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Ollscoil na hÉireann, Corcaigh
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From Dispute to Decree: A Critical Exploration of the Client Journey Through the
Legal Aid Board Family Dispute Resolution Services

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Doctor of Philosophy

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Table of Contents

Declaration	6
Acknowledgements.....	7
Abstract	8
List of Abbreviations.....	9
Table of Cases	10
Table of Legislation	11
<i>Chapter 1: Introduction</i>	12
1. Introduction	12
1.1 The Necessity for Change: A Call for Reform	13
1.2 A New Era: The Beginning of Reform.....	15
1.3 Establishing a System for Accessible Remedies	18
1.4 Navigating State-Provided Legal Assistance	19
1.5 An Expansion of the Legal Aid Boards Dispute Resolution Services.....	22
1.6 Enduring Issues in the Family Law System	24
1.7 Family Law in Transition: Empirical Insights into Ireland’s Evolving Legal Landscape	26
<i>Chapter 2: Methodology.....</i>	29
2. Introduction	29
2.1 Statement of Research Objectives	29
2.1.1 Research Questions (Quantitative Phase).....	30
2.1.2 Research Questions (Qualitative Phase).....	30
2.2 Research Design	31
2.2.1 A Socio-Legal Approach	31
2.2.2 Mixed-Methods	33
2.3 Research Methods	35
2.3.1 Quantitative Analysis.....	35
2.3.2 Qualitative Analysis.....	37
2.4 Ethical Considerations	48
2.4.1 Volunteerism and Informed Consent.....	48
2.4.2 Anonymity and Confidentiality	50
2.4.3 Emotional Distress.....	51
2.4.4 In Camera Rule	52
2.4.5 Potential Bias	54
2.5 Limitations to the Quantitative Analysis	56
2.5.1 Unavailable or Inconsistent Data.....	56
2.5.2 Indiscernible Data.....	59
2.6 Limitations to the Qualitative Phase.....	60
2.6.1 Sampling	61
2.7 Conclusion	61

<i>Chapter 3: Access to Justice in Ireland: The Role of Legal Aid and Mediation Services in Resolving Marital Breakdown</i>	63
3. Introduction	63
<i>Part 1</i>	63
3.1 Justice	63
3.2 Family Law	67
3.3 Access to Justice	70
3.4 Facilitating Access to Justice Through Legal Aid and Advice	73
3.4.1 What is Civil Legal Aid and Advice?	73
3.4.2 The Impetus for the Establishment of Civil Legal Aid and Advice in Ireland	74
3.4.3 A Statutory Scheme for Civil Legal Aid and Advice in Ireland	78
3.5 Enhancing Access to Justice Through Alternative Dispute Resolution	81
3.5.1 Development of the Family Mediation Service	81
3.5.2 How Can Mediation Enhance Access to Justice?	84
3.5.3 Can Mediation Inhibit Access to Justice?	85
<i>Part 2</i>	87
3.6 An Empirical Evaluation of the Capacity of Legal Aid and Mediation Services to Facilitate Access to Justice	87
3.6.1 Service Accessibility	87
3.6.2 The Necessity for Judicial Involvement	91
3.6.3 Service Provision Caseload	98
3.6.4 Wait Time for Service Accessibility	111
3.6.5 The Duration of Disputes	121
3.7 Enhancing Access to Justice: A Holistic Approach to Access to Justice	129
3.7.1 Procedural Simplification: An Unmet Need	130
3.7.2 Irish Courts Service	133
3.7.3 Irish Legal Aid Board and Family Mediation Service	138
3.7.4 Accessibility to Supports & Increased Interdisciplinarity	141
3.7.5 Legal Literacy	148
3.8 Conclusion	154
<i>Chapter 4: From Autonomy Perceived to Autonomy Achieved</i>	156
4. Introduction	156
<i>Part 1</i>	157
4.1 Theories of Autonomy	157
4.2 The Centrality of Autonomy to Family Law	160
4.3 The Development and Conceptualisation of Autonomy in Irish Family Law	162
4.3.1 Article 40 and the Introduction of Unenumerated Rights	162
4.3.2 The Unenumerated Right to Privacy	164
4.4 In Support of Family Autonomy	170
4.5 Challenging Personal Autonomy	173
4.6 Evolving Recognition for Individual Autonomy Through Marital Breakdown Remedies	176
4.6.1 Divorce a Mensa Et Thoro	176
4.6.2 Judicial Separation	177

4.6.3 Divorce.....	179
4.6.4 A ‘Clean Break’	183
4.6.5 Separation Agreements.....	189
4.7 Enhancing Autonomy Through Reform	195
<i>Part 2</i>	<i>203</i>
4.8 Autonomy in Mediation	203
4.9 The Threat of Autonomy	208
4.10 Legal Advice in Mediation	213
4.11 The Enforceability of Mediation Settlements	217
4.12 Constitutionally Mandated Judicial Oversight - The Core Barrier to Autonomy in Family law Disputes	220
4.13 The Endorsement of Relational Autonomy	222
4.14 Conclusion	227
<i>Chapter 5: Bridging the Gap: Enhancing Collaboration Between the Irish Legal Aid Board and Family Mediation Services in Judicial Separation and Divorce</i>	<i>229</i>
5. Introduction	229
5.1 The Desire to Integrate	229
5.2 The Need to Integrate	231
5.2.1 Legal Processes: A Contribution to Integrated Conflict Resolution.....	232
5.2.2 Mediation Process: A Contribution to Integrated Conflict Resolution	235
5.3 A Novel Platform for Service Synergy.....	238
5.4 An Absence of Integration	240
5.5 Evaluating Service Integration Initiatives	242
5.6 Barriers to the Attainment of Service Synergy.....	244
5.6.1 Differences in Service Accessibility	244
5.6.2 Access to Services Within a Timely Fashion	248
5.7 Increasing Integration	255
5.7.1 Additional Resources	255
5.7.2 Introduction of Guidelines and Underlying Principles.....	258
5.7.3 The Introduction of a Public Legal Education Campaign.....	259
5.7.4 Improved Service Provider Training.....	265
5.7.5 Improving Case Management & IT Services	274
5.7.6 Pilot the Provision of Legal Advice for FMS Clients	276
5.8 Conclusion.....	280
<i>Chapter 6 Conclusion</i>	<i>281</i>
6. Introduction	281
6.1 A System Under Strain.....	282
6.2 Existing Efforts and Emerging Gaps: Reforming Family Law Dispute Resolution in Ireland.....	283
6.3 Justifying the Method, Revealing the System: A Thematic Synthesis of the Client Experience.....	284

6.4 Strengthening the Client Experience Through Reform	286
6.5 Supporting Change: Targeted Reforms to Strengthen the Family Law Framework.....	289
6.6 Concluding Reflections	290
<i>Bibliography</i>	292
<i>Appendices</i>	332

Declaration

This is to certify that the work I am submitting is my own and has not been submitted for another degree, either at University College Cork or elsewhere. All external references and sources are clearly acknowledged and identified within the contents. I have read and understood the regulations of University College Cork concerning plagiarism and intellectual property.

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Abstract

This thesis critically explores the journey of judicial separation or divorce among clients of the Legal Aid Board (LAB) and Family Mediations Service (FMS), along with ascertaining how legal and mediation professionals employed by these services understand and describe their clients journey. Employing a socio-legal methodological framework, and drawing on interviews with clients, solicitors, and mediators, as well as a quantitative analysis of service data from the LAB and Family Mediation Service (FMS), the findings highlight persistent systemic issues despite ongoing reform efforts. Three central themes emerge: access to justice, autonomy, and the integration of mediation and legal services. The research illustrates how access to justice now encompasses both legal and non-legal supports, while party autonomy is increasingly shaped by the procedural design of dispute resolution processes. Integration, meanwhile, is shown to require more than physical co-location. Rather, true synergy demands coordinated delivery and shared professional ethos across services. In this context, the thesis proposes a number of evidence-based reforms. It calls for a systemic, coordinated approach to reform that aligns with emerging legislative frameworks and the evolving needs of service users. In doing so, it aims to enhance the accessibility, efficiency, and client experience of dispute resolution in cases of separation or divorce in Ireland.

List of Abbreviations

ADR	Alternative Dispute Resolution
AI	All-Issues Mediation
CB	Court-Based Mediation Cases Conducted by the Family Mediation Service
CTS	Case Tracking System for the Family Mediation Service
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EOS	EOS Case Tracking System of the Irish Legal Aid Board
FLAC	Free Legal Advice Centres
FMS	Family Mediation Service
HRC	Human Rights Commission
IRC EPS	Irish Research Council (renamed Research Ireland) Enterprise Partnership Scheme
LAB	Irish Legal Aid Board
LAB/FMS	The Irish Legal Aid Board inclusive of the Family Mediation Service
LRC	Law Reform Commission
MABS	Money Advice & Budgeting Service
PLE	Public legal education
RP	Family Mediation Cases on Referral from Legal Aid Board Law Centres
UCC SREC	University College Cork Social Research Ethics Committee
UNDP	United Nations Development Programme

Table of Cases

<i>Airey v Ireland</i> [1979] App No 6289/73
<i>AK v JK</i> [2009] 1 IR 814
<i>BD v JD</i> Unreported High Court 5 December 2003
<i>CC v NC</i> [2016] IECA 410
<i>DT v CT</i> [2002] 3 IR 334
<i>Fleming v Ireland</i> [2013] IEHC 2
<i>Fleming v Ireland</i> [2013] IESC 19
<i>H'D v P'D</i> [1978] WJSC-SC 1144 (unreported)
<i>JD v DD</i> [1997] 3 IR 64
<i>KC v TC</i> [2019] IEHC 198
<i>Kennedy v Ireland</i> [1987] IR 587
<i>LM v M</i> [1994] 2 Fam LJ 60 (SC)
<i>Marie O'Donoghue v Legal Aid Board</i> [2004] IESC 413
<i>McGee v The Attorney General</i> [1974] IR 284
<i>MK v JP</i> [2001] 3 IR 371
<i>Murray and Murray v Ireland</i> [1985] IR 532
<i>Norris v Attorney General</i> [1984] IR 36
<i>O'T v B</i> [1998] 2 IR 321
<i>QR v ST</i> [2016] IECA 421
<i>Ryan v Attorney General</i> [1965] IR 294
<i>SMcM v MMcM</i> [2006] IEHC 451
<i>State (C) v Frawley</i> [1976] IR 365
<i>TD v Minister for Education</i> [2001] 4 IR 259
<i>The State (Healy) v Donoghue</i> [1976] IR 325
<i>T v L</i> [2015] IECA 363
<i>Ward of Court (withholding medical treatment) No. 2</i> [1996] 2 IR 79
<i>WA v MA</i> [2005] 1 IR 1
<i>YG v NG</i> [2011] 3 IR 717
<i>Zimmermann v Switzerland</i> [1983] App No. 8737/79

Table of Legislation

Assisted Decision-Making (Capacity) Act 2015
Child Care Act, 1991
Children and Family Relationships Act 2015
Civil Law (Miscellaneous Provisions) Act, 2008
Civil Law (Miscellaneous Provisions) Act, 2011
Civil Legal Aid Act, 1995
Civil Liability and Courts Act 2004
Constitution of Ireland 1937
Courts and Civil Law (Miscellaneous Provisions) Act 2013
Criminal Justice (Legal Aid) Act 1962
Family Courts Act 2024
Family Law Act, 1995
Family Law Act 2019
Family Law (Divorce) Act, 1996
Family Law (Maintenance of Spouses and Children) Act, 1976
Family Support Agency Act, 2001
Fifteenth Amendment of the Constitution Act, 1995
Guardianship of Infants Act, 1964
Judicial Separation and Family Law Reform Act, 1989
Legal Aid, Sentencing and Punishment of Offenders Act 2012
Marriage of Lunatics Act, 1811
Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870
Mediation Act 2017
National Minimum Wage Act, 2000
Thirty-first Amendment of the Constitution (Children) Act 2012

Chapter 1: Introduction

1. Introduction

Historically, the influence of the Catholic Church in Ireland deterred the introduction of remedies addressing relationship breakdown in a family law context.¹ Article 41.3.2 of the 1937 Constitution of Ireland (prior to amendment in 1995) provided that ‘no law shall be enacted providing for the grant of a dissolution of marriage.’² Thus, the introduction of divorce was expressly prohibited, viewed as an ‘attack’ on the constitutionally defined family.³ As a consequence, the sole remedies available in Ireland until 1989 were an annulment,⁴ or divorce *a mensa et thoro*,⁵ both challenging to secure, forcing many to remain in what were ‘effectively dead or abusive relationships.’⁶ Reform has been slowly introduced in a relatively ad hoc manner over the past number of decades, as a result of the influence of the Catholic Church, conservative social norms, and a political reluctance to propose divisive reforms.⁷ As a consequence, divorce and the resolution of marital breakdown in Ireland has proved a far more challenging legal process than that experienced by a large majority of other western countries.⁸ More recently, however, the landscape of regulating marital

¹ Louise Crowley, ‘Irish divorce law in a social policy vacuum – from the unspoken to the unknown’ (2011) 33(3) *Journal of Social Welfare and Family Law* 227. Crowley highlights the prevalence of the Catholic Church’s teachings/ethos throughout the Irish Constitution and how many articles are ultimately premised on the authority of the Holy Trinity.

² Art 41.3.2 of the Constitution of Ireland, prior to the Fifteenth Amendment of the Constitution Act, 1995.

³ Art 41.1.1 of the Constitution of Ireland, specifies that ‘[t]he State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.’

⁴ Section 2(1) of the Family Law Act, 1995. A decree of nullity is defined as ‘a decree granted by a court declaring a marriage to be null and void.’ As an annulment recognises that the unity of marriage was never present to begin with, the parties are permitted to remarry.

⁵ Law Reform Commission, *Report on Divorce A Mensa Et Thoro and Related Matters Ireland* (LRC 8 – 1983). The divorce *a mensa et thoro* was inherited from the Ecclesiastical Courts and was therefore in existence prior to the drafting of the 1937 Constitution. While a divorce *a mensa et thoro* was a relationship breakdown remedy, if granted this decree was a divorce ‘from bed and board’, simply removing the obligation to cohabit with the spouse. While this remedy was available, the process of applying for the decree was identified as being very costly and complex. Following the implementation of s. 9 of the Judicial Separation and Family Law Reform Act, 1989 this remedy was abolished. See also: William Duncan, ‘Desertion and Cruelty in Irish Matrimonial Law’ (1972) 7(2) *Irish Jurist* 213.

⁶ Crowley (n 1) at page 228.

⁷ These factors will be considered in Chapter 4 as the introduction of marital breakdown remedies are discussed.

⁸ Kathleen Dillon, ‘Divorce and Remarriage as Human Rights: The Irish Constitution and the European Convention on Human Rights at Odds in *Johnston v. Ireland*’ (1989) 22(1) *Cornell International Law Journal* 63.

breakdown in Ireland has undergone a rapid period of development. Against this backdrop, this thesis empirically investigates the resolution of marital breakdown disputes via mediation and court-based litigation with a particular focus on the client experience. In order to provide a foundation from which to explore this central research question, this introductory chapter will frame the discussion through a consideration of: (i) the evidential necessity for reform within the Irish family law landscape; (ii) the establishment of structures providing for dispute resolution mechanisms; (iii) access to both legal support and mediation services; and (iv) persistent issues within the family law system. Having contextualised the phenomenon, an overview of the research site and outline of the subsequent chapters in the thesis is provided.

1.1 The Necessity for Change: A Call for Reform

While the absence of sufficient relationship breakdown remedies was considered by the Irish State on a number of occasions,⁹ of seminal influence in creating an impetus for change was the *Report of the Joint Committee on Marriage Breakdown*, published in 1985.¹⁰ The Report acknowledged ‘that the present law does not provide adequate protection for those persons whose marriages do not remain viable and that this, in itself, is a threat to marriage.’¹¹ In justifying the need for reform, the Report highlighted: (i) that children from subsequent relationships were viewed as ‘illegitimate’;¹² (ii) the lack of legal protection for parties in second relationships;¹³ (iii) the detrimental effects on both the parties and their children, when forced to remain in a broken marriage;¹⁴ and (iv) that while many individuals informally separate through constructing their own arrangements, there is a cohort who cannot reach an agreement on the terms of their separation and require a formal procedure to

⁹ Informal Committee on the Constitution, *Report of the committee on the constitution* (Dublin, 1967) as cited in Brian Girvin, ‘Lemass’s brainchild’: the 1966 Informal Committee on the Constitution and change in Ireland, 1965-73’ (2013) 38(151) Cambridge University Press 406. See also: LRC (n 5).

¹⁰ Joint Committee on Marriage Breakdown, *Report of the Joint Committee on Marriage Breakdown* (Dublin: Stationary Office 1985).

¹¹ *ibid* at paragraph 1.1.

¹² *ibid* at paragraph 5.2.

¹³ *ibid* at paragraph 5.2.

¹⁴ *ibid* at paragraph 5.4.

determine the outcome.¹⁵ In recognising the inadequacy of the legal landscape, the Report recommended that a referendum be held to determine whether or not the Oireachtas should be enabled to introduce divorce legislation.¹⁶ This recommendation arguably reflected the shortcomings of the framework in place at the time, given that the Committee in its conservative approach was tasked with ‘consider[ing] the protection of marriage and of family life...’¹⁷ The Report proved influential, resulting in a referendum for change, as the Irish State sought to consider the introduction of divorce.

The differing campaigns for the 1986 Referendum proved to be divisive, with the anti-divorce campaign backed by the Roman Catholic Church and right wing groups, who used fearmongering and scare tactics ‘related to money, children, property and inheritance to argue that divorce would tear apart the fabric of Irish society.’¹⁸ Central to their approach was the selective use of research regarding the negative consequences of divorce for women and children, enabling them to draw narrow and inaccurate conclusions.¹⁹ In contrast, the pro-divorce campaign predominantly focused on the need for liberalisation and individual rights, overlooking many of the substantive issues associated with the remedies introduction that had yet to be addressed.²⁰ On the 26th of June 1986 the referendum was held, but despite the preliminary polls indicating a preference for the amendment of Article 41 to introduce divorce, ultimately the referendum failed to pass, further perpetuating this unmet legal and societal need.²¹ The results of the referendum (63% to 37% majority in favour of retaining the terms of Article 41.3.2) were later attributed to a failure to adequately consider the outcomes of enabling divorce in terms of its economic consequences, particularly in relation to the financially dependent spouse.²² Arguably, this result illustrates the critical role of the government in guiding well informed decision

¹⁵ *ibid* at paragraph 5.5.

¹⁶ *ibid* at paragraph 7.8.29.

¹⁷ *ibid* at page vii.

¹⁸ Jenny Burley and Francis Regan, ‘Divorce in Ireland: The Fear, the Floodgates and the Reality’ (2002) 16(2) *International Journal of Law, Policy, and the Family* 202 at page 202. See also: Christine James, ‘Cead Mile Failte: Ireland Welcomes Divorce: The 1995 Irish Divorce Referendum and the Family (Divorce) Act of 1996’ (1997) 8(1) *Duke Journal of Comparative and International Law* 175.

¹⁹ Burley and Regan (n 18).

²⁰ Michele Dillon, *Debating Divorce: Moral Conflict in Ireland* (University Press of Kentucky 1993).

²¹ Burley and Regan (n 18).

²² Crowley (n 1)

making, as Crowley notes that ‘questions in respect of divorce and its financial consequences merely served to bolster the position of the anti-amendment lobby, and ultimately contribute to the defeat of the referendum.’²³ The role of the government in providing information, both historically and in contemporary times, will be discussed throughout this thesis.

1.2 A New Era: The Beginning of Reform

Though fear of both challenging Catholic teachings and the severing of the marital bond dissuaded Irish voters from voting in favour of the introduction of divorce, the issues associated with marital breakdown and the absence of associated remedies persisted and exacerbated in the years following the 1986 referendum.²⁴ Reform in this area, however, was brought about shortly thereafter by virtue of the enactment of the Judicial Separation and Family Law Reform Act, 1989 (hereafter the ‘1989 Act’). Introduced as a Private Members Bill (discussed further in Chapter 4), it is arguable that this procedure, relying upon a proposal from the opposition, demonstrates the failure of the government in situ to address many of the challenges that remained following the 1986 referendum. The enactment of the 1989 Act was described by Shatter as a ‘watershed in Irish family law’.²⁵ In granting a decree of judicial separation, albeit not permitting the parties to remarry, the courts now had a significantly increased scope to provide for one or both parties, with a wider array of ancillary relief now available.²⁶ While there are numerous grounds for obtaining the remedy,²⁷ the decree will only be granted where the court is satisfied that such provision has been made or intends to be made for the spouses and children to the relationship.²⁸ Such provision was to be ‘adequate and reasonable having regard to all

²³ Crowley (n 1) at page 230.

²⁴ This is to the exclusion of the ‘illegitimate’ child which was abolished as a concept in 1987 through the enactment of s. 44 of the Status of Children Act, 1987.

²⁵ Alan Shatter, *Family Law* (4th edn, Butterworths 1997) at page 383.

²⁶ Some of the most notable orders included exclusion orders, property adjustment orders, along with lump sum orders. The key provisions contained within Part 2 of the Judicial Separation and Family Law Reform Act, 1989 that regard ancillary relief have since been repealed and are now present in Part 2 of the Family Law Act, 1995.

²⁷ Section 2 of the Judicial Separation and Family Law Reform Act, 1989 (as enacted).

²⁸ Section 3 of the 1989 Act (as amended).

the circumstances of the case.’²⁹ In light of these requirements, a court order is necessary in all instances of judicial separation (and later divorce).

