the non-implementation of the Directive (based on the fact that someone ran in under a lorry). Even though the County Council was a separate corporate body, it was found by the European courts to be an arm of the State. So you are in wild man territory if you are going to argue that tomorrow, but fair dues to you if you try it. Run it as far as the Supreme Court and you might meet a few others up there arguing around the same time.

Audience 4:

You are saying that I have to wait until it is incorporated into Irish Law. But surely if it is already being incorporated into Northern Ireland Law and we have agreed our government automatically to take on board anything they agree, therefore I shouldn't have to wait. I mean if the government wants to drag this out, they could do so indefinitely and that would impair my rights as an individual.

Henry Abbott SC:

Well the argument has been made, and it for the Supreme Court to pronounce on that if it comes up. It should really come up in the Supreme Court as a matter of great urgency because the question is asked time and time again. The train is running in relation to Human Rights. But Judge Kelly, in an asylum case, said no, you are wrong, your argument is wrong, the Convention is not directly applicable.

Audience 4:

Well I will be in the Supreme Court in a matter of months but I don't know whether I will be allowed to raise that particular point, but I will try. Thank you very much.

Henry Abbott SC:

Well you will certainly be allowed to raise it. Whether your argument will prevail is certainly a question that everyone will be interested in knowing.

Audience 4:

But my point is that they won't be able to find out because it will be *in camera*!

Audience 5:

I would just like to clear up some facts that many people don't seem to realise. There are no stenographers in family law courts. In fact, if you try to get them in you will probably be stopped, and it has been stopped on many occasions. This means there is no record of what happens inside. Even the decision is up for grabs because both people then decide what the decision is - and if you don't agree, you have to go back to the Judge who has forgotten what the decision is. We have had illegible decisions written on scraps of paper by court clerks - and this is one of the things that this *in camera* rule does.

The other thing I would like to point out relates to Interim Barring Orders. I deal with people who go into court and support them and help them with it. To my knowledge no man has ever got back in to the family home after being cleared of an Interim Barring Order unless his wife gave permission. I know there's a problem - the problem of two people not getting on and being forced to live in the same house. But it is not his problem if he is being driven out by the State on a false allegation and then does not get back in.

No government body has ever researched this. I have asked for figures on this and any time we go to the so-called Dept of Justice, Equality and Law Reform we are told that there are no figures on this. The legislation is gender neutral. But all of the information given out by Equality & Law Reform has been for women and none for men.

The other mistaken impression that was given is that someone has to be wrong and right in these cases to decide who gets what. It is not true. A father has to prove that a mother is unfit to be a parent to actually get custody of his children. So there is no equal status. It is all on the father's side to prove that the mother is unfit. And that is a terrible position to put any father in.

In the new Equal Status legislation, it is now official in this country that the only one that you can discriminate against legally is the father. The Equal Status people have told us that we are not covered in it, because the legislation itself says that the courts are not bound by it. So we are actually omitted from it on purpose - which makes us the only people that you can discriminate against legally.

My last point is about the European Convention we voted in by Referendum. When it was up for Referendum, people were telling us this is what will happen when the European Convention of Human Rights came in - we would have this, that and the other. Now it seems the government can cherry pick what they decide to take in. Everything that has happened seems to purposely exclude fathers from equality. The simple way to bring in equality is to say that nobody can be discriminated against because of their gender. I just wanted to ask you what you thought of those comments. Thank you.

Dr Bob McCormack:

In relation to the Equality Legislation, it does not cover all aspects of life. It particularly relates to employment and other services. So there are many areas of life that are not covered under the Equality Legislation. Because courts are judicial bodies there is always an issue about interfering - the separation of powers doctrine. I am not justifying the ways in which fathers are treated. I am just saying that when people talk about equality legislation they should realise it only covers certain areas.

Audience 5:

But equal is equal is equal. When we went to school, the best way to check you got your answer right was you checked back and made sure that everything was still equal. What happens with our equality legislation is, you check back and you find nothing is equal.

Deputy Jan O'Sullivan

The problem with the Equality Legislation is that it only covers specific services and specific employment areas of legislation. But it is gender neutral in the sense that one of the grounds is gender.

The point that you are making is that family law is not covered under that particular legislation and that is true. It does not cover the courts but I don't know how we are going to cover the courts because of the separation of powers - how could that type of legislation come before us.

In relation to the Convention, it will be publicly debated in the Houses of the Oireachtas once the Bill is published. The protocol that I referred to, Article 5 Second Protocol, is the right of spouses to equal treatment under Family Law. It will be up to us to ensure that that protocol is translated into the legislative framework that is going to be debated. That should be done. If it is not done, then the legislation will not be properly implementing the Convention.

Audience 7:

I was very pleased with what Dan Neville had to say. Two or three years ago I spent some time in the Visitors' Gallery in Dail Eireann during the passage of the Children's Bill and Dan Neville expressed similar sentiments there. The resulting piece of legislation fell far short of our aspirations but it did contain some positive aspects such as the recognition of joint custody in law for the first time. It gave grandparents a right to apply for access, and it made the procedures for unmarried fathers easier.