Though addressing a lacuna in the family law landscape, obtaining a judicial separation was not without challenge, one of which was that the cost put it beyond the reach of many.³⁰ Secondly, an order of judicial separation can be granted on fault or no fault grounds, however, the no-fault based options mandate the applicant to fulfil a statutory period of separation.³¹ In terms of the fault based grounds, the evidential requirement to demonstrate fault is not a trivial matter and can heighten animosity between the parties.³² Given the availability of fault based grounds, where relied upon, it can be argued that the process of obtaining this remedy in part encouraged an adversarial approach. Although imperfect, the 1989 Act marked a significant turning point in Irish family law, with the State acknowledging its obligation to support families where the relationship is irretrievably broken down. Highlighting its impact in addressing a shortcoming of the legal framework, the reported number of ‘separated’ individuals dramatically increased from 37,245 in 1986³³ to 55,143 by 1991.³⁴ However, this apparent exponential growth may be impacted by the 1986 census failing to accurately capture the number of separated individuals in the State at the time.³⁵

With a growing acceptance of legal separation in Irish society, Article 41.3.2 became the subject of increased attention with the publication of the *White Paper on Marital*

²⁹ Section 20(1) of the 1989 Act (as enacted). Following the enactment of the Family Law Act, 1995 s. 20 of the 1989 Act was repealed and the corresponding provision is now contained in s. 16 of the Family Law Act, 1995. Section 52(h) of the Family Law (Divorce) Act 1996 amended s. 16(1) of the Family Law Act, 1995 Act to alter the wording from ‘adequate and reasonable’ to ‘proper’ aligning it with the requirement of divorce.

³⁰ Burley and Regan (n 18).

³¹ Section 2 of the 1989 Act (as enacted). When the 1989 Act was enacted, it set out six grounds upon which a judicial separation could be sought: (i) adultery; (ii) such behaviour on behalf of one spouse that the other spouse would not reasonably be expected to live with them; (iii) desertion for a continuous period of at least one year; (iv) that the spouses have lived apart for a continuous period of at least one year and there is consent for the granting of the decree; (v) that the spouses have lived apart for a continuous period of at least three years; (vi) the court is satisfied that normal marital relations have not existed between the spouses for a period of at least one year (a definition as to what constitutes as a normal marital relationship is not provided).

³² Lynne Kohm, ‘On Mutual Consent to Divorce: A Debate with Two Sides to the Story’ (2008) 8(1) *Appalachian Journal of Law* 35.

³³ Central Statistics Office, *Census 86* (CSO 86 - 1987).

³⁴ Central Statistics Office, *Census 91* (CSO 91- 1993).

³⁵ Louise Crowley and Marianne Joyce, *Family Law* (2nd edn, Round Hall 2023) at page 621.

Breakdown: A Review and Proposed Changes by the Department of Justice in 1992.³⁶ The White Paper outlined that ‘The government proposes to have a referendum on divorce after a full debate on the complex issues involved...’³⁷ and it proposed a number of options for the amendment of the 1937 Constitution in order to introduce divorce.³⁸ The White Paper also presented a draft of the proposed Family Law (Divorce) Bill, a critical move by the Government to address the shortcomings of the previous referendum. The Bill was a deliberate effort to inform the voting public of the manner in which divorce would be introduced, outlining proposed spousal rights and judicial powers, and in turn address the anti-divorce lobby claims concerning the potential impoverishment of women in particular. While these informative steps were taken, Coulter notes that the no-campaign was well constructed and resourced.³⁹ Similar to the 1986 referendum, their opposition primarily related to: (i) money, (ii) children, (iii) property, (iv) inheritance, and (v) the Irish ethos as a Catholic State.⁴⁰ Their campaign targeted people’s fear of the consequences of divorce, relying upon people’s limited knowledge and understanding. It’s most notable slogan constructed by Peter Scully ‘Hello Divorce, Goodbye Daddy’ insinuated that the introduction of divorce would lead husbands to abandon their families.⁴¹ The anti-divorce campaign also used emotional blackmail, as it responded to the advocacy for women to be free from their abusers by Women’s Aid, through querying whether the abuser should have the right to inflict this behaviour on a second wife.⁴² Despite the various attempts of the anti-divorce lobby, the White Paper and draft Family Law Bill provided the electorate with an insight into the envisaged new laws, thus affording them the opportunity to make a more informed decision at the ballot box.

³⁶ Department of Justice, *White Paper on Marital Breakdown: A Review and Proposed Changes* (DoJ 1992).

³⁷ *ibid* at paragraph 1.6.

³⁸ *ibid*. These grounds included: (i) grounds for divorce being a matter for the Oireachtas; (ii) an absence of normal marital relationship for 5 years; (iii) separation for 5 years; (iv) judicial separation or entitlement thereto plus a period of 2 years; and (v) irretrievable breakdown on proof of specified ‘fault’ and ‘no fault’ grounds.

³⁹ Carol Coulter, “‘Hello Divorce, Goodbye Daddy’: Women, Gender, and the Divorce Debate” in Anthony Bradley and Maryann Gialanella Valiulis (eds), *Gender and Sexuality in Modern Ireland* (University of Massachusetts Press/Amherst 1997).

⁴⁰ Burley and Regan (n 18). See also: James (n 18).

⁴¹ Coulter (n 39) at page 287.

⁴² *ibid* at page 289.

A second referendum took place on the 24th of November 1995 and passed with a majority of 9,114 votes, with 50.28% of the electorate being in favour of amending the 1937 Constitution to enable the introduction of divorce.⁴³ Two of the predominant reasons that have since been identified as contributing to the narrow margin, were fears for the financially dependent spouse along with the limitations of property division.⁴⁴ With the need to address such concerns, the Family Law (Divorce) Act, 1996 (hereafter the ‘1996 Act’) introduced divorce in a manner where marital ties can never be fully severed, given the on-going statutory capacity of a divorced spouse to seek additional financial relief.⁴⁵ The judiciary in determining whether or not to award the decree, is charged with ascertaining whether or not a undefined yet mandatory requirement of proper provision is made for both spouses and dependent children.⁴⁶ Thus, judges may grant one or more of a range of orders permitted, provided that it is in the interest of justice to do so.⁴⁷ While discussed at length in Chapter 4, the contract of marriage continues to have lifelong obligations (preventing the attainment of individual autonomy), with the outcome of divorce being determined by the judiciary in a discretionary manner meaning all circumstances can be provided for, but equally this regulatory approach can lead to inconsistencies and an absence of predictability.⁴⁸

1.3 Establishing a System for Accessible Remedies

With the legal framework in this jurisdiction requiring a court order to dissolve a marriage or secure a judicial separation, legal advice and/or representation plays an important role in enabling parties to navigate these disputes in a meaningful and informed manner.⁴⁹ However, for many years, those who lacked the necessary

⁴³ Kathryn O’Sullivan, ‘The legacy continues: ancillary relief on divorce in Ireland’ (2019) 25(3) Journal of Family Studies 337.

⁴⁴ *ibid.*

⁴⁵ Parties have a right to seek relevant orders at ‘any time thereafter’, along with the right to apply for a variation under s. 22 of the 1996 Act.

⁴⁶ Section 5(1)(c) of the 1996 Act. This Act also amended the Family Law Act, 1995 through altering the wording of s. 16(1) from ‘appropriate and reasonable’ to ‘proper’, aligning a judicial separation with the standards of a divorce.

⁴⁷ Section 20(5) of the 1996 Act.

⁴⁸ Louise Crowley, ‘Dividing the spoils on divorce: rule-based regulation versus discretionary-based decision’ (2012) International Family Law 388. See also: Roisin O’Shea, *Judicial Separation and Divorce in the Circuit Court* (PhD thesis, Waterford Institute of Technology 2014).

⁴⁹ Deirdre McGowan, ‘Reframing the Mediation Debate in Irish All-Issues Divorce Disputes: From Mediation vs. Litigation to Mediation and Litigation’ (2018) 40(2) Journal of Social Welfare and Family Law 181.

resources to pay for private representation were unable to access legal services. Reform in this area was slow despite persistent lobbying from Free Legal Advice Centres (hereafter 'FLAC') highlighting this unmet need.⁵⁰ Further contributing to the need for reform was the formation of the Pringle Committee,⁵¹ and the seminal case of *Airey v Ireland*,⁵² which are discussed in depth in Chapter 3. In response to these events, the Irish Legal Aid Board (hereafter the 'LAB') was established on the 21st of December 1979 to provide State funded legal services.

The LAB provides both legal aid and legal advice, supporting individuals in the resolution of their dispute. Section 25 of the Civil Legal Aid Act, 1995 (hereafter the '1995 Act') provides that legal advice constitutes 'any oral or written advice given by a solicitor of the Board or by a solicitor or barrister engaged by the Board for that purpose...' Section 27(1) of the Civil Legal Aid Act, 1995 defines legal aid as 'representation by a solicitor of the Board, or a solicitor or barrister engaged by the Board...' In proceeding to critically discuss the client's experience of pursuing a decree of judicial separation or divorce, the critical role of these services will be considered. However, it will also highlight how their limited availability represents a significant shortcoming in the Irish legal landscape.

1.4 Navigating State-Provided Legal Assistance

While constituting a government service, legal aid and legal advice is not available to all individuals involved in civil law matters. Rather, to qualify, an applicant must pass both a merits test and a means test. According to Denvir et al., this method of assessment reflects a demand-led approach, responding to individuals' needs rather than applying a uniform entitlement.⁵³ In satisfying the merits test for eligible matters,⁵⁴ the LAB must be satisfied that a person of average means (and thus assumed

⁵⁰ Free Legal Advice Centres, *Civil Legal Aid in Ireland: 40 Years On* (FLAC – 2009).

⁵¹ Committee on Civil Legal Aid and Advice, *Report to the Minister for Justice, Pringle Report* (Committee on Civil Legal Aid and Advice - 1977).

⁵² *Airey v Ireland* [1979] App No 6289/73.

⁵³ Catrina Denvir, Jacqueline Kinghan, Jessica Mant and Daniel Newman, *Legal Aid and the Future of Access to Justice* (Hart Publishing 2023).

⁵⁴ Section 28(9) of the Civil Legal Aid Act, 1995. Such matters excluded from legal aid involve disputes such as defamation, conveyancing, licensing etc.

able to afford private representation) would seek legal services for such a case and would be advised to pursue the case by their barrister or solicitor.⁵⁵ Additionally, it must be determined whether: (i) there are reasonable grounds for seeking recourse to the law; (ii) there is a reasonable chance of success; (iii) the legal route is an appropriate mechanism for resolution; and (iv) whether it satisfies a cost/benefit consideration.⁵⁶ A further primary determinant in securing legal aid and advice is the applicant's financial eligibility, assessed by way of a means test.⁵⁷ This test is determined on the basis of the applicant's financial position, supported by relevant documentation submitted by the applicant. Although currently under review,⁵⁸ the present threshold to qualify for civil legal aid and advice, is an annual disposable income of less than €18,000 and disposable assets of less than €100,000.⁵⁹ The operation of this means test will be discussed at length in this thesis as it has failed to stay abreast of societal developments and inflation. For example, the means test was last amended in 2006 for income and for capital assets in 2013.⁶⁰ At the time of amending the disposable income threshold, the minimum wage in Ireland was €7.65,⁶¹ whereas today it currently stands at €13.50.⁶² As a consequence, many people who cannot realistically pay for legal representation now fail the outdated test and are excluded from legal aid and advice (discussed further in Chapter 3). In light of these outdated thresholds, which prevent many from accessing justice, it is clear that the current legal aid review is long overdue. While it is unclear at present whether the means test will be altered, upon announcing the review, the then Minister for Justice Helen McEntee stated that 'The Review Group will make recommendations for its future, including in relation to eligibility.'⁶³ The question of whether, and in what way, eligibility is revised will be central to the future effectiveness of service delivery. Rhode's access-to-justice framework is a useful benchmark for assessments within

⁵⁵ *ibid* s. 24.

⁵⁶ *ibid* s. 28(2).

⁵⁷ *ibid* s. 29.

⁵⁸ Chief Justice's Working Group on Access to Justice, *Access to Justice Conference: Civil Legal Aid Review: An Opportunity with a view to developing a model system in Ireland* (Office of the Chief Justice 2023).

⁵⁹ Legal Aid Board, *Circular on Legal Services: A guide to decision making and best practice* (11th edn, LAB) at page 1-3.

⁶⁰ Dáil Debate, 12 December 2023, Vol. 1047 No. 4.

⁶¹ National Minimum Wage Act, 2000 (SI 203/2005), Order 2005.

⁶² National Minimum Wage Act, 2000 (SI 563/2024), Order 2024.

⁶³ Department of Justice, 'Minister announces review of Civil Legal Aid Scheme' (DoJ, 2 June 2022) <<https://www.gov.ie/en/department-of-justice-home-affairs-and-migration/press-releases/minister-announces-review-of-civil-legal-aid-scheme/>> accessed 9 June 2025.

this context.⁶⁴ She accepts that absolute equality to legal aid may be unattainable but insists that adequate access is achievable if: (i) low-income individuals receive fully subsidised, competent legal aid; (ii) middle-income individuals can obtain affordable legal services and effective informal dispute resolution options; and (iv) all parties have timely, fair, and cost-effective adjudication when informal avenues fail.⁶⁵ Most scholars agree that some form of eligibility screening is therefore necessary.⁶⁶ In line with this, the Irish State was recommended to implement a means test by the European Commission on Human Rights (discussed further in Chapter 3). The key question is how that screening is to be designed. FLAC in describing the current system in Ireland notes that ‘The imposition of such financial requirements on applicants of civil legal aid means that effectively only “paupers and millionaires” can engage with the Irish Courts system.’⁶⁷ Updating the means test is therefore essential to move from today’s exclusionary system toward the adequate access Rhode envisages.

For most individuals, legal aid and advice is not an entirely free service, rather those deemed eligible will be required to pay a contribution towards the costs of the service received, calculated ‘by deducting the allowances from the gross income.’⁶⁸ In consideration of the prescribed allowances, where the disposable income is equal to or less than €11,500, the minimum contribution of €30 for legal advice and €130 for legal aid applies.⁶⁹ Where above this threshold, €11,500 will be deducted from the party’s disposable income figure with the result used to calculate the contribution payable. With regards to legal advice, the contribution is 10% of the result calculated, however, there is a cap of €150. For legal aid, the contribution is 25% of the result calculated plus a further €130.⁷⁰ Though operating as the general procedure, ‘The Board may

⁶⁴ Deborah Rhode, ‘Access to Justice: Connecting Principles to Practice’ (2004) 17(3) *Georgetown Journal of Legal Ethics* 369.

⁶⁵ *ibid.*

⁶⁶ Laura Abel, ‘Designing Access: Using Institutional Design to Improve Decision Making about the Distribution of Free Civil Legal Aid’ (2013) 7(1) *Harvard Law & Policy Review* 61; Anzelika Baneviciene, ‘Eligibility Criteria for Legal Aid: Comparative Analysis’ (2019) 16(3) *US-China Law Review* 83. See also: Council of Europe, *The Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law* (CoE 2021). Ensuring the feasibility of the scheme is central to the justification for these eligibility requirements.

⁶⁷ Free Legal Advice Centres, *FLAC Submission to the Joint Oireachtas Committee on Justice and Equality: Access to Justice & Costs* (FLAC 2019) at page 20.

⁶⁸ Legal Aid Board, *Administrative Procedures Handbook* (13th edn, LAB) at page 4-11. See also: s. 29 of the 1995 Act.

⁶⁹ LAB (n 68) at page 4-11. This figure of €130 for legal aid is not in addition to the legal advice contribution that would have been paid rather it is a total of €130 for legal aid and advice.

⁷⁰ *ibid.*

waive a contribution or accept a lower contribution...'⁷¹ if payment would result in undue hardship for the applicant.⁷² Furthermore, there is an additional caveat for client contributions, where a case necessitates increased LAB resources e.g. counsel, expert witnesses, reports etc., 'The actual contribution is the cost to the Board of providing legal services in the particular case, subject to the maximum contribution.'⁷³ For Circuit Court judicial separation and divorce cases the LAB specifies that the maximum contribution is capped at €5,000.⁷⁴ It is only once these requirements are satisfied that clients will receive the supports necessary to aid in the resolution of their dispute.

1.5 An Expansion of the Legal Aid Boards Dispute Resolution Services

Though legal services are the foundation of the LAB, since 2011, the LAB also offers mediation services through the Family Mediation Service (hereafter the 'FMS') as an additional dispute resolution mechanism. Wilson notes that while many models of mediation exist, some of the most notable include: (i) facilitative; (ii) evaluative; and (iii) transformative.⁷⁵ Although describing them as models, Wilson further notes that some commentators refer to them as styles, with others using the terminology of model/style synonymously.⁷⁶ A detailed discussion of each model is outside the scope of this introductory chapter, however, Chapter 4 critically examines the facilitative and evaluative models, noting they are not necessarily mutually exclusive, rather it may be more accurate to consider them as presenting on either ends of a spectrum. While various definitions exist, in Ireland, s. 2 of the Mediation Act 2017 (hereafter the '2017 Act') defines mediation as 'a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute.'⁷⁷ The 2017 Act also recognises the

⁷¹ *ibid* page 5-21.

⁷² *ibid* page 5-25. Specified in the Handbook is that 'In considering whether undue hardship is caused, regard should be had to the circumstances of the majority of the Board's clients who pay the appropriate contribution.'

⁷³ *ibid* at page 4-11.

⁷⁴ *ibid*.

⁷⁵ Barbara Wilson, 'Models, styles and third parties: a fresh look at three core concepts in family mediation' in Marian Roberts and Maria Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020).

⁷⁶ *ibid*.

⁷⁷ Section 2 of the 2017 Act.

evaluative approach in s. 8(4) which provides that ‘The mediator may, at the request of all the parties, make proposals to resolve the dispute, but it shall be for the parties to determine whether to accept such proposals.’ The Act’s acknowledgment of both a facilitative and evaluative approach is to be welcomed, as the importance of a client-centred design will be discussed on an on-going basis throughout this thesis. Furthermore, in the ensuing chapters, the impact of the model adopted in service delivery will be considered with regards to the client experience.

In enabling parties to resolve their disputes, the FMS currently offers two models of mediation. Court-based mediation is available primarily for custody, access, guardianship, and maintenance disputes.⁷⁸ This model of mediation is a District Court initiative and therefore currently operates in a lower jurisdiction to those for judicial separation and divorce, however, this may change following the enactment and pending implementation of the Family Courts Act 2024 which is discussed in full in Chapter 5 of this thesis.⁷⁹ Alternatively, the FMS offers what is termed the ‘all-issues model’ of mediation. In describing this model, the FMS notes that the issues negotiated are couple specific, but commonly included in the final mediated agreement are ‘finances, maintenance, family home, other property, insurances, pensions, succession, parenting arrangements, and Guardianship.’⁸⁰ Although parties may negotiate the matters relevant to their dispute, for certain issues a court order may be required to give effect to the terms settled, as will be discussed in the forthcoming chapters. While these services operate under the remit of the LAB, in contrast to the eligibility requirements for legal aid and advice, mediation is offered by the FMS as a free service without a means or merits test. This distinction is not trivial and will be discussed in depth in Chapter 5. The expansion of the LAB’s scope in this manner is welcomed as it indicates an increased willingness to support individuals in a manner that accounts for their individual needs and circumstances, a marked departure from the historical approach to Irish family law disputes.

⁷⁸ Legal Aid Board, ‘Court-based Mediation’ <<https://www.legalaidboard.ie/en/our-services/family-mediation/court-based-mediation/>> accessed 1 May 2024.

⁷⁹ Section 38 of the 1996 Act and s. 31 of the 1989 Act (as amended). Both the High Court and Circuit Court have concurrent jurisdiction with regards to judicial separation and divorce.

⁸⁰ Legal Aid Board, *Family Mediation Procedures Handbook* (3rd edn, LAB 2023) at page 1-7.

1.6 Enduring Issues in the Family Law System

The Irish family law system has faced ongoing criticism for its failure to reform the processes for obtaining remedies sought, which in turn places additional burdens on service provision which is already overstretched.⁸¹ It has been repeatedly highlighted that the family court system is inefficient and overburdened, making it difficult to properly support those before it.⁸² In the 1996 LRC *Report on the Family Courts*, it was noted that:

The courts are buckling under the pressure of business. Long family law lists, delays, brief hearings, inadequate facilities and over-hasty settlements are too often the order of the day. At the same time too many cases are coming before the courts which are unripe for hearing, or in which earlier non-legal intervention might have led to agreement and the avoidance of courtroom conflict.⁸³

This Report ultimately described the family court system as ‘struggling and barely managing to cope...’⁸⁴ Demonstrating the continued relevance of this criticism, the more recent 2019 *Report on Reform of the Family Law System* carried out by the Joint Oireachtas Committee on Justice and Equality noted ‘The inadequacy of the physical conditions of the courts in which family law proceedings are held is an issue that has been consistently highlighted since the Law Reform Commission’s 1996 publication.’⁸⁵ With regards to the issue of delays, the 2019 Report highlighted that:

The consistent under-resourcing of the family law system has resulted in long delays in many parts of the country - an issue

⁸¹ Kathryn O’Sullivan, ‘Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities’ (2016) 36(1) *Legal Studies* 111; Louise Crowley, ‘Sheltering the Homemaker in Irish Family Law: Ireland’s Failure to Evolve with the Shifting Social and Family Norms Ireland’ (2018) 2018(1) *International Survey of Family Law* 271; Joint Committee on Justice and Equality, *Report on Reform of the Family Law System* (JAE 2019); Joint Committee on Justice and Equality Debate 13 March 2019; Department of Justice, *Family Justice Strategy 2022-2025* (DoJ 2022).

⁸² Law Reform Commission, *Consultation Paper on Family Courts* (LRC CP – 1994) at paragraph 7.02.

⁸³ Law Reform Commission, *Report on Family Courts* (LRC 52 – 1996).

⁸⁴ *ibid* at page ii.

⁸⁵ JAE (n 81) at page 23.

that was first raised in the LRC's 1994 Consultation Paper and that has not abated since its publication with the volume of family law applications continuing to place a burden on the existing court system.⁸⁶

In terms of the substantive law governing judicial separation and divorce, a further concern within the Irish system relates to the vast discretion afforded to the judiciary in the resolution of these cases. The 1996 *Report on the Family Courts* discussed the 'pressing need for research into the manner in which the courts exercise the very considerable discretion which they enjoy in several areas of family law.'⁸⁷ The call to explore this issue in depth was overtaken by direct criticism, as in the 2019 Report where Nuala Jackson SC (as she was then) noted how:

the unfettered discretion of judges results in a considerable variation of approach and outcome. It is difficult to identify any pattern, with outcomes depending on the personal views and disposition of a judge. We need formulas that quantify maintenance and guidelines for all other matters.⁸⁸

While these criticisms highlight the limited scope and reach of the reforms introduced, it is arguable that the Irish family law system is currently experiencing a renewed positive period of development, with the introduction of a series of enactments relevant to these disputes, namely: (i) the Mediation Act 2017; (ii) the Family Law Act 2019; and (iii) the Family Courts Act 2024. Though these statutes will be examined in detail throughout this thesis, collectively they aim to resolve marital disputes in a less adversarial manner, enhance the accessibility of remedies, and establish structures/procedures capable of delivering those remedies in an apt fashion. These objectives reflect a renewed effort by the State to resolve marital disputes in a more amicable and client-centred manner, an approach that is long overdue.

⁸⁶ JAE (n 81) at page 21.

⁸⁷ LRC (n 83) at paragraph 12.13.

⁸⁸ JAE (n 81) at page 92.

1.7 Family Law in Transition: Empirical Insights into Ireland's Evolving Legal Landscape

Whilst it is recognised that the current regulatory approach to marital breakdown has many shortcomings, empirical evidence on the lived experience of the process of securing a decree of separation or divorce in Ireland is virtually non-existent.⁸⁹ Against this backdrop, this thesis seeks to critically explore the experiences of separation and divorce among clients of the Legal Aid Board and Family Mediation Service, and how legal and mediation professionals operating within these services understand and describe their client's experience.⁹⁰ In doing so, it provides empirical insights into the lived experience of marital breakdown dispute resolution and offers a platform for evidence-based reform. This approach, which will be discussed further in Chapter 2, constitutes a human-centred design whereby the reforms are premised on the insights of those directly involved in the system.⁹¹

This research emerged following an invitation from the LAB's Research Committee to the University College Cork (hereafter 'UCC') School of Law, to explore its dispute resolution mechanisms and the client experience. The project was formalised and supported through the Irish Research Council's (newly named 'Research Ireland') Enterprise Partnership Scheme. As the State's largest provider of family law services, the LAB maintains extensive case management systems and employs a wide network of practitioners, making it a highly appropriate site for examining the intersection of law, policy, and the lived experience. Given the constraints of the *in camera* rule,

⁸⁹ Lucy-Ann Buckley, 'Irish matrimonial property division in practice: a case study' (2007) 21(1) *International Journal of Law, Policy and the Family* 48. Buckley analysed data pertaining to 89 divorce, separation and judicial separation cases. Considering both State provided and private services, Buckley's primary consideration was on the type of orders and agreements made. See also: O'Shea (n 48). O'Shea observed and analysed 1'087 Irish Circuit Court cases, along with conducting comparative research pertaining to other international legal jurisdictions. While the present research differs in many respects to these empirical studies, one notable aspect is this studies confinement to the services of the Irish Legal Aid Board & Family Mediation Service.

⁹⁰ Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010); Connie Healy, 'Dispute Resolution through Collaborative Practice: A Comparative Analysis' (2015) 27(2) *Child and Family Law Quarterly* 173; Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Socio-legal Studies 2017). While this thesis focuses primarily on litigation and mediation, it is acknowledged that a range of alternative family dispute resolution mechanisms exist. For a comprehensive discussion of these alternatives, readers are directed to the resources provided.

⁹¹ Margaret Hagan, 'A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Interventions to Make Courts User-Friendly' (2018) 6(2) *Indiana Journal of Law and Social Equality* 199.

discussed further in Chapter 2, the LAB's cooperation was instrumental in enabling empirical research into this sensitive area. Although the study does not directly capture private practice data, the LAB's central role in the provision of family law services in the State makes it a highly suitable site for ascertaining the lived experience of marital breakdown both directly (via those seeking marital breakdown remedies) and indirectly (via those providing legal and mediation services). The findings, while rooted in the public system, generate evidence-based recommendations with wider relevance across both public and private family law contexts.

Having established this empirical foundation, the structure of the thesis proceeds as follows. Chapter 2 provides a detailed overview of the methodological approach adopted. Issues such as ethical considerations and the approach to data analysis are discussed. Three themes, resulting from the data analysis and central to the research questions, will be explored in depth in the chapters which follow: (i) access to justice; (ii) autonomy; and (iii) service synergy. These themes are investigated through the lens of both the quantitative and qualitative analyses described in Chapter 2, ensuring a holistic exploration of the topics.

Chapter 3 explores the evolution of the statutory framework governing civil legal aid and mediation, and the challenges associated with service accessibility and judicial intervention. Through an exploration of the theme of access to justice, the role of legal aid and mediation in supporting the resolution of marital disputes will be considered, highlighting barriers to justice and evaluating the effectiveness of existing support structures. Drawing on the empirical data, potential reforms to the law in this area will be explored through an access to justice lens, focusing on the experiences of clients of the LAB and FMS.

The theme of autonomy, as a perceived core objective of the Irish family law framework will then be considered. In doing so, Chapter 4 traces the development of autonomy within Irish family law, analysing its intersection with mediation and legal representation. It critically assesses whether mediation serves to enhance autonomy or simply introduces new constraints, particularly in respect of the enforcement of mediation settlements and the attainment of enforceable marital breakdown remedies. Within the marital context, the chapter concludes with a discussion of the suitability

of both liberalistic and relational perspectives of autonomy in accounting for the family unit as a whole.

In addition to examining how ‘justice’ is defined and delivered within Irish family law, this study adopts a comprehensive approach as it considers the integration of legal aid and mediation services. Chapter 5 investigates the extent of collaboration between the LAB and FMS, identifying systemic barriers to service synergy (the final theme to be explored). It evaluates initiatives aimed at improving integration, including co-location models, resource allocation, case management strategies, and public legal education campaigns, providing an evidence-base for suggested reforms. Appropriate integration of these services may not only enhance service delivery but also facilitate the achievement of justice in a holistic sense, ensuring that outcomes are not only legally sound but also accessible, timely, and responsive to the broader needs of individuals and families.

The concluding chapter, Chapter 6, illustrates that the findings of this thesis are timely as the landscape of Irish family law is currently undergoing significant transformation, driven by legislative reforms and evolving societal needs. This thesis therefore contributes to the advancement of the critical issues of access to justice, autonomy, and service integration as key goals within the Irish legal framework by providing empirical insights into the lived experiences of LAB and FMS clients navigating the family law system. In illustrating the seminal reforms proposed throughout this thesis, Chapter 6 provides a concise overview, highlighting the capacity of this research to inform future policy developments and enhance the effectiveness of dispute resolution mechanisms.

Chapter 2: Methodology

2. Introduction

This chapter details the methodology employed in this thesis which investigates the dispute resolution journey of clients who utilise the Irish Legal Aid Board dispute resolution services (namely, mediation and litigation), informed by the actors involved (clients, solicitors, and mediators). It commences with a discussion of the research objectives in order to contextualise and justify the chosen design. The chapter then outlines both the quantitative and qualitative methods employed, including the approach taken to data collection and analysis. Further to discussing the empirical design, the ethical considerations which arose during the course of the research will also be explored. Having highlighted the strengths of the methodological approach, the chapter concludes with a discussion of the limitations encountered in its implementation.

2.1 Statement of Research Objectives

The primary objective of this research is to critically explore the client experience of mediation and court-based litigation when seeking a judicial separation or divorce. Given the importance of the client's lived experience, and the nature of the research question(s), it was determined that the most meaningful insights could be extrapolated from a critical exploration of the client's journey through the Irish Legal Aid Board's dispute resolution processes (litigation and/or mediation) from multiple perspectives (clients, solicitors, and mediators). To comprehensively explore this journey, a mixed-methods approach was identified as most appropriate. In implementing mixed-methods, which is discussed later in this chapter, Creswell and Plano Clark note that there are both quantitative and qualitative research questions, which 'typically include a central question and several subquestions.'⁹²

⁹² John Creswell and Vicki Plano Clark, *Designing and Conducting Mixed Methods Research* (3rd edn, Sage 2018) at page 163.

2.1.1 Research Questions (Quantitative Phase)

The central research objective for the quantitative phase was to ascertain and consider various performance metrics of the Irish Legal Aid Board & Family Mediation Service, establishing an evidence-base upon which to compare and consider the dispute resolution processes and their capacity to provide timely and desired outcomes for their clients. Smith sub-questions were developed to achieve this research objective:

1. What is the annual FMS & LAB separation and divorce caseload?
2. How many separation and divorce cases are concluded annually by way of FMS & LAB services?
3. What is the average wait time in order to avail of mediation and legal services with the FMS & LAB?
4. What is the average case duration in separation and divorce cases with the LAB and FMS?
5. What is the number of separation and divorce cases referred from the LAB to the FMS annually?
6. How do separation and divorce cases proceed following the construction of a mediation agreement with the FMS?

Through a critical exploration of these questions, using quantitative data, it was anticipated that the research would be able to provide insights into service delivery performance and to identify areas in need of further exploration through a qualitative analysis.

2.1.2 Research Questions (Qualitative Phase)

Whilst a quantitative approach was useful for investigating the processes on the basis of key performance measurables, such methods cannot provide insights into the lived experience which accounts for context sensitivity and nuances in service delivery. Dodgson states that the output of qualitative research accounts for/is impacted by ‘the environmental and sociocultural context in which the research takes place...’ as such

‘there is no objectivity.’⁹³ While objectivity is rightfully desired through the quantitative phase, in exploring the lived experience, more emphasis is placed on subjectivity and the views of participants. Thus, qualitative methods were employed to explore the personal experience of the interviewees. The central research question in the qualitative phase was to ascertain and evaluate the experience of FMS & LAB clients in addressing their marital breakdown dispute via mediation or court-based litigation. Three sub-questions were developed to comprehensively address this research question:

1. What is the lived experience of FMS & LAB clients seeking to resolve their separation or divorce dispute by way of mediation or legal services?
2. How do FMS mediators understand and describe the client journey in separation and divorce disputes?
3. How do LAB solicitors understand and describe the client journey in separation and divorce disputes?

In adopting a mixed-methods approach and empirically investigating these research questions, a holistic account of the client experience in seeking a separation or divorce with the LAB & FMS was developed. The research design selected to address these questions will now be discussed in further detail.

2.2 Research Design

2.2.1 A Socio-Legal Approach

Traditionally, the methodological approach adopted in legal research has primarily been doctrinal,⁹⁴ however, in recent years there has been a rise in empirical studies

⁹³ Joan Dodgson, ‘About Research: Qualitative Methodologies’ (2017) 33(2) *Journal of Human Lactation* 355 at page 355.

⁹⁴ William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009).

researching legal phenomena.⁹⁵ This is due to an increasing recognition of the gap between policy and practice, and the capacity of empirical research to provide ‘not just more information about law... [but] information of a different character from that which can be obtained through other methods of research. It answers questions about law that cannot be answered in any other way.’⁹⁶ A variety of terms are commonly used to refer to this contemporary approach to legal analyses, such as ‘the law in action’, ‘law in the real world’, ‘socio-legal studies’, and ‘law and society’.⁹⁷ For the purposes of this thesis, the terminology of ‘socio-legal’ is adopted.⁹⁸ While there are certain discrepancies regarding the interpretation of this terminology, they all involve an empirical analysis of the law. Given the overall objective of this research, and the importance of gaining insights into each client's personal experience, it was determined that an empirical approach was more suited to fulfilling the research objectives than a doctrinal approach.

Positioned within the socio-legal framework, this research in its pursuit of contributing to civil justice reform places a substantive emphasis on the experiences and needs of those who engage with legal and dispute resolution systems.⁹⁹ Rather than viewing reform solely through a doctrinal lens, closer attention is given to how individuals encounter, understand, and navigate legal processes in practice. With such a focus, this investigation constitutes a human-centred design placing the client journey to the fore of the analysis. In doing so, the insights generated are capable of informing reforms that are not only legally robust, but also more accessible, participatory, and responsive to the challenges encountered by clients of the LAB and FMS. Having considered the methodological approach, it is now necessary to discuss the methods which were

⁹⁵ Kees van den Bos, *Empirical Legal Research: A Primer* (Edward Elgar Publishing 2020). In order to demonstrate this position, Kees notes that this methodology of empirical legal research is on the rise in law schools globally.

⁹⁶ Anthony Bradney, ‘The Place of Empirical Legal Research in the Law School Curriculum’ in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012) at page 1033.

⁹⁷ Twining (n 94). While drawing a distinction between these terms, Twining notes that there is a substantial overlap.

⁹⁸ Peter Cane and Herbert Kritzer, ‘Introduction’ in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) at page 1. Cane and Herbert consider socio-legal as ‘an interdisciplinary movement with strong roots in sociology but including scholars from a wide range of traditional disciplines including law.’

⁹⁹ Victor Quintanilla, ‘Human-Centered Civil Justice Design’ (2017) 121(3) Penn State Law Review 745.

employed as part of this research, namely mixed-methods (quantitative and qualitative).

2.2.2 Mixed-Methods

Choosing to adopt a qualitative and/or quantitative methodology will determine the manner in which research is approached. Each method has its own unique advantages and disadvantages which need to be taken into consideration in relation to the research aims and questions addressed.¹⁰⁰ Though once the subject of so-called ‘Paradigm Wars’,¹⁰¹ over the last number of decades a third approach known as mixed-methods has emerged. Johnson and Onwuegbuzie define mixed-methods as ‘the class of research where the researcher mixes or combines quantitative and qualitative research techniques, methods, approaches, concepts or language into a single study.’¹⁰² Now considered to be the third major research paradigm, mixed-methods involves the process of collecting, analysing and integrating both quantitative and qualitative data.¹⁰³ Given the nature of the research questions for this work, it was determined that a mixed-methods approach was required in order to comprehensively address the overall research objectives. Additionally, its capacity to offset any potential limitations associated with a singular approach was recognised. In implementing this design, quantitative methods provided an objective insight into the performance of the dispute resolution processes, whereas qualitative information provided contextual nuances in relation to the lived individual experience, thus combining to establish a holistic account of the client’s journey from dispute to decree.

¹⁰⁰ Johnson Burke and Anthony Onwuegbuzie, ‘Mixed Methods Research: A Research Paradigm Whose Time has Come’ (2004) 33(7) Educational Researcher 14. In this article Burke and Onwuegbuzie consider each method individually prior to discussing the balance that ensues from implementing mixed-methods. They note that quantitative methods are objective in nature and thus less prone to researcher bias. In contrast, qualitative methods are subjective in nature and provide a more in-depth insight into the topic of exploration.

¹⁰¹ Alan Bryman, ‘The End of the Paradigm Wars?’ in Pertti Alasuutari, Leonard Bickman and Julia Brannen (eds), *The SAGE Handbook of Social Research Methods* (SAGE 2008). With regards to the ‘Paradigm Wars’, proponents of either a quantitative or qualitative approach would advocate for its superiority over the other.

¹⁰² Burke and Onwuegbuzie (n 100) page 17. See also: John Creswell, *A Concise Introduction to Mixed Methods Research* (2nd edn, Thousand Oaks, CA: Sage 2021). Although qualitative and quantitative approaches have traditionally been viewed as dichotomies, it is more advantageous to consider them as existing on either ends of a continuum with mixed-methods presenting in the middle.

¹⁰³ Timothy Guetterman, Wayne Babchuk, Michelle Smith and Jared Stevens, ‘Contemporary Approaches to Mixed Methods–Grounded Theory Research: A Field-Based Analysis’ (2019) 13(2) Global Social Policy 179.

It is useful to note that variations exist in how mixed-methods are employed, with such discrepancies typically regarding the emphasis placed on the quantitative and qualitative strands. On the basis of the priority afforded to each phase, a mixed-methods study is categorised as equal status or dominant. Given that this study has two aims, with the first addressed via a quantitative analysis and the second via a qualitative analysis, neither the qualitative nor quantitative analysis is disproportionately dominant. It would not be possible to objectively assess and compare the dispute resolution process in the absence of a quantitative phase, nor would it be feasible to ascertain the client experience in the absence of the qualitative phase. For this reason, it is an equal status mixed-methods design that is most suited to completing the aims of this research. In employing this design, the study adopts a pragmatic epistemological stance whereby addressing the research question comprehensively is prioritised over strict adherence to any single philosophical paradigm.¹⁰⁴ In doing so, quantitative methods are used to generate objective performance metrics, while qualitative methods are used to capture context and various nuances. The implementation of this approach is ultimately a recognition that different forms of knowledge are suited to different research questions but of equal value. The quantitative and qualitative methods will now be considered in depth, along with their unique contribution to this study as a whole.

¹⁰⁴ Johnson Burke, Marilyn McGowan, and Lisa Turner, 'Grounded Theory in Practice: Is It Inherently a Mixed Method' (2010) 17(2) *Research In The Schools* 65. See also: Richard Prawat and Robert Floden, 'Philosophical Perspectives on Constructivists Views of Learning' (1994) 29(1) *Educational Psychology* 37; Dennis Phillips and Nicholas Burbules, *Postpositivism and Educational Research* (Rowman & Littlefield 2000); John Creswell and David Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (5th edn, Thousand Oaks: Sage 2018). The chosen position is significant as it will impact the epistemology of the study thereby influencing the research paradigm. Consideration of the various research paradigms is highly important as they are the philosophical assumptions or set of beliefs that guide the actions and the manner in which the researcher perceives the world. Associated with a qualitative dominant mixed-methods study is a qualitative epistemology, aligning with a constructivist philosophy. Constructivism is premised on the notion that the learner plays an active role in how the knowledge is constructed. A quantitative dominant mixed-method study is linked to a quantitative epistemology and is therefore in line with a post-positivist philosophy. A post-positivist philosophy challenges the absolute truth of knowledge. Furthermore, an equal status mixed-methods study is related with a mixed-methods research epistemology and is therefore linked with pragmatist or dialectical pragmatist philosophy. Dialectical pragmatist philosophy involves the construction of knowledge that is premised on multiple viewpoints from multiple sources.

2.3 Research Methods

2.3.1 Quantitative Analysis

As previously noted, the quantitative phase of this study was employed to gain insights into the performance metrics of the LAB/FMS dispute resolution mechanisms. Central to the objective nature of quantitative analyses is ‘collecting numerical data that [is] analysed using mathematically based methods (in particular statistics).’¹⁰⁵ In utilising this method, the processes were assessed in tandem, on the basis of performance metrics, namely: (i) caseload; (ii) cases concluded; (iii) case duration; (iv) wait time; (v) referrals; and (vi) the manner in which mediation cases proceed. As mediation is increasingly being offered as an alternative to legal assistance in family disputes, it is useful to evaluate the process relative to litigation.¹⁰⁶

2.3.1.1 Data Collection

A preeminent challenge associated with quantitative analyses of the law is gaining access to appropriate data.¹⁰⁷ Drawing on the relationship established with the LAB/FMS by way of the Irish Research Council Enterprise Partnership Scheme (hereafter the ‘IRC EPS’), access was granted to data from the Case Tracking System (hereafter the ‘CTS’) of the FMS and the EOS case management system (hereafter the ‘EOS’) of the LAB. As this data had not been recorded or collected for the purposes of the present study, it constitutes secondary data defined by Johnston as ‘data that was

¹⁰⁵ Martha Aliaga and Brenda Gunderson, *Interactive Statistics* (2nd edn, Prentice Hall 2002) as cited in Daniel Muijs, *Doing Quantitative Research in Education with SPSS* (2nd edn, Sage 2011) at paragraph 1.1.

¹⁰⁶ This view is evident through the enactment and implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which removed the availability of legal aid for the majority of family disputes in England and Wales. In the absence of its availability, mediation is offered as an alternative.

¹⁰⁷ John Baldwin and Gwynn Davis, ‘Empirical Research in Law’ in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2003). Baldwin and Davis note that in seeking to conduct such research, it is frequently the case that ethical approval is denied or conversely provided under very strict research conditions. As will be discussed later in this chapter, ethical approval was initially denied in this study and only provided where the researcher conceded to strict research conditions. Thus, the very conduct of this study constitutes empirical support for this assertion of Baldwin and Davis.

collected by someone else for another primary purpose.’¹⁰⁸ To mitigate the limitations associated with analysing secondary data, a rigorous process was undertaken with the enterprise mentor to maximise the utility of the available data.¹⁰⁹ In consideration of the aim of the quantitative phase, practice documents and LAB annual reports were investigated to determine the type of data recorded on each case management system. Having ascertained the nature of the information stored, anonymised aggregate data was then retrieved from both systems and provided to the researcher in Microsoft Excel files where it was subsequently securely stored on the UCC OneDrive.

2.3.1.2 Data Analysis

In order to gain a holistic overview of the dispute resolution processes offered by the LAB/FMS in the context of relationship breakdown, quantitative data was used to explore the following key issues: (i) caseload; (ii) cases concluded; (iii) wait time; (iv) case duration; (v) referrals; and (vi) the manner in which cases proceed. To facilitate this exploration, data was obtained under structured headings such as reporting year, case category, cases registered, and cases closed. In relation to mediation, additional information was obtained in relation to the number and type of session in each case, the manner in which each case was closed by the service provider and the pathways through which clients accessed FMS services. Additional information relevant to legal services regarded the number of legal aid certificates issued according to case type, and case duration according to defined time intervals. Given the nature of the data extraction process whereby the researcher was required to explicitly set-out the information to be distilled, minimal surplus information was obtained. Owing to the nature of the quantitative data collected, a descriptive analysis was identified as most appropriate.¹¹⁰ The role of descriptive statistics is to ‘summarize data’ achieved by way of ‘constructing frequency tables and graphs, and/or calculating summary

¹⁰⁸ Melissa Johnston, ‘Secondary Data Analysis: A Method of Which the Time Has Come’ (2014) 3(3) *Qualitative and Quantitative Methods in Libraries* 619 at page 619.