We still have a long way to go to achieve the various things touched on by Dan Neville. He talked about the child's need for both parents. That most certainly is not being upheld by the courts at present. He talked about the hostility and the adversarial approach in the courts. There will always be hostility from a breakdown, but that hostility is greatly exacerbated by the system that is there. The blame for that falls to some extent on one of Mr. Neville's colleagues, Mr. Alan Shatter. He created the system.

Mary Cleary touched on the problems of people being barred from their homes without any proofs being offered or any proofs being required. I am not a lawyer, but I think this is because the Domestic Violence Act operates under the Civil Law regime which requires that judges decide cases on the 'balance of probabilities', whereas in the Criminal system the case has to be proven 'beyond all reasonable doubt'. Since the poster says "It's a crime to beat a woman", should we not therefore have domestic violence cases heard in the Criminal courts rather than the Civil courts?

Henry Abbott SC:

In relation to the ordinary Civil Law, anyone can go in and get an *ex parte* injunction - an injunction without notice to the other side - where there is an urgent situation, where the *status quo* must be protected; where if it is not protected by a Court Order great injustice can be done because the later court action will never save the situation. In other words, where there would be *irreparable harm* done - that is the term used.

We can all imagine situations where there has been gross abuse or violence in the home, where life and limb are in danger. I would say that any judge with a clear case of that kind, would be justified in making an Interim Barring Order or any Interim Order.

But where the trouble arises is in relation to these Orders very often being given out far easier than they might be obtained say if I went in for an injunction in a commercial case in the High Court. There I would have to prove matters very carefully and I am bound by the *rule of utmost good faith* as a lawyer and as plaintiff. In that situation I have to point out the weak aspects of my case. I think that discipline is not rigidly adhered to in the Interim Barring Order stage.

But as a principle there is nothing wrong with Interim Barring Orders because unfortunately life does create these situations where the Interim Barring Order may be necessary in certain cases.

But I have suspected for many years that smart people representing litigants will go in and they will get quickly enough to create the role of victim with an Interim Barring Order on the basis that 'possession is nine points of the law'.

I practice mainly civil, non-family, law and some civil litigants will come to me, or solicitors might come to me as counsel, and say: "Let's get in there and get an Interim Order - we will be on the high ground then!" And of course there is merit to that, but you have to be very careful in Courts 5 and 6 in the High Court to make sure that you are not misleading the court in any way, that you are not gilding the lily - only to be found out later. Because if you are found to have painted the picture very much to your advantage to get this Interim Order, then you will pay for it later on, when your word won't be taken.

But family law situations are so informal that it is very hard to get caught out, because very often there is no record. In 90% of cases there is no record. So the disease begins to take root in that way and it is a matter of degree. Unfortunately I think that there are many abuses.

Response 2:

In the family law courts, because of the informality, planting a doubt is almost enough, rather than having to actually prove anything. An Interim Order should be seen as exceptional and there should be a fast, full hearing afterwards. The injustice is in the delay. It should be really a matter of some urgency to hear the matter.

Una Hayden

I am a spokesperson for *Grandparents Obliterated*. I would like two questions answered.

Since the legislation was introduced on the 9th January 1998, where grandparents have the right to apply to court for access to their grandchildren, how many such applications have been through the courts, and how many have been successful in getting a hearing?

It is important that I know because grandparents get in touch with me every day of the week and they are asking advice from me: Should I go to court? Will I get a hearing?

I don't want grandparents being ripped off by solicitors and barristers. It is happening fathers all the time - they are a walking money bank. You have to have money or you will lose everything. The same is happening grandparents.

As regard equality, I want to make Jan O'Sullivan aware that in the Family Law courts there is a big problem for grandparents. If you are the paternal grandparent you do not get equal rights of access to your grandchildren, but if you are the maternal grandparent you may because the mother has custody of the children. So she ensures that her mother and her side of the extended family have a right of access to the children. That is not equality. Why should the paternal grandparents and the paternal extended family lose out simply because of gender also?

Dan Neville is the first TD that ever mentioned grandparents. We are the forgotten people. There are many situations where the parents do not give stability to their children and the grandparents do.

Deputy Dan Neville:

I will put down a Dail Question tomorrow to the Minister on that very point.

Deputy Jan O'Sullivan:

I am not for a minute saying that the courts are treating all equal. That is not equality if the paternal grandparents are not given the same rights as maternal grandparents. I am not for a minute saying there is equality in this.

Henry Abbott SC:

Before the statutory change was brought in giving grandparents some rights, the courts themselves recognised that in difficult access situations the paternal grandparents often provided a home and a secure base where access could be guaranteed to everyone's satisfaction.

Where there was total distrust in relation to how access would be used, and to get a mother weaned on to the idea of the husband having access, was always a fraught situation in the first few weeks after a Barring Order where battle lines were very strongly drawn. My recollection as a junior practitioner was that if you could get the paternal grandparent to provide a secure base and to be in and out while access was going on, then you did far better in seeking access.