¹⁰⁹ Alan Bryman, *Social Research Methods* (5th edn, Oxford University Press 2016) at page 312-313. Bryman identifies numerous associated challenges with secondary data noting: (i) a lack of familiarity with the data; (ii) complexity of the data; (iii) no control over the data quality; and (iv) an absence of key variables.

¹¹⁰ As the focus of this research is to analyse the LAB & FMS processes, it was not an aim to generate inferences to a wider population, eliminating the need for inferential statistics.

measures as averages.’¹¹¹ To generate this output, it was necessary to isolate, clean, prepare, and input the newly formed functional data into SPSS so that the analysis could ensue.¹¹² The primary rationale for adopting this statistical method was its ability to provide an overview of the sample data and communicate it in a detailed and comprehensible manner.¹¹³

While descriptive statistics were the primary method of analysis in the quantitative phase, an independent samples t-test was conducted on the number of cases referred from LAB law centres to the FMS.¹¹⁴ This approach was necessary in order to ascertain whether there was a statistically significant difference in the number of cases referred from those law centres which are co-located with mediation offices, in comparison to those which are not.¹¹⁵ Analysing this relationship was important as the LAB has placed a significant emphasis on the co-location model in recent years.¹¹⁶ The findings of the quantitative data analysis are presented and discussed on an ongoing basis, as relevant, throughout this thesis. This approach enables the empirical data to be considered in conjunction with theoretical insight.

2.3.2 Qualitative Analysis

2.3.2.1 Qualitative Design

To investigate clients’ lived experience of dispute resolution in cases of marital breakdown, as well as exploring the views of other key actors involved in these

¹¹¹ Mikel Harry, Prem Mann, Ofelia De Hodgins, Richard Hulbert, and Christopher Lacke, *Practitioner's Guide to Statistics and Lean Six Sigma for Process Improvements* (John Wiley & Sons 2010) at page 151.

¹¹² IBM, ‘IBM SPSS Statistics’ < <https://www.ibm.com/products/spss-statistics> > accessed 20th January 2025. SPSS is an advanced statistics software tool.

¹¹³ Prabhaker Mishra, Chandra Pandey, Uttam Singh, Anshul Gupta, Chinmoy Sahu, and Amit Keshri, ‘Descriptive Statistics and Normality Tests for Statistical Data’ (2019) 22(1) *Annals of Cardiac Anaesthesia* 67.

¹¹⁴ Tae Kyun Kim, ‘T test as a parametric statistic’ (2015) 68(6) *Korean journal of anaesthesiology* 540. This method of statistical analysis is used to compare the means between two groups and determine whether there is a statistically significant difference. See Chapter 5 for a full discussion on the output of this statistical analysis.

¹¹⁵ Legal Aid Board, *Annual Report* (LAB 2017) at page 13. It is noted that the ‘objective of the co-locations is to encourage more persons seeking legal services in relation to a family dispute to seek to resolve the dispute with the assistance of a mediator rather than through a court process.’ Noted in the most recent Legal Aid Board, *Annual Report* (LAB 2023), is that there are 10 co-located centres.

¹¹⁶ See Chapter 5 for a full discussion on the unique contribution of this model to service delivery.

processes (mediators and solicitors), qualitative methods were employed to explore their role in ‘discerning how human beings understand, experience, interpret, and produce the social world.’¹¹⁷ Thus, the qualitative approach is commonly associated with ascertaining individual perspectives or what is often referred to ‘as the actor’s point of view.’¹¹⁸ Curry et al. note that a qualitative analysis is particularly suited to researching areas that are complex in nature and unsuited to quantitative measurements, developing a holistic understanding of the target area, along with identifying causal mechanisms underlying the area of research.¹¹⁹ While there are a range of qualitative methods (e.g. ethnography, focus groups etc.), due the nature of the research questions, interviews were identified as the appropriate means to obtain data. Luo and Wildemuth explain that an interview in its simplest form constitutes ‘a particular type of purposeful conversation.’¹²⁰ In this instance, interviews were used as the method of data collection in order to ascertain the lived experience of the primary actors i.e. clients/mediators/solicitors.

Approaches to qualitative interviewing include structured, semi-structured and unstructured interviews.¹²¹ In the context of this research, semi-structured interviews were identified as most appropriate due to their ability to produce in-depth and detailed information relevant to the topic of exploration.¹²² Other methods were considered but ultimately rejected on the basis of their suitability to the subject area and their ability to address the research question comprehensively. By way of example, focus groups were deemed inappropriate due to the sensitive nature of marital breakdown, ethnography was rejected on the basis of privacy concerns, and finally surveys were rejected on the basis of their inability to generate in-depth insights into the client experience. It was therefore determined that semi-structured interviews were most appropriate. Kvale and Brinkmann define semi-structured interviews as ‘an interview

¹¹⁷ Michael Lewis-Beck, Alan Bryman and Tim Futing Liao, *The SAGE Encyclopaedia of Social Science Research Methods* (SAGE Publications 2004) at page 893.

¹¹⁸ *ibid.*

¹¹⁹ Leslie Curry, Ingrid Nembhard and Elizabeth Bradley, ‘Qualitative and Mixed Methods Provide Unique Contributions to Outcomes Research’ (2009) 119(10) *Circulation* 1442.

¹²⁰ Lili Luo and Barbara Wildemuth, ‘Semistructured Interviews’ in Barbara Wildemuth (ed), *Applications of Social Research Methods to Questions in Information and Library Science* (Libraries Unlimited 2017) at page 248.

¹²¹ John Creswell, *Qualitative inquiry and research design: Choosing among five approaches* (3rd edn, SAGE 2013). See also: Luo and Wildemuth (n 120).

¹²² Lydia Nkansah and Victor Chimbwanda, ‘Interdisciplinary Approach to Legal Scholarship: A Blend from the Qualitative Paradigm’ (2016) 3(1) *Asian Journal of Legal Education* 55.

with the purpose of obtaining descriptions of the life world of the interviewee in order to interpret the meaning of the described phenomena.’¹²³ Distinct from an unstructured interview, a semi-structured interview has a target area for which the interviewer seeks to explore by way of a list of questions, often referred to as an interview guide or aide-memoir.¹²⁴ Throughout the duration of this research, the interview guide was continually updated taking account of potential areas of insight as they arose (see ‘Appendix F’ for the initial interview guide constructed at the studies onset). As the researcher became increasingly familiar with the subject area, the questions developed and outlined in the interview guide were more focused, moving beyond broad descriptive accounts of the dispute resolution process. In the earlier interviews, the emphasis was placed on eliciting narrative accounts of the dispute resolution journey, however, as patterns developed and issues began to emerge, later interviews incorporated more targeted prompts aimed at exploring how and why these journeys would occur in the manner specified. This enabled a deeper examination of the processes with regards to the structural, relational, and institutional influences identified by participants. In this way the evolving nature of the interview guide supported the development of richer and more nuanced insights.

While the interview guide ensured that the researcher remained on topic, it was not strictly adhered to in a fashion that would be required in structured interviews. This approach is not novel, rather Kvale notes that it is up to the interviewer to determine to what degree they adhere to and follow the interview guide, and additionally, how much the interviewee’s responses are investigated and probed into.¹²⁵ It is therefore at the interviewer’s discretion to ask the questions in the order they see fit, change the wording, and exclude certain questions altogether.¹²⁶ This ability to alter the course of the interview demonstrates the inherent associated flexibility which allows the interviewer to devise questions on the spot or to ask for further clarification from the interviewee in their response. Thus, an array of topics relevant to the client experience

¹²³ Steinar Kvale and Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, Sage Publications 2015) at page 6.

¹²⁴ Bryman (n 109). See also: Luo and Wildemuth (n 120) page 249. Luo and Wildemuth note that a semi-structured interview commences ‘...with a list of topics and associated questions as a loosely structured interview guide.’

¹²⁵ Steinar Kvale, *Interviews: An Introduction to Qualitative Research Interviewing* (Thousand Oaks, Sage 1996).

¹²⁶ Bryman (n 109).

were explored, and the following key themes emerged: (i) access to justice; (ii) autonomy; and (iii) service synergy.¹²⁷ The findings are presented in Chapters 3, 4 and 5. Having discussed data collection, it is now necessary to consider the sampling strategy employed.

2.3.2.2 Recruitment and Sampling Strategy

Central to the successful implementation of the semi-structured interviews was selecting an appropriate recruitment and sampling strategy.¹²⁸ The recruitment of participants was pursued through various different mechanisms in order to maximise awareness of the study and to facilitate voluntary participation among both clients and service providers within the LAB and FMS. Recruitment commenced with a presentation being delivered by the researcher to LAB and FMS workers outlining the research objectives, ethical safeguards, and participation procedures. The purpose of this presentation was to ensure that staff were appropriately informed about the study and could both consider participation themselves and signpost eligible clients. Following this, information sheets were distributed and made available in law centres and mediation offices throughout the country in order to reach potential participants as they engage with services. In addition to these steps, the study was advertised through the researchers professional social media platform. Furthermore, bulk emails were periodically circulated within the LAB & FMS by the enterprise mentor inviting expressions of interest from both practitioners and clients on an ongoing basis. Having generated awareness around the study, it was necessary to implement an appropriate sampling strategy.

Sampling strategies are commonly categorised according to whether they constitute probability or non-probability methods (alternatively referred to as purposeful or non-purposeful sampling).¹²⁹ The approach adopted is highly influential as each strategy

¹²⁷ Given the prevalence of these topics and their fundamental importance to the research objective, they were identified as suitable themes for Chapters 3, 4 and 5 in this thesis.

¹²⁸ Allison Shorten and Calvin Moorley, 'Selecting the sample' (2014) 17(2) Evidence Based Nursing 32. It is noted that a sampling strategy refers to the process by which a subgroup or sample is drawn from the population.

¹²⁹ Aamir Omair, 'Sample size estimation and sampling techniques for selecting a representative sample' (2014) 2(4) Journal of Health Specialties 142. See also: Andrea Berndt, 'Sampling Methods' (2020) 36(2) Journal of Human Lactation 224. While distinguishable in such a fashion, there exists an array of

has its own unique advantages and disadvantages.¹³⁰ In the context of this research, a purposeful sampling strategy was employed for its potential to recruit ‘information-rich cases’.¹³¹ Such cases are recruited through ‘identifying and selecting individuals or groups of individuals that are especially knowledgeable about or experienced with a phenomenon of interest.’¹³² In this instance, the phenomenon of interest is marital breakdown and in identifying participants who had experience with this target area it was possible to attain a significant quantity of relevant and in-depth information.

Though the study sought to implement purposive sampling from the outset, due to the limited number of individuals who initially expressed an interest to participate, it was necessary to adapt the approach to ensure an appropriate sample size. In doing so, a snowball sampling strategy was implemented.¹³³ Naderifar and colleagues note that ‘Snowball sampling is a convenience sampling method. This method is applied when it is difficult to access subjects with the target characteristics. In this method, the existing study subjects recruit future subjects among their acquaintances.’¹³⁴ The implementation of both purposive and snowball sampling is not uncommon as Parker et al. specify how ‘snowball sampling is often combined with purposive sampling.’¹³⁵ This approach is advantageous due to its time and cost efficiency, along with facilitating the establishment of rapport as there is already an established connection between the interviewee and the researcher.¹³⁶ While there are various benefits to this sampling strategy, a deciding factor in its selection is its suitability to recruiting a hard

approaches within these categories, such as: simple random sampling; stratified random sampling; cluster sampling; quota sampling; snowball sampling etc.

¹³⁰ Bryman (n 109). Bryman highlights that a preeminent consideration in the selection of a sampling strategy is the potential implications for bias and error.

¹³¹ Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (4th edn, Sage Publications 2014) at page 105.

¹³² Lawrence Palinkas, Sarah Horwitz, Carla Green, Jennifer Wisdom, Naihua Duan and Kimberly Hoagwood, ‘Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research’ (2015) 42(5) *Administration and Policy in Mental Health and Mental Health Services Research* 533 at page 534.

¹³³ As is noted in the forthcoming section, regarding the limitations of the qualitative phase, the researcher initially implemented random purposive sampling as the strategy for data collection. Upon recruiting a sole participant in a number of weeks, the sampling strategy was altered as snowball sampling was adopted as a more suitable replacement.

¹³⁴ Mahin Naderifar, Hamideh Goli and Fereshteh Ghaljaie, ‘Snowball Sampling: A Purposeful Method of Sampling in Qualitative Research’ (2017) 14(3) *Strides in Development of Medical Education* 1 at page 2.

¹³⁵ Charlie Parker, Sam Scott, Alistair Geddes, ‘Snowball Sampling’ in Paul Atkinson, Sara Delamont, Richard Williams, Alexandru Cernat, Joseph Sakshaug (eds), *Sage Research Methods Foundations* (Sage 2021).

¹³⁶ Naderifar, Goli and Ghaljaie (n 134) at page 2.

to reach population.¹³⁷ Despite these associated advantages, snowball sampling is not without its limitations. Criticisms relate to the potential for selection bias, as it is reliant on the researcher's resources and connections, along with a lack of external validity, generalisability, and representativeness.¹³⁸ While sampling bias is a prominent critique, its potential impact on this research is diminished through the target population. Naderifar et al. opine that 'The risk of bias is low when the population is homogeneous in terms of the target characteristic under question...'¹³⁹ As will be discussed in the next section on sample size and in the forthcoming section on the limitations of this research, the challenge of recruiting a sufficient sample meant that all individuals who met the required characteristics were interviewed. These included LAB/FMS service providers who had resolved separation or divorce disputes, as well as LAB/FMS clients who had sought to resolve such disputes through these services. This approach helped minimise the potential for researcher bias. Having considered both the strengths and weaknesses with regards to the central research aim of the thesis, it was determined that snowball sampling was the most appropriate means of generating a suitable sample. This method of sampling was utilised in recruiting two populations: clients of the LAB & FMS and service providers (i.e. solicitors and mediators) of the LAB & FMS. Recruitment commenced with a presentation to LAB and FMS staff detailing the nature of the study, and information sheets for clients (Appendix A) and service providers (Appendix B) were made available in LAB & FMS offices around the country. The enterprise mentor also advertised the study by way of internal email. Following each service provider interview, the researcher asked the participant to distribute the studies information sheets amongst their clients and colleagues, thus encouraging further participation.

¹³⁷ *ibid.*

¹³⁸ Charlie Parker, Sam Scott, Alistair Geddes, 'Snowball Sampling' in Paul Atkinson, Sara Delamont, Richard Williams, Alexandru Cernat, Joseph Sakshaug (eds), *Sage Research Methods Foundations* (Sage 2021). See also: Gaganpreet Sharma, 'Pros and cons of different sampling techniques' (2017) 3(7) *International Journal of Applied Research* 749.

¹³⁹ Naderifar, Goli and Ghaljaie (n 134) at page 2.

2.3.2.3 Sample Size

Fundamental in ensuring the credibility of empirical research is securing adequate supporting data.¹⁴⁰ While significant weight is attached to the sample size in quantitative research, generally the size of the sample is not as significant in qualitative research. This alternative emphasis can be attributed to qualitative research being focused on contextual nuances of the interviewees' experience rather than achieving generalisability.¹⁴¹ Of greater importance in qualitative research is reaching the point of theoretical saturation, where themes start to reoccur as opposed to unveiling new information.¹⁴² While the premise of theoretical saturation is evident, it can be difficult to predict a sufficient sample size from the outset, thus Guest, Bunce & Johnson outline that 'Although the idea of saturation is helpful at the conceptual level, it provides little practical guidance for estimating sample sizes, prior to data collection, necessary for conducting quality research.'¹⁴³ Despite the absence of guidance in this respect, it has been suggested that the minimum number of participants necessary to reach theoretical saturation in qualitative interviews is fifteen.¹⁴⁴ Thus, a sample size of fifteen participants was sought for both clients and service providers. The approach to sampling aimed to achieve an approximately equal balance of those who provide or had experience of either mediation or court-based litigation. While the desired sample size for services providers was achieved with n=15, comprising seven solicitors and eight mediators (categorised according to the profession they practiced at the time the interview was conducted), the recruitment of clients proved very challenging. Despite persistent attempts to recruit clients of the LAB & FMS, along with extending the recruitment period, a sample size of n=5 was achieved. While the analysis of this data demonstrates a reoccurrence of themes, this sample size operates as a core limitation to the study and will be discussed further in the section on limitations. Notwithstanding

¹⁴⁰ Bryan Marshall, Peter Cardon, Amit Poddar and Renee Fontenot 'Does Sample Size Matter in Qualitative Research? A Review of Qualitative Interviews in is Research' (2013) 54(1) Journal of Computer Information Systems 11.

¹⁴¹ Mark Mason, 'Sample Size and Saturation in PhD Studies Using Qualitative Interviews' (2010) 11(3) FQS 19. Mason notes that there is more of an emphasis placed on the meaning of the data itself as opposed to its generalisability.

¹⁴² *ibid.* See also: Barney Glaser and Anselm Strauss, *The discovery of grounded theory: Strategies for qualitative research* (Aldine Publishing Company 1967); Marshall, Cardon, Poddar and Fontenot (n 137).

¹⁴³ Greg Guest, Arwen Bunce and Laura Johnson, 'How Many Interviews Are Enough? An Experiment with Data Saturation and Variability' (2006) 18(1) Field Methods 59 at page 59.

¹⁴⁴ *ibid.* See also: Mason (n 141).

this constraint, the data obtained through client participation is rich in nature, providing novel insights into the experience of those utilising these mechanisms. Although the subject of the interviews with service providers largely focused on their clients, analysis of the data demonstrates that certain fundamental aspects of the lived experience would have been overlooked had the client voice not been directly included. Thus, client inclusion was important. Having discussed the sample size, the next section will consider the representation within the sample itself.

2.3.2.4 Gender Representation

Further to seeking insights from the perspective of both mediation and legal services, consideration was given to gender representation within the client sample from the outset. While it was initially anticipated that an approximate gender balance would be achieved, this could not be guaranteed in practice due to the sample size and the consequential necessity to interview all those who expressed a willingness to participate. In spite of this, the final sample included both male and female clients of the LAB & FMS, with two male and three female participants having been interviewed. Though the gender of participants was noted, it did not emerge as a distinct theme within the data analysis. While some participants discussed issues such as vulnerability, financial dependence, emotional burden and perceived power imbalances, these concerns were not expressed in a systematically gendered manner. As a result, gender was not treated as a standalone analytic category. In the forthcoming sections an in-depth discussion of this analytic process will be provided.

2.3.2.5 Transcription

The semi-structured interviews were recorded for the purpose of transcription and analysis.¹⁴⁵ While the goal of transcribing is to reproduce what was said during the course of the interview, there are numerous approaches to achieving this objective, with the stance adopted predominantly determined in consideration of the research

¹⁴⁵ Bryman (n 109).

questions.¹⁴⁶ Owing to the variety of approaches, it is useful to consider them as existing on a continuum with naturalism on one end and de-naturalism on the other.¹⁴⁷ As this thesis explores the client experience from a procedural standpoint, the method of transcription adopted is located on the denaturalised end of the continuum. Transcription was completed by the researcher, limiting the potential for a data breach while simultaneously affording greater familiarity with the data set.¹⁴⁸ Once the denaturalised and anonymised/pseudonymised transcripts were complete,¹⁴⁹ they were stored securely on the UCC OneDrive. Following the transcription process, analysis of the data commenced.

2.3.2.6 *Qualitative Data Analysis*

Thematic analysis was employed for its capacity to identify, analyse and report patterns within the data.¹⁵⁰ Other approaches considered but deemed less suitable were grounded theory and discourse analysis. As the study was not concerned with the generation of a theory but rather the examination of an existing process, grounded theory was not selected.¹⁵¹ Furthermore, as the study was primarily concerned with the clients journey rather than the language of the participant and how they interpret the world, discourse analysis was not employed.¹⁵² Though recognised as one of the most widely availed of methods in analysing qualitative data, thematic analysis remains poorly defined across the literature,¹⁵³ with the absence of associated

¹⁴⁶ Daniel Oliver, Julianne Serovich, and Tina Mason Social, 'Constraints and Opportunities with Interview Transcription: Towards Reflection in Qualitative Research' (2005) 84(2) *Social Forces* 1273.

¹⁴⁷ *ibid.* According to Oliver et al. naturalised transcripts include all idiosyncratic elements of what is conveyed during the interview such as pauses and nonverbals. In contrast, denaturalised transcripts are absent of such elements. The naturalised transcription method is frequently located in conversational analysis studies whereas the denaturalised transcription method is commonly identifiable in studies chiefly concerned with informational content.

¹⁴⁸ Julia Bailey, 'First Steps in Qualitative Data Analysis: Transcribing' (2008) 25(2) *Family Practice* 127.

¹⁴⁹ Uwe Flick, *The Sage Handbook of Qualitative Data Analysis* (Sage 2014). A pseudonym is a mechanism of representing the person/participant in question otherwise than by their real name. Anonymity refers to the removal of any identifiable information regarding the participant.

¹⁵⁰ Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3(2) *Qualitative Research in Psychology* 77.

¹⁵¹ Antony Bryant and Kathy Charmaz, *The Sage Handbook of Grounded Theory* (SAGE 2007).

¹⁵² Bob Hodge, 'Discourse Analysis' in Tom Bartlett and Gerard O'Grady (ed), *The Routledge Handbook of Systemic Functional Linguistics* (Routledge 2017).

¹⁵³ *ibid.* See also: Jennifer Attride-Stirling, 'Thematic networks: an analytic tool for qualitative research' (2001) 1(3) *Qualitative Research* 385.

guidelines contributing to an ‘anything goes’ critique.¹⁵⁴ Seeking to avoid such limitations, this research adhered to a widely cited and prescriptive account constructed by Braun and Clarke, discussed further below.¹⁵⁵ Advantages of this approach include: (i) its suitability to analysing qualitative data aimed at policy development; (ii) generating unforeseen insights in relation to the data; (iii) identifying similarities and differences within the dataset; and (iv) the results of the analysis being accessible.¹⁵⁶ A further notable strength is the high degree of associated flexibility as it is not confined to one set of theoretical assumptions or research paradigms, thus aligning with an equal status mixed-methods epistemology.¹⁵⁷ While the advantages identified are of significant benefit to the study, it was imperative that the researcher avoid the associated pitfalls, namely the failure to analyse the data set or conduct a weak analysis.¹⁵⁸

Though there is an absence of universal guidelines on conducting a thematic analysis, Braun and Clarke usefully set out their six-step guide for its effective implementation.¹⁵⁹ In doing so, they note how the steps are ‘guidelines’ and not rigid rules.¹⁶⁰ In applying the widely adopted approach, Phase 1 of the analysis commenced with a familiarisation of the data set, (predominantly) achieved through reading and re-reading the transcripts while making initial observations/notes. Additionally, much of the familiarisation with the data set was aided through the transcription of the interviews by the researcher and not a third party. At this early stage, it was already noticeable how participants frequently discussed the processes in a comparative manner, along with common misconceptions and their individual experience. The next stage of the process necessitated the construction of some initial codes to represent a particular feature or aspect of the data. The method of coding adopted (as described in

¹⁵⁴ Charles Antaki, Michael Billig, Derek Edwards, and Jonathan Potter, ‘Discourse analysis means doing analysis: a critique of six analytic shortcomings’ (2003) 1(3) *Athenea Digital* 14. While this critique is made in relation to discourse analysis, it must be noted that thematic analysis falls under the remit of discourse analysis and thus the critique is applicable.

¹⁵⁵ Braun and Clarke (n 150). Braun and Clarke specifically set out to fulfil the lacuna and address the associated limitations by way of developing a prescriptive guide applicable for research within the field of Psychology and beyond.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.* These features are central to the preceding ‘anything goes’ critique.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.* In discussing step six it will be noted that this study availed of such flexibility and incorporated the research findings on an on-going basis, facilitating the empirical data to be discussed in consideration of theoretical insights.

full below) was not strictly inductive or deductive as the codes/themes were identified within the data set but equally of relevance to the research question.¹⁶¹ Utilising NVivo software,¹⁶² the codes developed at this stage of the analysis were purposefully broad seeking not to narrow the research focus in an adverse fashion. Examples of these early codes included: point of service contact; fees; court environment; emotional toll of subject area; case profiles; and process awareness. Once the initial coding had taken place, Phase 3 began with the sorting of the codes into broader themes consisting of both main themes and sub-themes which were subsequently refined in the next stage.¹⁶³ By way of example, codes such as scheduling appointments, delays between steps, and long case duration were grouped under the theme of procedural delay. The process of refinement was completed in consideration of the coded extracts and the entire data set. Phase 5 similarly involved defining and refining themes, however, this was carried out in consideration of the sub-themes that had been highlighted. In doing so, the theme of procedural delay was subsumed into the overarching theme of access to justice. Similarly the themes of digital infrastructure and administrative procedures were subsumed into service synergy. In contrast, the themes of individual practitioner style and client profiles were not directly retained as themes. Following the completion of this stage it was now possible to explicitly define and distinguish between themes. In coding the data utilising NVivo software, three key themes arose from the data set: (i) access to justice; (ii) autonomy; and (iii) service synergy. While the final phase of Braun and Clarke's guidelines involves the production of a single write-up or report, given the nature of the research questions and the themes which emerged, the findings of the qualitative study are presented throughout the substantive chapters of the thesis.¹⁶⁴ In adopting this approach, it is believed that a more in depth and holistic exploration is conducted as the themes are considered in tandem with quantitative data and theoretical insights. It is foreseen that adopting this approach enables a fluid exploration of the 'law in books' and the 'law in action'. Having discussed and

¹⁶¹ *ibid.* This approach is not uncommon as Braun and Clarke acknowledge that inductive and deductive approaches are not mutually exclusive.

¹⁶² Lumivero, 'NVivo 15 - The Most Trusted Qualitative Analysis Software (QDA) is Even Better' <<https://lumivero.com/products/nvivo/>> accessed 20th January 2025. This software tool is utilised to 'Identify themes, run advanced queries, and discover evidence-based insights.'

¹⁶³ Braun and Clarke (n 150) at page 92. Braun and Clarke note that 'Sub-themes are essentially themes-within-a-theme.'

¹⁶⁴ *ibid.* As previously specified in the body of the text, these 'guidelines' are not rigid rules, enabling such deviation.

explored both the quantitative and qualitative methods employed, it is now necessary to proceed to an overview of the ethical considerations which arose in this research.

2.4 Ethical Considerations

A number of ethical considerations arose during the course of this research. In accordance with the UCC Code of Research Conduct, ethical approval was obtained from the Irish Legal Aid Board and the UCC Social Research Ethics Committee (hereafter ‘SREC’) prior to undertaking any empirical research.¹⁶⁵ In formally securing the approval of the LAB/FMS, the researcher signed a research agreement specifying their professional responsibility and the role of the LAB/FMS, as will be discussed in the coming sections. The key ethical considerations which presented will now be considered, namely: (i) volunteerism and informed consent; (ii) anonymity and confidentiality; (iii) the potential for emotional distress; (iv) the operation of the in camera rule; and (v) the possibility of bias.

2.4.1 Volunteerism and Informed Consent

A key ethical consideration in this study was volunteerism, thus ensuring each individual’s participation was absent of coercion or pressure.¹⁶⁶ Careful consideration was required in this context due to the established connection with the LAB/FMS as an enterprise partner. To ensure participants (who were either service providers i.e. employees or clients of the LAB & FMS) experienced no pressure to participate, all communications took place directly between the researcher and participant(s). In implementing this procedure, the LAB/FMS was unaware of those who expressed a willingness to participate, and equally, so too were the service providers in respect of their participating clients. Further to this safeguard, the researcher reminded participants of the voluntary nature of the study during the pre-interview protocol and of their right to withdraw any information proffered and/or their full participation within the two weeks following the conclusion of the interview. In addition to the issue

¹⁶⁵ University College Cork, *Code of Research Conduct Version 2.4* (UCC 2021) at paragraph 3.7.

¹⁶⁶ National Health and Medical Research Council, *National Statement on Ethical Conduct in Human Research* (NHMRC – 2023).

of volunteerism, it was also necessary to ensure that an individual's decision to participate came from an informed perspective. In defining voluntary, informed consent, Sieber and Tolich note how:

Informed means that the subject knows what a reasonable person in the same situation would want to know before giving consent. This involves not only what the study is about but also what the subject will have to do. *Consent* means an explicit agreement to participate.¹⁶⁷

In ensuring that participants had the necessary level of information to provide their informed consent, the researcher developed information sheets (see Appendix A & B) and consent forms (see Appendix C & D) approved by the UCC SREC.

Due to the partnership with the LAB and their position as a gatekeeper to the data source (as will be discussed under the ethical consideration of 'Potential Bias'), to ensure volunteerism, their sole role in the qualitative phase was to advertise the study. The enterprise mentor fulfilled this function by issuing an email throughout the organisation which contained both the information sheets and the direction that all queries or expressions of interest to participate be conveyed directly to the researcher whose contact details were provided. Separately, in targeting clients of the LAB & FMS, information sheets were made available in law centres and mediation offices throughout the country. Furthermore, service providers were asked to distribute information sheets amongst their client base to make them aware of the study, along with highlighting its voluntary nature. In addition to those steps outlined, prior to each interview the researcher explained what participation would entail, along with discussing the content of the consent form. The application of these steps ensured that every participant provided their voluntary, informed consent. While obtaining voluntary, informed consent was a fundamental safeguard, given the nature of this study, various other protective measures were also required which will now be discussed.

¹⁶⁷ Joan Sieber and Martin Tolich, *Planning ethically responsible research* (2nd edn, Sage Publications 2012) at page 115.

2.4.2 Anonymity and Confidentiality

Consideration was also given to the issues of anonymity and confidentiality. Anonymity refers to ‘the assurance that participants are not individually identified by disguising or withholding their personal characteristics.’¹⁶⁸ In contrast, confidentiality requires that the researcher not ‘divulge any findings relating to research participants, other than in an anonymized form.’¹⁶⁹ To uphold these fundamental principles, several safeguards were employed depending on whether the relevant data was acquired from the quantitative or qualitative phase, as will now be discussed.

2.4.2.1 Ensuring Participant Anonymity and Confidentiality in the Quantitative Phase

As previously noted, approval was granted for access to anonymised aggregate data from the case management systems which was to be distilled by the enterprise mentor and given to the researcher. While this data was anonymised and thus not subject to General Data Protection Regulation (hereafter ‘GDPR’), it remained under the ownership of the LAB/FMS. To ensure it was handled appropriately, a research agreement was formulated between the researcher and the LAB/FMS prior to the implementation of this process. Specified in the agreement, was that the investigation would adhere to the Legal Aid Board’s code of ethics and would not compromise the privacy of clients and service providers. The UCC SREC were satisfied with this agreement as the GDPR concerns which would have arisen due to direct case management access were now alleviated. Whilst anonymity and confidentiality were a key consideration in the quantitative phase, these issues posed a greater risk during the qualitative phase and thus required the following additional safeguards

2.4.2.2 Ensuring Participant Anonymity and Confidentiality in the Qualitative Phase

Given the sensitive nature of the issues under investigation, significant consideration was given to confidentiality and anonymity concerns during the qualitative phase of

¹⁶⁸ Michael Lewis-Beck, Alan Bryman, and Tim Futing Liao, *The SAGE Encyclopaedia of Social Science Research Methods* (Volume 1, SAGE 2004) at page 18.

¹⁶⁹ *ibid* at page 169.

the research. As previously noted, to ensure the LAB/FMS was unaware of the identity of those who expressed a willingness to participate, communications took place directly between the researcher and the potential participant. A further aspect of the pre-interview protocol involved the consent form signed by participants being immediately scanned and uploaded to UCC OneDrive, with the hard copies destroyed. Once each interview was conducted, the original recording was immediately transferred to UCC OneDrive, and the recording was deleted from the recording device. Following transcription, the data was pseudonymised and participants were assigned an alpha-numeric code i.e. Name A = Client 1, Name B = Solicitor 1 and Name C = Mediator 1, along with any other identifiable information removed from the text. Other data safeguards were employed e.g. completing the data analysis using NVivo software on a UCC supplied password encrypted laptop. The final measure implemented to ensure anonymity and confidentiality, involved the transcripts only being accessible to the researcher or the relevant participant (upon request). In accordance with UCC guidelines, this qualitative data will be stored for a minimum period of ten years, once elapsing the researcher will take responsibility for deleting and destroying the data. Further to protecting the identities of participants, additional ethical considerations, namely: (i) the likelihood of emotional stress; (ii) the operation of the in camera rule; and (iv) the potential for researcher bias, will now be discussed.

2.4.3 Emotional Distress

DiCicco-Bloom and Crabtree note that the primary duty of a researcher is the protection of participants.¹⁷⁰ Due to the subject matter of the research (dispute resolution pathways for relationship breakdown) it was recognised that though the focus was on their experience of the resolution process, there was a potential threat of emotional distress for participants. Thus, it was imperative that appropriate safeguards were employed to ensure the safety of the research participants. Central to mitigating these concerns was the researchers implementation of an appropriate pre- and post-interview protocol, along with a comprehensive consideration of the semi-structured interview guide.

¹⁷⁰ Barbara DiCicco-Bloom and Benjamin Crabtree, 'The qualitative research interview' (2006) 40(4) Medical Education 314.

Although the focus of this research was exclusively on the individual actor's experience of the procedural aspects of the dispute resolution process, this did not negate the possibility that participants could find the content of the interviews distressing. In recognition of this concern, the pre-interview protocol included guidance on the subject matter of the research as outlined in the information sheet (see Appendix A & B). In addition, interviewees were reminded at the beginning of the interview of the support services listed on the information sheet as well as reiterating the voluntary nature of the interview and their right to discontinue at any stage. Once the interview concluded, the researcher carried out a debriefing. The interviewee was reminded of their right to view their individual interview transcript and their ability to withdraw, make amendments or redactions for up to two weeks following the completion of the interview.

2.4.4 In Camera Rule

Another central consideration for this empirical work was the in camera rule. The Latin term 'in camera', translating as 'in chambers', is commonly used with reference to cases being heard in private.¹⁷¹ While numerous statutory provisions limit the requirement for open justice and mandate the operation of the in camera rule,¹⁷² of particular relevance is s. 34 of the 1989 Act and s. 38(5) of the 1996 Act which provide for the application of the in camera rule in judicial separation and divorce proceedings. Although referenced within statute, the implementation of the in camera rule in the Circuit Court is given effect by the Circuit Court Rules Order 59 Rule 13 which concerns the prohibition on publicity of family law proceedings.¹⁷³ Such is the seriousness of this rule that where contravened, the accused can be fined €50,000

¹⁷¹ Anne Egan, 'The In Camera Rule: A Barrier to Transparency or a Necessity in Irish Family Law?' (2012) 15(3) *Irish Journal of Family Law* 59 at page 59.

¹⁷² Article 34.1 of the Irish Constitution provides for the concept of open justice in outlining that '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.' Section 29 of the Child Care Act, 1991 provides that virtually all proceedings concerning children will be heard otherwise than in public. Further statutory provisions imposing the in camera rule are present within: s. 25(1) and 25(2) of the Family Law (Maintenance of Spouses and Children) Act 1976; s. 38(6) of the Family Law Act 1995; and s. 16(1) of the 1996 Act.

¹⁷³ Circuit Court Rules (Family Law) 2018, (SI 427/2018), Order 59 Rule 13.

and/or receive a term of imprisonment not exceeding 3 years.¹⁷⁴ While providing a vital role in protecting the privacy of parties to a familial dispute, its operation has been the subject of considerable criticism, primarily due to the lack of a clear definition of its scope.¹⁷⁵ Parkes et al., in the recently published Department of Justice report regarding the in camera rule (hereafter the ‘2025 Report’), note that:

A fundamental issue with the in camera rule is that the parameters of the rule have not been defined and delineated in legislation. Exceptions to the rule have been defined in law pertaining to media court reporting and research. However, due to the prolonged absence of a comprehensive legislative framework pertaining to the in camera rule, it has been largely left to the judiciary to define the inner and outer limits of the rule as it operates in areas such as child care and family law proceedings, criminal law and company law, as well as special care cases.¹⁷⁶

Similarly, in the 2019 Report of the Joint Committee on Justice and Equality (hereafter the ‘2019 Report’), it is noted that ‘the precise parameters of what is prohibited are not set out, and whether any particular conversation about a set of in camera proceedings would breach the rule largely comes down to the subjective opinion of individual judges.’¹⁷⁷ In seeking to ascertain the client experience, the standing of this rule constituted a central concern as:

In essence, any person involved in in camera proceedings in the field of child protection, private family law or elsewhere risks being held in contempt of court every time he or she discusses the proceedings with anyone other than his or her legal representative or the other parties to the proceedings. The

¹⁷⁴ Section 40(A)(2)(ii) of the Courts and Civil Law (Miscellaneous Provisions) Act 2013.

¹⁷⁵ Aisling Parkes, Simone McCaughren, and Kenneth Burns, *The Operation of the In Camera Rule in Family Law Proceedings* (DoJ 2025).

¹⁷⁶ *ibid* at page 8.

¹⁷⁷ Joint Committee on Justice and Equality, *Report on Reform of the Family Law System* (JAE 2019) at page 26-27.

law neither clearly allows nor prohibits interviews with children, young people and their parents. In the absence of clarity, researchers, children, young people and parents are at risk of being held in contempt of court.¹⁷⁸

The views expressed in the 2025 and 2019 Reports highlight the challenging nature of researching Irish family law on an empirical basis.¹⁷⁹ Thus, ensuring that this rule was not contravened was a core consideration for this research, whilst still answering the central research objective(s). This necessitated a conservative approach to the qualitative phase, namely ensuring that participants spoke to the procedural elements of their experience rather than discussing substantive subject matter and/or disclosing other dispute related information. Having highlighted the concerns posed due to the research subject matter, the final ethical consideration to be discussed is the issue of bias.

2.4.5 Potential Bias

The IRC EPS connects researchers with an enterprise partner in a relevant field, resulting in a mutually beneficial collaboration. While the advantages that ensue from this scheme will be dependent upon the established relationship, of particular benefit to the present study is the novel access to a rich source of data. The issue of bias must therefore be considered, as the LAB/FMS with its vested interests takes on the role of ‘gatekeeper’ to this information. Through dictating ‘both the researcher’s physical access to the organization and influenc[ing] the degree of support the researcher is given subsequently by others within that organization...’ the gatekeeper ultimately ‘controls research access’.¹⁸⁰ Arising from the impact of this often-inevitable reality, contemporary research has sought to analyse the influence and role of ‘gatekeepers’ in academic studies. Drawing on the work of Broadhead and Rist, McFadyen identifies the predominant mechanisms by which gatekeepers negatively impede a study,

¹⁷⁸ *ibid* at page 26-27.

¹⁷⁹ *ibid*; Parkes, McCaughren, and Burns (n 175). A central proposal of the 2025 Report, aimed at addressing the shortcomings of the rule, is the introduction of comprehensive primary legislation applicable across all relevant proceedings.

¹⁸⁰ Victor Jupp, *The SAGE Dictionary of Social Research Methods* (SAGE 2006) at page 126.

including ‘limiting the conditions for access to participants, limiting access to data and to respondents, restricting the scope of analysis and by retaining prerogatives with respect to dissemination strategies.’¹⁸¹ The understanding of these impacts has been further explored by Brodeur et al. who note the influence of institutional priorities, perceptions of risk, and assumptions about participant vulnerability.¹⁸² As such, the gatekeeper’s potential to shape the sample composition and potentially exclude certain voices from the research process is well documented. Given this potential, the researcher continuously sought to manage this delicate relationship appropriately,¹⁸³ implementing reflexivity as a means of continually assessing the on-goings of the collaboration.¹⁸⁴ This reflexivity was vital as ‘there is a need for social skills and professional integrity in such negotiations with gatekeepers.’¹⁸⁵ Adopting a reflexive approach was advantageous as numerous different individuals fulfilled the LAB gatekeeper role throughout the studies duration, necessitating the repeated establishment of trust and adaptability.

Despite the potential concerns posed, to the researchers knowledge, no such barriers or limitations have been encountered. From the studies onset, it was evident that the assigned ‘gatekeepers’ had a keen desire to support and ensure the ongoing progress of the study. When direct onsite access to the case management systems was denied (by UCC SREC due to GDPR concerns), the enterprise mentor extrapolated anonymised data so that the quantitative research questions could be examined.¹⁸⁶

¹⁸¹ Robert Broadhead and Ray Rist, ‘Gatekeepers and the Social Control of Social Research’ (1976) 23(3) *Social Problems* 325, as cited in Jackie McFadyen, ‘The Role of Gatekeepers in Research: Learning from Reflexivity and Reflection’ (2016) 4(1) *Journal of Nursing and Health Care* 82 at page 83.

¹⁸² Madison Brodeur, Ariel Schartz, and Katherine McDonald, ‘A Scoping Review of the Ways Gatekeepers May Hinder or Promote Opportunities for People With Intellectual and/or Developmental Disabilities to Learn About Research Participation’ (2025) 69(5) *Journal of Intellectual Disability Research* 329.

¹⁸³ David Buchanan, David Boddy and James McCalman, ‘Getting In, Getting On, Getting Out, and Getting Back’ in Alan Bryman (ed), *Doing Research in Organizations* (Routledge 1988). Buchanan and colleagues constructed a guide to aid researchers in the management of a gatekeeping relationship. Information and advice is provided regarding the stages of: (i) pre fieldwork; (ii) during fieldwork; (iii) post fieldwork; and (iv) how the investigator exits the research.

¹⁸⁴ Bryman (109) at page 695. Reflexivity regards the researchers reflectiveness ‘about the implications, for the knowledge that they generate about the social world, of their methods, values, biases, decisions, and mere presence in the very situations they investigate.’

¹⁸⁵ Shenuka Singh and Douglas Wassenaar, ‘Contextualising the role of the gatekeeper in social science research’ (2016) 9(1) *South African Journal of Bioethics and Law* 42 at page 44.

¹⁸⁶ This occurrence evidences the challenging nature of researching family law on an empirical basis as previously discussed.

Furthermore, during the qualitative phase of the study, the gatekeeper desired to be kept abreast of the recruitment process and at times proffered suggestions to aid and encourage participation. In light of this support, there is no basis to suggest that the gatekeeper negatively impeded this study. While the researcher is confident that a healthy relationship has been maintained throughout, this research is on-going and will likely lead to subsequent publications utilising the data collected. As this data was obtained from the LAB/FMS, they are to be provided with a copy of any intended publication 30 days prior to publishing, following which they will consent to the publication or submit a confidentiality notice. This aspect of the research agreement demonstrates the enduring relationship established with the LAB/FMS as a gatekeeper, and the necessity to manage it in an appropriate fashion (see Appendix G).¹⁸⁷ Having considered the ethical considerations presenting throughout, a retrospective approach will now be adopted to ascertain and consider the limitations of both the quantitative and qualitative research undertaken.