Una Hayden

It is part of the problem today, the number of grandparents who are actually rearing the children. Where would the country be only for the grandparents that are minding these children while the young parents are out working. We are the back bone of this country - stability comes from the grandparents.

Lily O'Neill:

My name is Lily O'Neill of *Women in the Home*. We have been reminded of the rights of the child - every child that is born has a fundamental right to a father and a mother. Present legislation discriminates against the child's rights. In the social benefits area, young girls who have a baby, if they rid of the father and live on their own, are subsidised up to £300 a week. I have my own grandson who lives with his girlfriend and because they want to live together as a family, they are denied these rights. I think this is where the problem begins - young girls and women find that they are economically subsidised if they get rid of the father. It is a bit late when it gets to court.

One speaker said that if the rights of the child is the first priority, everything else will fall into place. Our generation were criticised because we stuck together for the children. But it was because we recognised that the child had rights, and the parents had duties and responsibilities.

Audience 10:

My name is Eddie and I represent Vocal Ireland Victim for Child Abuse Law (??). One of those laws is the *in camera* rule. The only people protected by the *in camera* rule are solicitors, psychologists, medical professionals, psychiatrists. These are the people that are being protected. There is no scrutiny of what goes on in these courts.

There are men in this country who for the last fifteen years have been stigmatised as perverts and child beaters. Family Law courts and all courts must be changed so that these people can be brought in to the public domain. There is a Medical Council inquiry going on at the moment, which is *in camera*, I fought for five years for that Medical Council inquiry to be in the public or held as a public inquiry. That inquiry was challenged by the Eastern Health Board to protect their employees.

I have been involved in the Family Law courts for 12 years and everything has been *in camera*. The Medical Counsel may publish a report when the challenge came there from the Eastern Health Board against the decision to run the inquiry in public. Justice Barr in the High Court ruled that the Judicial Review should be heard *in camera*. This was against my wishes and the wishes of the other family involved.

I took a case against the Ombudsman. That was *in camera*.

The only time that I was allowed a public hearing was in a recent case against the Information Commissioner which is up on his web site. I now stand waiting a judgement of that particular case, and that judgement is going to have serious ramifications for all cases of child sexual abuse.

The court must be accessible to journalists to see what exactly is going on - the lies, the incompetence.

Audience 11:

A question to Mr MacDiarmada please. Who is in charge of the files inside the court? Whose responsibility is it? Is it the judge or the registrar?

Diarmuid MacDiarmada:

It is the responsibility of whoever is in charge of the office.

Audience 11:

Can the file be released into one of the Solicitor's office, without the other party being aware of that?

Diarmuid MacDiarmada:

I don't know. I am not in a position to comment on this.

Audience 11:

Regarding an appeal from the District Courts on to the Circuit Courts, how long does it take for the file to be transferred from the District Court to the other court?

Diarmuid MacDiarmada:

That would vary depending what was involved in terms of getting the file ready, getting the work done to send to the other court - that would vary from place to place.

Audience 11:

So we are talking here about the Family Law in general so there is no regulation, there is no charter.

Diarmuid MacDiarmada:

There is no time limit that I am aware of. I don't think that there is time limit.

Audience 12:

My question relates to how the Constitution under Article 40 and the European Charter on Human Rights, how they sit alongside ex-party Interim Barring Orders.

It would appear that under an ex-party Barring Order no one can get access to property even when the applicant spouse is absent. It also appears that you can have no access to private documentation which may support your case unless your spouse provides it or hands it over. That assumes she does not vet the documents before passing them on and doesn't destroy any material which she knows would be damaging to her case.

The third element is the use of Affidavits in support of an *ex parte* Interim Barring Order. I have been advised that grandparents who often have a great deal of input and have seen marriages fall apart - and the reasons why - are not always in a position to attend court because of their age and stamina (either mental or physical).

The final point is to do with Legal Aid. Invariable men are finding themselves financially beaten as a result of an ex-party Barring Order. Many lawyers, understandably, will not give 100% support to your case because they are uncertain whether they will get paid fees at the end of it.

Audience 12:

Can a senior counsel engaged by the Legal Aid Board say that the opinion which reverses the decision in favour of me is the property of the Legal Aid Board and that I am not entitled to see it. Is that fair? Before my defence was submitted.

Henry Abbott SC:

Did you engaged the Legal Aid Board to a price?

Audience 12:

About £600.

Henry Abbott SC:

If the senior counsel has given the Legal Aid Board an opinion, the contents of the actual document itself would probably be technically that of the Legal Aid Board. But I have acted for the Legal Aid Board in the past and if the Board demanded that the client would not hear my opinion, then I wouldn't act for the Board. Or for that matter, if a solicitor said to me: 'Well, if you have that opinion, don't tell the client', I would resign from the case.

The Legal Aid Board is in a special situation as they are committing funds. But I certainly wouldn't act for the Board in those circumstances if there was any prejudice to the client.