2.5 Limitations to the Quantitative Analysis

Several limitations arose with the quantitative phase of this study, predominantly in respect of the utility of secondary data. These limitations have been categorised according to whether data was unavailable or unidentifiable in the desired format. Notwithstanding these limitations, as will be discussed in full below, rich insights from the quantitative phase were achieved and are discussed in the ensuing chapters.

2.5.1 Unavailable or Inconsistent Data

In seeking to extrapolate and analyse data from the case management systems, it was determined that a timescale of 1/1/2014-1/1/2021 was most appropriate. This decision was premised on the introduction of the legal services case management system (EOS) in 2012, with the categories for data entry established in 2013. Unlike legal services

¹⁸⁷ This aspect of the research agreement persists for 5 years following the conclusion of the study.

data,¹⁸⁸ quantitative information regarding mediation services was solely available post 2017.¹⁸⁹ To the exclusion of wait times, where mediation and legal services data was obtained from LAB annual reports (thus drawing from a different data source), this limitation pertained to all target areas in the quantitative phase. Despite the confined timespan, rich insights were obtained from the data regarding FMS & LAB services. Narrowing in scope, those instances where data was unavailable or inconsistent in relation to a specific target area will now be considered.

In exploring the manner in which FMS cases proceed, the data obtained lacked uniformity. In 2021 additional categories were introduced on the case tracking system for this target area and while facilitating richer insights into the client experience, for the purposes of the present study their presence distorted the data considered. These newly introduced categories constituted: (i) Courts; (ii) Other; (iii) Solicitor; and (iv) Self, whereas prior to their introduction, the sole options available were: (i) Law Centre; (ii) Private Solicitor; and (iii) Did not Disclose. While the newly established categories curtailed the observable trends, advantageously they had the effect of highlighting a fundamental aspect of the client experience that may have otherwise been overlooked. Prior to 2021 the bulk of the data was recorded in the 'Did not Disclose' category, however, the newly recorded data demonstrated that the majority of clients were proceeding as lay litigants through the recording of the 'Self' category.¹⁹⁰ Although the introduction of these categories created inconsistencies in the data set, they were beneficial in facilitating a holistic understanding of the client experience. Advantageous in this instance, additional limitations encountered did not benefit the study in the same manner.

Data pertaining to legal services case duration was available according to four periods.¹⁹¹ Although such detailed information was recorded, all but one of these

¹⁸⁸ Unless otherwise stated 'legal services' will be used to refer to legal aid and legal advice as provided by the LAB. Furthermore, unless otherwise stated 'mediation services' will be used to refer to the process of mediation as provided by the FMS.

¹⁸⁹ In response to being queried on this availability, the enterprise mentor noted that electronic records were unavailable prior to this date.

¹⁹⁰ See Table 1 & Figure 1 on page 92.

¹⁹¹ These four periods consisted of: (i) the number of weeks between the date that the application was completed to the date of the first consultation; (ii) the number of weeks between the date of the first consultation to the date of the legal aid certificate being issued; (iii) the number of weeks between the

categories contained no data omissions. Constituting a complete data set was the category related to the full process i.e. the period from the date of the application for services being completed and accepted to the date that the case was closed. Despite the availability of legal services case duration information in weeks, mediation data for this area of exploration was categorised in a different manner. Distinct from legal services, data on mediation case duration was solely available through exploring the number of sessions carried out, further to the average wait time to access mediation services. While insightful, supplemental information was necessary for useful comparisons to be drawn between the processes. For example, anecdotal evidence was obtained in the semi-structured interviews regarding the frequency in which mediation sessions are scheduled and the average case duration in separation and divorce disputes. Through combining both quantitative and qualitative insights, it was possible to compare both mediation and legal services on the basis of case duration, thereby overcoming a core limitation of the quantitative phase.¹⁹²

A further limitation of the quantitative analysis pertains to the legal services information and the absence of applying ‘separation’ and ‘judicial separation’ terminology in a uniform manner. When availing of LAB services, a separation agreement is typically obtained on the basis of legal advice, whereas a court ordered judicial separation or divorce necessitates a legal aid certificate to issue proceedings.¹⁹³ In exploring caseload according to the number of legal aid certificates granted, data was distinguishable according to three marital breakdown remedies: (i) divorce; (ii) separation; and (iii) judicial separation. Given that it is predominantly secured on the basis of legal advice, minimal certificates were issued to those seeking a separation agreement. In comparison to the 11,817 divorce certificates and 4,431 judicial separation certificates, only 6 certificates were issued in respect of separation agreements. While the data pertaining to caseload drew a distinction between: (i) separation; (ii) judicial separation; and (iii) divorce, the data available for cases closed annually was solely discernible on the basis of ‘separation’ or ‘divorce’, indicating

date of the first consultation and the date that the case was closed; and (iv) finally the number of weeks between the date that the application was completed to the date that the case was closed.

¹⁹² See Figure 11 on page 125 and the discussion that ensues.

¹⁹³ *YG v NG* [2011] 3 IR 717 at page 729. While not explicitly defined in legislation, a separation agreement has been referred to by Denham CJ as ‘an extant legal document, entered into with consent by both parties, and it should be given significant weight.’ This remedy will be discussed in depth in Chapter 3.

that the ‘separation’ category constituted separation agreements and judicial separations. Notwithstanding this lack of distinction, as this studies classification for inclusion in the legal services cases closed data set was ‘Aid file completed and closed’ it is assumed that there were minimal, if any separation agreements included in this target area due to them predominantly being obtained on the basis of ‘Legal Advice’ as previously discussed.¹⁹⁴ Thus, despite being classified as ‘separation’ this data almost entirely regards judicial separations. While this is a limitation, given the absence of certificates issued for separation agreements as previously highlighted with regards to caseload, it is not envisaged that the data was distorted. Having noted those occurrences where data was unavailable or inconsistent, the next section will discuss instances where quantitative data was indiscernible or unidentifiable in the desired format.

2.5.2 Indiscernible Data

The second limitation of the quantitative analysis was the inability to distinguish data on the basis of certain characteristics e.g. case type and outcome. Given the necessity of securing a legal aid certificate to pursue a decree of judicial separation or divorce with LAB support, it was possible to identify these two case types for legal services. Unfortunately, no such identifiable information was recorded for FMS case files. FMS case types were categorised on the basis of the model of mediation employed (AI= all-issues mediation; RP = mediation cases on referral from law centres; CB = court-based mediation). While this inability to identify/categorise mediation cases on the basis of judicial separation, separation or divorce could not be resolved, in seeking to improve the accuracy of the information included within the data set, court-based cases were excluded. This decision was premised upon judicial separation and divorce cases operating out of an alternative jurisdiction to court-based mediation as offered by the FMS which is a District Court initiative.¹⁹⁵ Despite enhancing the accuracy in such a manner, a central caveat to the results presented is how the data regarding mediation

¹⁹⁴ In Chapter 3 it will be highlighted empirically that separation agreements are rarely carried out by LAB service providers in recent years. Rather, the contemporary approach is to wait until the parties meet the requirements for divorce (should this be their desired outcome) and if necessary, seek individual orders for specific matters in the interim if required.

¹⁹⁵ Legal Aid Board, ‘Court-based mediation’ < <https://www.legalaidboard.ie/en/our-services/family-mediation/court-based-mediation/>> accessed 20 January 2025.

services may be considered an overrepresentation, given that it is not solely confined to cases where parties are seeking a judicial separation or divorce.

In comparison with legal services, minimal information was available regarding the manner in which mediation cases close, with them solely being identifiable on the basis of a: (i) written agreement; (ii) no agreement; or (iii) a verbal agreement. Despite the recording of such information, it was not feasible to isolate the data according to this classification in some instances. In exploring case duration for mediation services, those cases where a written agreement was achieved could not be isolated.¹⁹⁶ In the absence of this capacity, the data when considered to the exclusion of the supplementary qualitative information (as previously discussed) is distorted by inputs where parties may have attended a sole joint mediation session and subsequently chose to disengage without having reached an agreement. However, through combining both quantitative and qualitative methods this limitation was ultimately mitigated through the process of triangulation.¹⁹⁷ In carrying out this process, the findings of the quantitative and qualitative analysis were integrated throughout the thesis rather than treating them as separate or sequential strands. As such, quantitative patterns, such as wait times or referral rates were examined and contextualised through qualitative themes which emerged enabling comparisons from different data sources on the same topic thus improving the rigour of the insights drawn. Having ascertained the limitations of the quantitative phase, limitations relating to the qualitative phase will now be discussed.

2.6 Limitations to the Qualitative Phase

In contrast to the quantitative phase which utilised secondary data, primary data was collected during the qualitative phase of the research.¹⁹⁸ Whilst primary data offsets many of the limitations associated with secondary data, some limitations were

¹⁹⁶ See Figure 11 on page 125.

¹⁹⁷ Nancy Carter, Denise Bryant-Lukosius, Alba DiCenso, Jennifer Blythe, and Alan Neville, 'The Use of Triangulation in Qualitative Research' (2014) 41(5) *Oncology Nursing Forum* 545 at page 545. Triangulation is a research strategy utilised '...to test validity through the convergence of information from different sources.'

¹⁹⁸ Joseph Rabianski, 'Primary and secondary data: Concepts, concerns, errors, and issues' (2003) 71(1) *The Appraisal Journal* 43 at page 44. In its simplest form, primary data constitutes 'facts and information collected specifically for the purposes of the investigation at hand.'

encountered during this phase of the research, namely issues pertaining to the sampling strategy and sample size (clients). This will now be considered along with its overall impact on the research.

2.6.1 Sampling

As previously noted, some limitations were encountered with sampling and achieving an adequate sample size during the qualitative phase of the research. In order to surmount this, snowball sampling was employed. This was identified as a suitable approach given its greater capacity to generate an appropriate sample and thus enable an in-depth qualitative analysis.

The small sample of clients (n=5) interviewed has already been identified as a limitation. Given the small sample of clients, it was not possible to ensure that there was an equal spread of clients who availed of mediation and legal services. The sample consisted of one participant who availed of both LAB & FMS processes, while the remaining participants utilised mediation to resolve their dispute (these figures do not account for those who also availed of private legal services following the construction of their mediation agreement).¹⁹⁹ However, inclusion of the client voice was important, and it also facilitated the triangulation of perspectives (clients, solicitors, and mediators) through a total of 20 completed interviews. This, coupled with the quantitative data analysis, provides rich, and novel insights into the journey to securing separation and divorce as experienced by FMS & LAB clients.

2.7 Conclusion

This chapter detailed the methodological approach adopted in this thesis. In implementing a mixed-methods design, a critical exploration of the client experience when seeking a separation or divorce using the LAB/FMS was enabled. The findings provide the basis for the chapters which follow. What emerges is a nuanced picture of

¹⁹⁹ For data pertaining to the manner in which mediation cases proceed, see Table 1 and Figure 1 on page 92.

the lived experience of marital disputes in Ireland, contributing for the first time, empirical insights into the client's journey. As previously noted, three themes, with reference to the literature, will be explored in the chapters which follow: (i) access to justice; (ii) autonomy; and (iii) service synergy. As the facilitation of access to justice is a primary role of the LAB, it is the subject of the next chapter.

Chapter 3: Access to Justice in Ireland: The Role of Legal Aid and Mediation Services in Resolving Marital Breakdown

3. Introduction

This chapter critically explores the theme of access to justice as it pertains to cases of separation and divorce. Legal aid supports access to justice in these cases for individuals who would be otherwise unable to afford to pursue a separation or divorce. As a central pillar of legal scholarship and a core function of the Irish Legal Aid Board, Part 1 of this chapter begins with a theoretical discussion of the historical foundations of access to justice, along with prominent interpretations of the concept. The focus of the chapter will then shift to the facilitation of access to justice in Irish family law, with a particular emphasis on the dissolution of marital disputes. In Part 2 of this chapter, quantitative and qualitative data will be introduced and considered to assess the performance of the structures currently facilitating access to justice. Through an in-depth exploration of the empirical data, this chapter presents a human-centred perspective to access to justice, focusing on how legal and mediation services are experienced by clients and perceived by professionals, in order to propose a number of evidence-based reforms capable of enhancing the experience of the dispute resolution process. In this context, three sub-themes are identified: (i) the need to simplify procedure; (ii) accessibility to supports; and (iii) improving legal literacy.

Part 1

3.1 Justice

Hans Kelsen described the question of ‘what is justice?’ as constituting the ‘eternal question of mankind’.²⁰⁰ Despite insights from some of the most notable philosophers and political thinkers in history,²⁰¹ there remains no normative answer to this

²⁰⁰ Hans Kelsen, *What Is Justice? Justice, Law, and Politics in the Mirror of Science Collected Essays by Hans Kelsen* (Berkely 1960) at page 1.

²⁰¹ Margot Hurlbert and James Mulvale, ‘Defining Justice’ in Margot Hurlbert (ed) *Pursuing Justice: An Introduction to Justice Studies* (Fernwood Publications 2011). Although Aristotle’s views on justice

question.²⁰² Such is its complexity that there is an absence of consensus as to whether justice is a natural or social construct. This chapter adopts the social perspective, given the endorsement of the social stance in contemporary academia and the recognition that family law evolves in accordance with societal values.²⁰³ Interpretations of justice are commonly depicted from a legalistic perspective, yet arguably this is reductionist as justice forms the cornerstone of law, ethics and politics.²⁰⁴ While the ability of the law to facilitate justice is central to this chapter, it is necessary to briefly consider justice as a broader theoretical and contextualised concept.

Conceptualisations of justice tend to refer to an aspect or dimension of justice, resulting in an array of theories that are typically context sensitive. While not universally endorsed,²⁰⁵ Romano contends that there are three primary contextual dimensions: (i) retributive or criminal justice;²⁰⁶ (ii) corrective or civil justice;²⁰⁷ and (iii) distributive or social justice. The latter of these dimensions is of particular interest in contemporary philosophy and concerns the ethical appropriateness of how rights, finances and benefits are distributed amongst those who are on unequal footing.²⁰⁸ Through this concern for those who are on unequal footing, it is arguable that social justice (as it is contemporarily conceived) is a cornerstone for the establishment of the Irish Legal Aid Board (as will be discussed further in the next section). Given this

arguably constitute moral virtues, Hurlbert and Mulvale draw a direct alignment with distributive justice. See also: Terence Irwin, *Aristotle's First Principles* (Oxford University Press 1990). Aristotle sought to delineate between distributive and corrective justice with the former concept pertaining to what is considered socially just whereas the latter is more transactional in nature, whether voluntary or involuntary and there is an injustice in the transaction as a result. For further reading see: Anna Heenan, *Autonomy, Care and Family Law* (Hart Publishing 2024).

²⁰² Kelsen (n 200).

²⁰³ John Rawls, *A Theory of Justice* (Belknap Press 1971); Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974). This social stance was adopted by both Rawls and Nozick in their seminal works. For further reading see: George Bragues, 'David Hume vs. Thomas Reid: Is justice socially constructed or natural?' (2008) 25(2) *History of Philosophy Quarterly* 137.

²⁰⁴ David Raphael, *Conceptions of Justice* (Oxford University Press 2003).

²⁰⁵ Komal Parnami, 'Concept of Justice Difficulties in Defining Justice' (2019) 2(5) *International Journal of Law Management & Humanities* 1. Aristotle opined that justice constitutes both commutative and distributive justice.

²⁰⁶ Romano Cesare, 'Can You Hear Me Now: The Case for Extending the International Judicial Network' (2009) 10(1) *Chicago Journal of International Law* 233. Retributive justice is commonly considered to constitute criminal justice and is concerned with the ethical appropriateness of a punitive approach to address wrongdoing.

²⁰⁷ *ibid.* Corrective justice often referred to as civil justice, regards the ethical appropriateness of rectifying imbalances caused by a loss or gain.

²⁰⁸ *ibid.* See also: Parnami (n 205).

relevance, it is necessary to consider social justice broadly prior to shifting focus to civil justice where marital disputes are accounted for in Irish law.

As a consequence of the established link with social order, justice develops in accordance with society, rendering it an evolving concept.²⁰⁹ Contemporary theories have sought to progress beyond the utilitarian's view of social justice,²¹⁰ adopted by philosophers such as Jeremy Bentham and John Stuart Mill.²¹¹ This perspective in which the good of the group can be prioritised at the expense of the individual has since fallen out of favour with recent social developments favouring liberalism. Conceptualisations of justice premised on liberalism vary yet are typically characterised and differentiated according to perspectives on moral equality and individual autonomy (as is the focus of Chapter 4).²¹² John Rawls a contemporary philosopher, presented a theory of justice as 'fairness' in the seminal work *A Theory of Justice*.²¹³ This theory aimed to provide a conception of justice that is a systematic alternative to utilitarianism.²¹⁴ Utilising what Rawls describes as the 'veil of ignorance', he notes what a rational member of society would identify as the principles of justice.²¹⁵ Rawls was not a strict egalitarianist as he favoured an equitable approach

²⁰⁹ John Rawls, *A Theory of Justice Revised Edition* (Harvard University Press 1999). In proceeding to discuss Rawls theory of justice as fairness, it will be identified that it is the attainment of substantive justice that enables 'justice' to remain cohesive with contemporary society. See also: Roscoe Pound, 'Justice According to Law' (1913) 13(8) *Columbia Law Review* 696; Jacques de Ville, 'Mythology and the Images of Justice' (2011) 23(3) *Law & Literature* 324.

²¹⁰ Rafael Pereira, Tim Schwanen, and David Banister, 'Distributive Justice and Equity in Transportation' (2017) 37(2) *Transport Reviews* 170 at page 173. Pereira and colleagues eloquently surmised utilitarianism as 'the policy that best aggregates people's conflicting preferences becomes simply a matter of efficient administration, where the best alternative is the one which maximises aggregate net welfare for the greatest number of people.' See also: Will Kymlicka, *Contemporary Political Philosophy An Introduction* (2nd edn, Oxford University Press 2002).

²¹¹ Julia Driver, 'The History of Utilitarianism' (*The Stanford Encyclopaedia of Philosophy*, 2009) <<https://plato.stanford.edu/entries/utilitarianism-history/>> accessed 31 August 2023.

²¹² Kymlicka (n 209). See also: Chapter 4 for a full discussion on the interrelationship between interpretations of liberalism and autonomy along with their expression in the Irish marital breakdown regime.

²¹³ Rawls (n 203).

²¹⁴ Rawls (n 209) at page xi.

²¹⁵ *ibid.* The premise of this contractual theory commences with what is known as the 'original position' in which members of society form a social contract and determine what fundamental principles would be most just or fair in governing all citizens. The formation of these principles necessitates an entirely impartial and unbiased approach in their development. To achieve this aim, a hypothetical scenario is devised by Rawls whereby a 'veil of ignorance' removes any notion of personal circumstances, with individuals retaining only those 'primary goods'. Absent of an awareness of personal circumstances, it is necessary for the conceptualisation of justice devised to cater for all. This assertion is premised on there being just as much a likelihood of the hypothetical individual constructing the conceptualisation to be placed in an impoverished position than there is an affluent position i.e. they must hedge their bets. Utilising this hypothetical scenario he developed the following principles of justice. The first being the

over strict equality, thereby justifying what is termed ‘justice as fairness’.²¹⁶ In describing his theory, Rawls notes that it is ‘a matter of pure procedural justice’ with the ‘social system’ being designed ‘so that the outcome is just whatever it happens to be’, thus accounting for what is known as both procedural and substantive justice.²¹⁷ While procedural justice refers to an assessment of the steps taken in achieving justice, substantive justice is an assessment of the decision that results from the steps taken thus establishing an equality of outcome.²¹⁸ Although Rawls utilises the original position and veil of ignorance (procedural mechanisms), his ultimate aim is to achieve a substantively just society that is guided by two principles: the equal liberty principle and the difference principle. The former specifies that ‘each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.’²¹⁹ The latter of these principles outlines that ‘social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.’²²⁰ In consideration of the equal liberty principle which is ultimately concerned with the entitlement of equal basic rights and liberties, alongside the difference principle, specifying that inequalities are justifiable only where benefiting the least advantaged in society, there is a clear concern for substantive justice and the attainment of a ‘fair’ outcome for all.

Though Rawls’ theory pertains to the construction of a socially just society, it aligns with the Irish approach to marital breakdown (a facet of the civil law system) as will be discussed in full in the next section. In accordance with the views of Rawls, Genn notes that procedural justice is a necessary precursor in order to achieve substantive

‘equal liberty principle’ in which all citizens would want equal basic rights and liberties. The second principle is divided into two parts. Part I, the equality of opportunity principle dictates that all citizens have the same opportunity to succeed based on merit. Part II, the difference principle, concerns the distribution of wealth and notes that society should be structured so that the greatest benefit is provided to the least advantaged.

²¹⁶ Rawls (n 209).

²¹⁷ *ibid* at page 74.

²¹⁸ Lola Akin Ojelabi and Judith Gutman, ‘Family Dispute Resolution and Access to Justice in Australia’ (2020) 16(2) *International Journal of Law in Context* 197. See also: Edith Barrett and Tom Tyler, ‘Procedural Justice as a Criterion in Allocation Decisions’ (1986) 50(2) *Journal of Personality and Social Psychology* 296.

²¹⁹ Rawls (n 209) at page 53.

²²⁰ *ibid* at page 53.

justice.²²¹ Further discussing this inter-relationship, Pound considers justice of the law as having both legal and non-legal elements.²²² While he identified procedural justice as firmly entrenched in the legal aspect, judicial discretion was identified as the non-legal element.²²³ Thus, even though Pound considered this discretionary stage of the process non-legal, this judicial capacity aligns itself with substantive justice and is a central aspect of legal processes.²²⁴ In the next section, it will be argued that the marital breakdown regime in Ireland incorporates both procedural and substantive elements with the aspiration of achieving a ‘fair’ outcome. Using the empirical data to support the arguments made, it will be contended that it is necessary to reform those procedural mechanisms within the marital breakdown process to better facilitate the attainment of substantive justice.

3.2 Family Law

Situated within the core dimension of civil justice, as identified by Romano, is family law.²²⁵ The concept and outcomes of ‘family justice’ is debated with a resultant range of interpretations.²²⁶ Referring to family justice, MacLean, Eekelaar and Bastard note that it constitutes:

²²¹ Hazel Genn, *Judging Civil Justice* (Oxford University Press 2010) at page 13. It is arguable that Genn’s premise is further supported by the work of Rawls as previously discussed, whereby the procedural mechanism (the veil of ignorance and original position) were utilised to obtain a substantive outcome.

²²² Pound (n 209).

²²³ *ibid.*

²²⁴ Ronald Dworkin, ‘Judicial Discretion’ (1963) 60(21) *Journal of Philosophy* 624.

²²⁵ Cesare (n 206).

²²⁶ Alison Diduck, ‘Autonomy and Family Justice’ (2016) 28(2) *Child & Family Law Quarterly* 133. Diduck is of the view that achieving justice in a family law context is reliant on facilitating party autonomy by way of self-determination. While party autonomy is desirable in a family law context as will be discussed in Chapter 4, it is not advisable in all instances. In proceeding to conceptualise justice in family law within this chapter, it will be seen that it is necessary to adopt an alternative perspective on justice which can remove parties of their ability to self-determine. For an alternative perspective see: Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Socio-legal Studies 2017) at page 6. Barlow et al. present a more context sensitive interpretation of family justice. In *Mapping Paths to Family Justice*, it is identified that this terminology has two different meanings with one constituting an adjective and the other a noun. Where adjectival ‘It refers broadly to all those people and institutions associated with its operation...’ Where constituting a noun, ‘This is what parties (hopefully) receive from the family justice system.’ In proceeding to discuss the concept, the views of Barlow et al. directly contrast with the views of Diduck as they specify that ‘we take the view that justice is not just about promoting parties’ autonomy and self-determination. Rather, it has a separate meaning against which both processes and outcomes can (and should) be measured.’ This topic will be the subject of Chapter 4 where it is explored in depth.

not only Family Law, the legal framework within which personal obligations over the life course are managed and regulated, but also the justice system which delivers legal knowledge, advice and support at times of change of status or family stress, together with the mechanisms for dispute resolution, and adjudication where agreement cannot be reached.²²⁷

The scope of this definition is purposely broad, acknowledging the holistic nature in which justice is achieved in the family law context. It could be argued that through advocating for knowledge, advice and necessary supports, which can mitigate social inequalities, there is an appreciation of the egalitarianist view.

Irish case law pertaining to relationship disputes indicates that justice has become synonymous with ‘fairness’.²²⁸ In the case of *DT v CT Fennelly J* noted that:

The Court must do what is “proper” in the sense of “appropriate.” I would have thought that this is also synonymous with what is “fair” or “just.” In the moral sense, this is a clearly stated objective. In practice, it requires the Court to weigh in the balance the infinite variety and complexity of the elements of human affairs and relationships and to arrive at a just result.²²⁹

²²⁷ Mavis Maclean, John Eckelaar and Benoit Bastard, *Delivering Family Justice in the 21st Century* (Hart Publishing 2015) at page 1.

²²⁸ *BD v JD* Unreported High Court 5 December 2003. While undefined in legislation, McKechnie J in the case of *BD v JD* equated the fulfilment of proper provision as requiring them to ‘utilise the facts of this case within the provisions of that section so that the resulting orders are fair, just and equitable.’ See also: Louise Crowley, ‘Irish Divorce Law in a Social Policy Vacuum – from the Unspoken to the Unknown’ (2011) 33 *Journal of Social Welfare and Family Law* 227.

²²⁹ Per Fennelly J in the case of *DT v CT* [2002] 3 IR 334 at page 413. This Supreme Court case regarded a divorce dispute and sought to ascertain whether a ‘clean break’ was achievable in Irish law. For additional information on this case, see the forthcoming chapter. Within this case Denham J also equates justice to fairness stating that ‘This concept of justice, fairness, applies to both spouses.’

While this view clearly equates justice with fairness, it further accounts for both the procedural and substantive elements of justice as noted by Pound.²³⁰ Through this substantive and discretionary element, it is apparent that fairness necessitates context sensitivity. Although valuable in facilitating a deeper appreciation of justice, the case of *DT v CT* is of particular relevance to this work, given the stated view by Denham J in her judgment that ‘The underlying principle of the Act of 1996 is fairness.’²³¹ This interpretation directly aligns the Irish regime with Rawls view of ‘justice as fairness’ as previously noted.²³²

While factors to a marital dispute will primarily be considered in a subjective manner, it could be argued that guidance (or procedural mechanisms) is provided for by s. 20 of the 1996 Act which largely mirrors that of s. 16 of the Family Law Act, 1995.²³³ In the Irish Supreme Court, McGuinness J noted that ‘In this jurisdiction the overriding requirement of a fair outcome is governed by s 20(5) of the 1996 Act’ which prevents the making of orders for ancillary relief unless such order is in the interests of justice.²³⁴ Therefore, achieving justice or fairness in divorce disputes seemingly necessitates consideration of the statutory factors set out in s. 20, thereby introducing a procedural element.²³⁵ The veracity of this argument is however undermined through s. 20(2) specifying the court is merely to ‘have regard to’ such elements, permitting a variable emphasis on a case-by-case basis.

Of further critical impact with regards to this lack of consistency and cohesion, is that justice as a goal remains undefined (as does proper provision). It is arguable that the absence of an appropriate definition of justice and the variability in the consideration

²³⁰ Pound (n 209).

²³¹ *DT v CT* (n 229) at page 382. The articulation of this principle is highly commendable as this thesis will critique the Irish marital breakdown regime for its lack of underlying principles and how this limits the attainment of party autonomy (discussed in full in Chapter 4).

²³² Rawls (n 209).

²³³ Such factors to be taken into consideration include: (i) the welfare of dependent children; (ii) the financial situation of the parties; (iii) the standard of living the family had been accustomed to prior to marital breakdown; (iv) the age of the spouses and the duration of their marriage; (v) whether there are any physical or mental disabilities the spouses or dependent children suffer from; (vi) the contributions made by the spouses to the family unit; (vii) a loss suffered as a result of the marital breakdown; and (viii) the conduct of the spouses if it would be otherwise unjust to disregard it.

²³⁴ *MK v JP* [2001] 3 IR 371 at 383. This Supreme Court case considered the weight to be given to an exiting separation agreement.

²³⁵ An almost identical set of factors were set out in s. 20 of the 1989 Act. These factors which regard a judicial separation are now contained within s. 16 of the Family Law Act 1995.

of the s. 20 factors, places a greater emphasis on context sensitivity and the judicial capacity to exercise informed judgment.²³⁶ As Keane CJ observed in the case of *DT v CT*:

the circumstances of individual cases will vary so widely that ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what he or she considers a just resolution in all the circumstances.²³⁷

Despite incorporating both procedural and substantive elements, this statutory approach evidently illustrates a greater emphasis is placed on the subjective interpretations of the judiciary in Irish marital disputes.²³⁸ While there are merits to this approach, as Chapter 4 will identify, it does serve to operate as an impediment to private ordering in separation and divorce disputes.²³⁹ Having discussed the conceptualisation of justice within the context of marital disputes, the capacity of the Irish family law system to achieve access to justice will now be considered.

3.3 Access to Justice

It is critical to consider the way access to justice is facilitated in order to ascertain the experience of parties to family law proceedings. Mechanisms by which justice is achieved will impact upon an individual's capacity to secure meaningful 'access to justice', and conceptualisations of justice and access to justice are interlinked with the

²³⁶ Dáil Debate 23 November 1988, Vol. 384 No. 6. In debating the introduction of a judicial separation (as will be discussed later in this chapter), McCartan TD noted that 'fairness, equity and protection of the vulnerable spouse in matrimonial law in Ireland is what should guide us in this legislation and to hell with certainty.' This is clear evidence of a preference for substantive justice even in the drafting stages of the relevant legislation. See also: Seanad Debate, 18 October 1995, Vol 144 No. 15. Noted by Deputy Taylor (as he was then) is that 'even in an Act one cannot set out the detailed provisions of the huge multiplicity of cases that will arise. Every case is different and it is hard to find two cases where the assets, income, prospects, ages, length of marriage, needs etc. will be the same. Of necessity, whether we like it or not, we have to leave the discretion on those provisions to the decision of the court, having heard the circumstances of each family.' Thus, justice relies upon subjective adjudication – not rules.

²³⁷ *DT v CT* (n 229) page 365.

²³⁸ In Chapter 4, this broad scoping discretion will be identified as a defining feature of the Irish marital breakdown regime and is discussed in full.

²³⁹ In Chapter 4, it will be discussed that conveying such broad sweeping judicial discretion may come at the expense of individual autonomy.

former guiding the latter. A seminal study conducted on this theme was the Florence Access to Justice Project which sought to ‘examine the emergence and development’ of access to justice.²⁴⁰ Led by Mauro Cappelletti and Bryant Garth, the project conducted in the 1970’s cast a purposefully broad scope, drawing on the experience of over 100 experts in 27 countries from a range of academic disciplines, demonstrating that justice as a concept is not confined to the law.²⁴¹ The project’s subsequent publications collectively documented a systemic investigation into the manner in which justice is facilitated on a global scale, offering rich insights into the evolving scope and constituents of access to justice.²⁴² The central achievement of this expansive study was the identification of what Cappelletti and Garth termed the access to justice ‘waves’ which occur in chronological sequence, having traced the evolution of access to justice from its origins to its current portrayal in contemporary society.²⁴³ Originating in the USA and Europe from the 1960’s onwards, the first ‘wave’ consisted of the provision of legal assistance to those unable to afford it.²⁴⁴ The purpose of facilitating such aid was to remove the socio-economic barriers in accessing justice through affording access to aid and advice, thereby increasing a societal awareness around rights.²⁴⁵ Given the intention to mitigate socioeconomic barriers in accessing justice, this ‘wave’ could be considered a form of distributive justice, aligning itself

²⁴⁰ Mauro Cappelletti, Bryant Garth and Nicolò Trocker, ‘Access to Justice: Comparative General Report’ (1976) 40(3/4) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 669. This project was funded by the Ford Foundation and the National Research Council of Italy.

²⁴¹ *ibid.* See also: Mauro Cappelletti and Bryant Garth, *ATJ and the Welfare State: An Introduction* (Sijthoff 1981); Bruno Salles and Paulo Cruz, ‘The Florence Access-To-Justice Project: Descriptive Aspects’ (2020) 22(1) *Revista de Derecho* 178.

²⁴² Mauro Cappelletti and Bryant Garth, *Access to justice. Volume I. Book I: A world survey* (Sijthoff & Noordhoff 1978-1979a); Mauro Cappelletti and John Weisner, *Access to justice. Volume II. Book I: promising institutions* (Sijthoff & Noordhoff 1978-1979); Mauro Cappelletti & John Weisner, *Access to Justice. Volume I. Book II: A world survey* (Sijthoff & Noordhoff 1978-1979b); Mauro Cappelletti & John Weisner, *Access to justice. Volume II. Book II: Promising institutions* (Sijthoff & Noordhoff 1978-1979a); Mauro Cappelletti and Bryant Garth, *Access to Justice Book III: Emerging issues* (Sijthoff/Noordhoff, 1979); Mauro Cappelletti and Klaus Friedrich Koch, *Access to Justice Book IV: The anthropological perspective* (Sijthoff & Noordhoff 1978-1979). The Project resulted in the Florence Access-to-Justice Series in which four books distributed in six volumes were published between 1978 and 1979. Book I documented the empirical study carried out by way of a global questionnaire. The questions developed by the Florence Centre of Comparative Legal Studies sought to identify common problems and solutions arising in accessing justice. Book II set out a doctrinal analysis of the responses received to the questionnaire. Book III sought to evaluate and consider various access to justice reforms. Book IV consisted of a number of anthropological studies on dispute resolution. See also: Salles and Cruz (n 241).

²⁴³ Mauro Cappelletti and Bryant Garth, *Access to justice. Volume I. Book I: A world survey* (Sijthoff & Noordhoff 1978-1979a); Mauro Cappelletti and John Weisner, *Access to justice. Volume II. Book I: promising institutions* (Sijthoff & Noordhoff 1978-1979).

²⁴⁴ *ibid.*

²⁴⁵ Cappelletti and Weisner (n 243). See also: Salles and Cruz (n 241).

with egalitarianist philosophies and specifically Rawls ‘difference principle’. Commencing in the USA between 1965-1970 and extending to European countries, the second ‘wave’ constituted a new era in legal approach whereby individual interests were diffused, so that protection could be provided to the collective. This ‘wave’ led to the creation of collective actions and involved a grouping of individuals pursuing justice in a unified manner such as class action lawsuits.²⁴⁶ The final ‘wave’ identified by Cappelletti and Garth originated in the 1970’s and concerned the simplification of dispute resolution services, drawing on a wider array of supports and facilitating the increased range and availability of mechanisms to resolve disputes in a private or informal manner.²⁴⁷ Cappelletti and Garth perceived this ‘wave’ as extending access to justice to incorporate ADR methods.²⁴⁸ In consideration of this seminal piece of research, Galanter notes that the empirical investigation ‘codified a broadened notion of access beyond representation by lawyers and beyond courts as the site of justice-seeking.’²⁴⁹ Through examining the quantitative and qualitative data presented in Part 2 of this chapter, empirical evidence supports the need for a holistic approach to dispute resolution to ensure that justice is upheld.

While the Florence Access to Justice Project documented the evolution of access to justice, the United Nations Development Programme (UNDP) offers a broad scoping definition.²⁵⁰ Drawing on its various research projects, the UNDP defines access to justice:

as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards. There is no access to

²⁴⁶ *ibid.*

²⁴⁷ Naomi Creutzfeldt, Arabella Kyprianides, Ben Bradford and Jonathan Jackson, ‘Legal Needs and Access to Justice’ in Naomi Creutzfeldt, Arabella Kyprianides, Ben Bradford and Jonathan Jackson (eds) *Access to Justice, Digitalization and Vulnerability* (Bristol University Press 2024). While the final ‘wave’ identified in the Florence Access to Justice Project pertained to procedural simplification, more recently, contemporary literature suggests that a fourth wave has emerged through the digitalisation of the law and access to justice in this context.

²⁴⁸ Cappelletti and Weisner (n 243). See also: Salles and Cruz (n 234).

²⁴⁹ Marc Galanter, ‘Access to Justice in a World of Expanding Social Capability’ (2010) 37(1) *Fordham Urban Law Journal* 115 at page 116.

²⁵⁰ United Nations Development Programme, ‘Our mission, our goals, our mandate’ (UNDP 2023) <<https://www.undp.org/about-us>> accessed 12 November 2024. The UNDP is the United Nations development agency that aids countries in achieving their sustainable development goals such as the elimination of poverty, economic growth and human development.

justice where citizens, especially marginalized groups, fear the system, and see it as alien; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. For UNDP, access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight.²⁵¹

This definition adopts an egalitarianist perspective of achieving justice that is purposefully broad in its scope, which is to be welcomed. In exploring the manner in which access to justice is currently facilitated in Ireland, this chapter will endorse the UNDP interpretation of access to justice and consider whether the current marital breakdown regime satisfactorily accounts for the 1st and 3rd ‘wave’ as identified by the Florence Access to Justice Project.

3.4 Facilitating Access to Justice Through Legal Aid and Advice

3.4.1 What is Civil Legal Aid and Advice?

Central to the first ‘wave’ of the access to justice movement, and directly referenced in the UNDP definition, is the necessity for legal representation. Similarly, Salem and Saini identify an absence of legal representation as the most pervasive barrier in accessing justice for those individuals who are otherwise unable to afford representation.²⁵² While civil legal aid and advice has not always been available in Ireland, both are now defined and provided for on a statutory basis in the Civil Legal Aid Act, 1995.²⁵³ Though the scope of the services offered by the Irish Legal Aid Board were limited upon its establishment, they are now available for a wide array of

²⁵¹ United Nations Development Programme, *Strengthening Judicial Integrity through Enhanced Access to Justice* (UNDP 2013) at page 5.

²⁵² Peter Salem and Michael Saini, ‘A Survey of Beliefs and Priorities About Access to Justice of Family Law: The Search for A Multidisciplinary Perspective’ (2017) 55(1) Family Court Review 120.

²⁵³ Civil legal aid is defined s. 27 and legal advice is defined under s. 25.

disputes and are firmly entrenched within the Irish legal landscape.²⁵⁴ Given the complexity of the law and associated court processes, this resource is fundamental in ensuring procedural justice for those seeking to vindicate their rights in the absence of private representation. The provision of these services ought to be regarded as a form of social justice, with Sommerlad describing legal aid as a ‘tool in the struggle against social exclusion’,²⁵⁵ and Denvir et al. specifying that it ‘reduc[es] social exclusion in society.’²⁵⁶ Similarly, in Ireland, TD Ciaran Murphy (as he was then), noted that ‘there is a consensus among all those at all concerned with social justice that the need for civil legal aid is incontrovertible.’²⁵⁷ Despite this recognised value, distinct from criminal legal aid, the statutory right to civil legal aid and advice was subject to a much greater delay in its introduction.²⁵⁸ While currently accessible subject to eligibility requirements, in exploring the development of the scheme for civil legal aid and advice in Ireland, it will emerge that its necessity was demonstrated long before its establishment.

3.4.2 The Impetus for the Establishment of Civil Legal Aid and Advice in Ireland

Commonly associated with laying the foundations for a scheme for civil legal aid and advice in Ireland are: (i) the establishment of FLAC; (ii) the formation of the Pringle

²⁵⁴ Pdraig O’Morain, *ATJ for All: The History of the Free Legal Advice Centres 1969 – 2003* (FLAC 2003). The LAB has expanded greatly since its inception. A predominant critique of the service provided following its establishment was the confined scope. Previously excluded from its scope was representation before tribunals, class action and test cases, in addition to a wide variety of other disputes for civil bill sums above £150. The LAB has since greatly expanded and its services are more widely available, as is evidence in its Legal Aid Board, *Annual Report* (LAB 2022) where it covers debt, international protection, child abduction etc. See also: Gerry Whyte, ‘And Justice for Some’ (1984) 6(1) *Dublin University Law Journal* 88; Free Legal Advice Centres, *Annual Report 2022: Bringing Access to Justice Together* (FLAC 2022).

²⁵⁵ Hilary Sommerlad, ‘Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid’ (2004) 31(3) *Journal of Law and Society* 345 at page 348. See also: Richard Abel, ‘Law without Politics: Legal Aid under Advanced Capitalism’ (1984) 32(3) *UCLA Law Review* 474.

²⁵⁶ Catrina Denvir, Jacqueline Kinghan, Jessica Mant and Daniel Newman, *Legal Aid and the Future of Access to Justice* (Hart Publishing 2023) at page 2.

²⁵⁷ Seanad Debate, 20 June 1979, Vol. 92 No. 6.

²⁵⁸ There has been a statutory right to criminal legal aid and advice since 1962 by virtue of the Criminal Justice (Legal Aid) Act 1962, with such access being recognised as a constitutional right in the case of *The State (Healy) v Donoghue* [1976] IR 325. See also: Jenny Burley, ‘Legal Aid and Family Law in Ireland’ (2000) 25(4) *Alternative Law Journal* 169. Burley suggests a number of potential causes for the delay in introducing civil legal aid, including an absence of judicial separation and divorce leading to a disinterest in family law by the government and legal profession, along with a failure to establish a governmental responsibility for its facilitation as part of social services as was carried out elsewhere.

Committee; and (iii) the case of *Airey v Ireland* (all of which will be discussed in turn). FLAC, established in 1969, is self-described as ‘a human rights organisation which exists to promote equal access to justice for all.’²⁵⁹ Through the demand for FLAC’s legal advice services, coupled with the organisations research projects identifying unmet legal needs, the necessity for a civil legal aid and advice scheme in Ireland became undeniable.²⁶⁰ Reliant on donations, and run by volunteers who were predominantly law students, it was only following a threat to close down its services that State funding for FLAC was secured in 1974.²⁶¹ This threat was also instrumental in instigating a government commitment to the establishment of a State system providing civil legal aid and advice.²⁶² In fear of FLAC’s closure, which had been central in mitigating this lacuna, the government formed a working group which later became known as the ‘Pringle Committee’ with the purpose of ascertaining how a scheme for civil legal aid and advice should be made available in Ireland.²⁶³ Formed by the then Minister for Justice Patrick Cooney, and chaired by Judge Denis Pringle, the Pringle Committee was established in December 1974.²⁶⁴ In publishing its 289 page Report, of which only 3 pages considered the need for a legal aid scheme (indicating that its requisite was all but assumed),²⁶⁵ it was recommended that the State formulate and fund a Government appointed legal aid board with the primary role of the organisation being the provision of legal aid and advice subject to a means and

²⁵⁹ FLAC, ‘Mission Statement’

<<https://www.flac.ie/about/#:~:text=FLAC%20is%20a%20human%20rights,mechanisms%20to%20v indicate%20their%20rights>> accessed 20 November 2024.

²⁶⁰ O’Morain (n 254). In the years post its formation, FLAC experienced rapid growth in the demand for its services. When publishing its first annual report in 1972, FLAC had handled 2,437 files. This figure increased to over 8,000 files by the publication of FLAC’s second annual report in 1974, with over one third of the cases relating to family law (despite the absence of judicial separation and divorce as currently known). This demand for FLAC’s services was clear evidence of the unmet legal needs of citizens and shone a light on the longstanding failure of the State to address this barrier in accessing justice. See also: Seanad Debate 16 Feb 1995, Vol. 141 No. 18. A survey conducted by FLAC on the presence of unmet legal needs and the absence of awareness as to rights was referenced throughout the parliamentary debates on the establishment of a civil legal aid scheme demonstrating its direct influence. For further reading see: FLAC, *Civil Legal Aid in Ireland: 40 Years On* (FLAC – 2009).

²⁶¹ O’Morain (n 254). See also: Dáil Debate, 12 February 1974, Vol. 270 No. 3.

²⁶² Claire Carney, ‘The Growth of Legal Aid in the Republic of Ireland – II’ (1979) 14(2) *Irish Jurist* 211.

²⁶³ *ibid.* This threat was also instrumental in securing State funding for FLAC’s services. See also: O’Morain (n 254).

²⁶⁴ Whyte (n 254). It took three years post the formation of the Committee for the Pringle Report to be published on December 14, 1977.

²⁶⁵ Committee on Civil Legal Aid and Advice, *Report to the Minister for Justice, Pringle Report* (Committee on Civil Legal Aid and Advice - 1977) at page 36. Where reference was made, the Report simply noted that there is ‘considerable support for the view that a scheme of civil legal aid and advice is needed’ and subsequently cited a number of submissions supporting this position.

merits test.²⁶⁶ The scheme proposed by the Committee was extensive as it recommended that:

A comprehensive scheme of legal aid and advice should be concerned not only with the provision of legal advice and legal representation but also with the dissemination of information about the law and with research aimed at establishing the nature and extent of hidden legal needs.²⁶⁷

Eleven months following the publication of the Pringle Committee Report and prior to the implementation of its recommendations, a case was brought against Ireland in the European Court of Human Rights (ECtHR) by Mrs Josie Airey.²⁶⁸ Josey Airey's abusive husband had refused to sign a deed of separation and as a result she was required to issue proceedings to secure a decree of judicial separation (*divorce a mensa et thoro*) for which, at that time, only the High Court had jurisdiction.²⁶⁹ Unable to afford the costs of pursuing this case,²⁷⁰ Mrs Airey brought an application to the European Commission on Human Rights.²⁷¹ The basis for her argument were the high costs associated with taking a judicial separation case and in the absence of a legal aid

²⁶⁶ *ibid.*

²⁶⁷ *ibid* page 29. See also: *ibid* page 49. In arriving at the determination as to whether to provide a mechanism for the distribution of information and the facilitation of research, the Report outlined 'Should the scheme be concerned, for example, with dissemination of information on aspects of law which are likely to concern those in need and with research aimed at establishing the precise nature and extent of hidden need? Our view is that it should. Equality of access to the law is hindered not only by lack of money but also by lack of information. Financial support for litigation, on its own, certainly does not guarantee equality.'

²⁶⁸ *Airey v Ireland* [1979] App No 6289/73.

²⁶⁹ The High Court inherited jurisdiction over this decree from the Ecclesiastical Courts by virtue of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870. While the parties remained married, this remedy constituted a divorce from bed and board, alleviating them of their obligation to cohabit.

²⁷⁰ *Airey v Ireland* (n 268) at paragraph 11. During the course of the case, it was noted 'that the approximate range of the costs incurred by a legally represented petitioner was £500 - £700 in an uncontested action and £800 - £1,200 in a contested action, the exact amount depending on such factors as the number of witnesses and the complexity of the issues involved.'

²⁷¹ She contended that her right to a fair trial under Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) was infringed (along with Articles 8, 13, and 14). Article 6(1) of the Convention pertains to the right to a fair trial specifying that 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' See also: Philip Leach, *Taking a Case to the European Court of Human Rights* (2nd edn, Oxford University Press 2005). If seeking to take a case in the European Court of Human Rights it was necessary to make an application to the European Commission. The Commission would assess the application in two stages, these being an admissibility and merits stage of evaluation.

scheme, no such access to the courts was possible.²⁷² The gravity of Mrs Airey's case was significant and in preparation, the Commission sought to address a number of competing interests in its Plenary Report.²⁷³ Ultimately, in seeking to avoid a ruling that would necessitate legal aid to be granted in all civil law cases, the Commission proposed the introduction of a legal aid system dependent on a means test, and/or the 'introduction of simplified and cheaper proceedings or the appointment of an official to help in the presentation of the case to the Court.'²⁷⁴ It is arguable that the operation of this proposed means test is not a denial of access to justice, rather it demonstrates the application in practice of the difference principle as identified by Rawls.²⁷⁵ In the subsequent hearing, although not unanimously agreed, the ECtHR determined that the absence of free legal aid for the applicant was a violation of her right to access the courts under Article 6 of the Convention.²⁷⁶ This ruling was made on the basis that 'the possibility of self-representation before the High Court does not provide the applicant with an *effective* right of access and, therefore, also does not constitute a domestic remedy.'²⁷⁷ The choice wording of '*effective*' would suggest that had Josey Airey proceeded in the absence of representation, her procedural justice as previously conceived in this chapter would have been impeded due to her inability to participate effectively. As the State was held to be in violation of its commitments under the European Convention on Human Rights and Fundamental Freedoms (hereafter the 'ECHR'), it ultimately made a formal undertaking to put in place a civil legal aid

²⁷² *Airey v Ireland* (n 268) at paragraph 24-25. In response to Airey's contention, the Irish State assumed the position that she was free to take her case to the High Court and self-represent. While in theory correct, the procedural aspects of the High Court were far more complex than those of the lower courts. In demonstration of this complexity, the views of Mr Alan Shatter a specialist in Irish family law were cited. With regards to the Irish court system, Mr Shatter referenced how the High Court is the least accessible not only due to the significant associated costs, but also as 'the procedure for instituting proceedings...is complex particularly in the case of those proceedings which must be commenced by a petition' such as in the case of a judicial separation.

²⁷³ European Commission of Human Rights, *Application No. 6289/73 Johanna Airey against Ireland, Report of the Commission (Adopted on 9 March 1977)* (Council of Europe 1977) at paragraph 77. It was noted that 'The Commission is of the opinion that Art. 6 must be understood to impose an obligation on the State to secure proper access by removing such obstacles.' See also: paragraph 80 where, conscious of the potential implications on member States of the ECHR, the Commission proceeded to outline that this 'finding does not amount to a requirement of free legal aid to be granted automatically in this or other civil cases.'

²⁷⁴ *ibid* at paragraph 80.

²⁷⁵ Rawls (n 209) at page 53.

²⁷⁶ *Airey v Ireland* (n 268).

²⁷⁷ *ibid* at paragraph 24.

scheme.²⁷⁸ In August 1980, State legal aid and advice for certain civil cases became available in Ireland for the first time.²⁷⁹

3.4.3 A Statutory Scheme for Civil Legal Aid and Advice in Ireland

Following the *Airey v Ireland* case, the Irish State was obliged to institute a scheme for civil legal aid.²⁸⁰ Although its establishment in 1979 was highly commendable,²⁸¹ the scheme was not without flaw, namely its absence of statutory footing which persisted until the enactment of the Civil Legal Aid Act, 1995.²⁸² However, MacLachlan and Harding note that ‘Despite this shift to legislation, the scheme was not changed in any substantial way, although funding was increased.’²⁸³ Whyte further substantiates this claim that meagre change was brought about by the enactment of the Civil Legal Aid Act, 1995, specifically referencing s. 5(1) which specifies that the provision of legal aid and advice is subject to the availability of resources, a default position to eschew responsibility of service delivery.²⁸⁴ Whyte also critiques the scheme on the basis of its ‘failure to provide for periodic review of the financial limits on eligibility [which] leaves open the possibility that inflation will restrict the category

²⁷⁸ Department of Justice, *Scheme of Civil Legal Aid and Advice* (DoJ 1979). This formal commitment came by way of the publication of the ‘Scheme of Civil Legal Aid and Advice’ in which a document detailing the proposed scheme was laid by Gerry Collins the Minister of Justice as he was then, before each house of the Oireachtas in December of 1979.

²⁷⁹ Whyte (n 254).

²⁸⁰ Article 46 of the ECHR. This obligation stems from binding nature of ECtHR judgements as outlined in Article 46 of the ECHR.

²⁸¹ Seanad Debate 23 February 1978, Vol. 88 No. 6. In discussing the schemes establishment, Senator Robinson (as she was then), specified how it was ‘one of the most important subjects that the Seanad has debated.’

²⁸² Mel Cousins, ‘Legal Aid Reform in France and the Republic of Ireland in the 1990s’ in Francis Regan, Alan Paterson, Tamara Goriely and Don Fleming (eds), *The Transformation of Legal Aid* (Oxford University Press 1999). During its trial (non-statutory based) phase, Cousins notes how the services provided were absent of consistency in their delivery. As the Irish State experienced a contemporaneous period of economic difficulty, a series of cutbacks were implemented, leading to long delays in accessing legal aid and advice to the extent that the service was suspended at certain stages in order for it to clear the significant backlog of cases. Other such flaws included the confined scope of the service and the insufficient funding to meet the standards required by the ECtHR ruling. Such inadequacies contributed to the submission of the Civil Legal Aid Bill, 1993 which ultimately established the foundation for the enactment of the Civil Legal Aid Act, 1995. See also: Whyte (n 254); Burley (n 258).

²⁸³ Lara MacLachlan and Maebh Harding, ‘The legacy of *Airey v Ireland*: family law distortion of civil legal aid’ (2025) 1(1) Legal Studies 1 at page 10.

²⁸⁴ Gerry Whyte, *Social Inclusion and the Legal System: Public Interest law in Ireland* (Institute of Public Administration, 2000) at page 294. Whyte notes that in the debates leading to the enactment of the 1995 Act, it had been suggested the s. 5 be expanded to include the functions of public legal education and research, however, this proposition was rejected on the basis of insufficient resources.

of eligible applicants.’²⁸⁵ In the coming sections it will be demonstrated that this ‘possibility’ has since become the reality, leaving many individuals who are not in a position to afford private representation unable to satisfy eligibility requirements.

While FLAC and the Pringle Report sought to institute a social and legal movement to facilitate wider access to justice, the motivations behind the response to the *Airey v Ireland* case were less admirable and have had long standing repercussions. Unfortunately, as the premise of the case was the inability to afford legal representation, this was to the exclusion of other matters such as an awareness of legal rights.²⁸⁶ As a consequence, the Court did not examine whether there should be a duty placed on the State to ensure access to information on the availability of advice and representation. Whyte notes how this approach enabled the State to obviate what had been a core proposal of the Pringle Committee, the establishment of a mechanism for the provision of such information to the public.²⁸⁷ Regrettably, this omission remains a core shortcoming,²⁸⁸ with the need to improve public legal education highlighted in the empirical findings of this thesis which are discussed in the coming sections, and further again in Chapter 5.

While the inadequacies of the scheme have long been noted,²⁸⁹ they have more recently been subject to renewed attention following the establishment of the Chief Justice’s Working Group on Access to Justice in 2021.²⁹⁰ Referencing a speech delivered by Keith Walsh SC at the 2023 Conference regarding the barriers facing legal aid services in Ireland, the Working Group noted in their report that:

²⁸⁵ *ibid* page 301.

²⁸⁶ Whyte (n 254). See also: *Airey v Ireland* (n 268).

²⁸⁷ Whyte (n 254).

²⁸⁸ Joint Committee on Justice and Equality, *Report on Reform of the Family Law System* (JAE 2019).

²⁸⁹ Free Legal Advice Centres, *Access to Justice: A Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland* (FLAC 2005). In lobbying the State to address the schemes inadequacies, FLAC has published various reports on the scheme such as *Access to Justice: A Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland* which also includes a proposed blueprint for civil legal aid in Ireland. See also: Free Legal Advice Centres and Coolock Community Law Centre, *The Closed Door: A Report on Civil Legal Aid Services in Ireland* (FLAC & CCLC 1987); FLAC (n 260).

²⁹⁰ Chief Justice’s Working Group on Access to Justice, *Access to Justice Conference: Civil Legal Aid Review: An Opportunity with a view to developing a model system in Ireland* (Office of the Chief Justice 2023) at page 5. In January of 2021, former Chief Justice Francis Clark established the Working Group with the intent of evaluating and making advancements in access to justice within the State. In its inaugural year the Working Group held a conference ‘to identify the strands of access to justice that would form the basis of its work’, resulting in legal aid being chosen as the primary area of focus. Having identified its target area, legal aid constituted the topic of exploration for a second conference held in 2023.

some of the most pressing issues are inadequate resourcing, which causes long delays; accessing a solicitor given the reduction in the number of solicitors on the Private Practitioners Panel; the financial contribution; the financial eligibility criteria; the merits test; and the lack of public knowledge of individual rights and the legal aid system.²⁹¹

In assessing access to justice within the State, the Chief Justice’s Working Group noted the need ‘for a comprehensive review and reform of the civil legal aid system.’²⁹² In June 2022 the Minister for Justice Helen McEntee (as she was then) established a Civil Legal Aid Review Group to re-evaluate the operation of the legal aid scheme,²⁹³ the first formal review of the scheme since its establishment in 1979. In contrast, other jurisdictions such as the Canadian provinces of Ontario and British Columbia, along with England and Wales, have carried out more frequent reviews, some doing so almost three decades ago.²⁹⁴

While the introduction of a scheme for civil legal aid and advice in Ireland was delayed, it has achieved its fundamental role in providing wider access to justice in accordance with the first ‘wave’ of the access to justice to movement. Although legal aid remains paramount, the access to justice scope has since expanded. Additional services such as those considered within the remit of the third ‘wave’ are now perceived as central to enabling meaningful access to justice. The section which

²⁹¹ *ibid* at page 41.

²⁹² Chief Justice’s Working Group on Access to Justice, *Conference 1st and 2nd October 2021* (Office of the Chief Justice 2021) at page 9.

²⁹³ Office of the Chief Justice 2023 (n 290) at page 8. Albeit independent of the Civil Legal Aid Review Group, the ‘Access to Justice Conference: Civil Legal Aid Review: An Opportunity with a view to developing a model system in Ireland’ aspired to be ‘of assistance to and inform the work of the Review Group’.

²⁹⁴ Lord Woolf, *Access to Justice Part II: Final Report* (Lord Chancellor’s Department 1996). In England and Wales, Lord Woolf carried out a review leading to an interim and final report published in 1995 and 1996. See also: Lord Woolf, *Access to Justice: Interim Report* (Lord Chancellor’s Department 1995). With a similar ambition to reform their system, Canada conducted a review in Ontario in 1995 and in British Columbia in 2004. For Ontario see: Robert Blair and Sandra Lang, *Civil Justice Review First Report* (The Review 1995). For British Columbia see: Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (Justice Review Task Force 2006).

follows will identify how the Irish State sought to respond and stay abreast of such developments in the access to justice field.

3.5 Enhancing Access to Justice Through Alternative Dispute Resolution

3.5.1 Development of the Family Mediation Service

In one of the very first governmental acknowledgements of the potential for mediation as an alternative and effective means of resolving family law disputes in Ireland, the Department of Justice held a seminar on Conciliation in Family Law Cases in June of 1984.²⁹⁵ A year later the Joint Committee on Marriage Breakdown (hereafter ‘the Committee’) considered a variety of non-litigious processes for resolving family conflicts. In comparison to other ADR methods, the Committee was of the view that mediation was the most suitable process for resolving family disputes.²⁹⁶ This was premised on the advantages associated with mediation, namely the client-centred approach, expected expediency and economic efficiency,²⁹⁷ in addition to the Committee’s belief regarding its suitability for dealing with disputes involving children.²⁹⁸ While the advantages of mediation are further discussed in the next section, at present, it is useful to highlight that a body of research has emerged illustrating that the associated advantages are context sensitive.²⁹⁹ In their longitudinal

²⁹⁵ Department of Justice, *Conciliation in Family Cases Seminar, June 1984* referenced by Law Reform Commission, *Consultation Paper on Family Courts* (LRC CP 8 – 1994) at paragraph 2.10.

²⁹⁶ Joint Committee on Marriage Breakdown, *Report of the Joint Committee on Marriage Breakdown* (Dublin: Stationary Office 1985) at paragraph 8.4. The other methods considered included: simple bilateral negotiations; supported negotiations; and umpiring. See also: Simon Roberts, ‘Mediation in Family Disputes’ (1983) 46(5) *Modern Law Review* 537.

²⁹⁷ Joint Committee on Marriage Breakdown (n 289) at paragraph 8.5. Further advantages included: (i) high levels of party autonomy in achieving quality agreements; (ii) providing support for the parties; (iii) focusing only the family unit; (iv) facilitating communication; and (vi) being less adversarial when compared to litigation. See also: paragraph 1.2 – 1.8. While the Report fails to specify the particular evidence relied upon by the Committee in forming their opinions, it is specified in the Report how: over 700 written submissions were received from a ‘wide variety of religious, social, medical, legal and political organisations and from individual members of the public’; 24 groups or individuals made oral submissions; the Committee consulted with Governmental Departments, State Bodies and many other organisations; and furthermore, Mr Gerard Duncan Barrister-at-Law stood as a legal advisor.

²⁹⁸ *ibid* at paragraph 8.6. See also: Ombudsman for Children’s Office, *Annual Report* (OCO 2024). This is a growing field of research exploring the potential/importance of incorporating children within the mediation process where relevant.

²⁹⁹ Rachael Blakey, ‘Assessing the availability of legal supports through the ‘Help with family Mediation’ legal aid scheme’ (2024) 46(1) *Journal of Social Welfare and Family Law* 82. Blakey examines the complexities associated with the delivery of mediation and its effectiveness in practice.

study based in Virginia USA, which compared mediation and adversary settlement, Emery et al. having associated mediation with: (i) high rates of settlement; (ii) resolving cases quicker and at a lower cost; (iii) high rates of adherence to the agreements formed; (iv) higher levels of party satisfaction; and (v) better co-parenting relationships, proceeded to specify that:

our research shows what mediation can do in one program, not what mediation will do in practice. We need more research on how mediation and adversary procedures work in different settings, against various legal backdrops, and among large groups of people of diverse backgrounds.³⁰⁰

This position is further supported by more recent research including the work of Akbaba who considered how the apparent associated advantages of accessibility and effectiveness in promoting access to justice is impacted by broader structural and cultural factors.³⁰¹ Such influences include power dynamics and the availability of legal and institutional safeguards resulting in the variable presentation of mediations associated benefits. Thus, while mediation is frequently lauded for its benefits, empirical insight into how these disputes operate in practice is required if its use is to be accurately assessed. This is addressed later in this chapter and revisited again in Chapter 4.

Following the publication of the Committee's Report in 1985, a family mediation service was established on the 1st of September 1986.³⁰² Set up as a three-year pilot scheme under the auspices of the Department of Justice, the service continued to operate beyond the lapsing of its initial pilot period. While it is arguable that

See also: Barlow, Hunter, Smithson and Ewing (n 226). This large scale empirical mixed-methods study conducted in England and Wales sought to compare: (i) solicitor negotiation; (ii) mediation; and (iii) collaborative law. The results of the study illustrated the inaccuracy of citing mediations advantages as opposed to mediations potential advantages. The study highlighted the impact of practitioner skill level, client profile, and client circumstances. While noting these factors, this study did acknowledge mediations 'fringe benefits' of reducing party conflict and improving communication.

³⁰⁰ Robert Emery, David Sbarra, and Tara Grover, 'Divorce Mediation: Research and Reflections' (2005) 43(1) Family Court Review 22 at page 34.

³⁰¹ Akbaba Büsra Gülsah, 'Family mediation: A critical tool for enhancing women's access to justice in turkish family law' (2025) 110(2025) Women's Studies International Forum 1.

³⁰² Sinead Conneely, *Family Mediation in Ireland* (Routledge 2002).

insufficient resources were highly influential, Terry Leyden the then Minister of State at the Department of Industry and Commerce, was cautious as regards the pilot's future noting that:

Before setting the service on a permanent footing, however, there is a number of wider issues which need to be addressed. In the light of experience and the knowledge gained from the operation of the pilot scheme, the various ways of providing a mediation service need to be carefully examined.³⁰³

This absence of a statutory footing persisted until the enactment of the Family Support Agency Act, 2001.³⁰⁴ Although the statutory basis was delayed, arguably the scheme's success is visible through its expansion nationwide while on a pilot basis.³⁰⁵ The model of the statutory scheme closely followed that as originally proposed by the Committee, namely that it was an out-of-court, voluntary and free service.³⁰⁶ Unlike the legal aid scheme, it is not subject to a means and merits test, making it universally available in the State, thus increasing its capacity to facilitate access to justice. Furthermore, the FMS was highly unique in that it constituted the first publicly funded mediation service in Europe.³⁰⁷ Though the service had been operating under the Family Support Agency Act, 2001 this responsibility was transferred to the LAB following the amendment of the Civil Legal Aid Act, 1995 by the Civil Law (Miscellaneous Provisions) Act, 2011.³⁰⁸ While Chapter 5 will further investigate the suitability of this transition on the basis of an overlapping caseload and the need for cohesion between legal and mediation services, a core rationale proffered at the time of the transition was that it would allow for consistent oversight which had previously been absent due to departmental restructuring.³⁰⁹ Having identified the potential suitability of mediation to the pursuit of a resolution in a family dispute, the next section will

³⁰³ Dáil Debate 30 November 1989, Vol. 393 No. 10.

³⁰⁴ Section 4 of the Family Support Agency Act, 2001 (as enacted).

³⁰⁵ Dáil Debate 11 October 2001, Vol. 542 No. 1.

³⁰⁶ Joint Committee on Marriage Breakdown (n 297).

³⁰⁷ Dáil Debate 21 July 2011, Vol. 739 No. 4.

³⁰⁸ Section 54 of the Civil Law (Miscellaneous Provisions) Act, 2011 regards the amendments that were made to the 1995 Act. Section 50 of the Civil Law (Miscellaneous Provisions) Act 2011 states that 'On the coming into operation of this section the functions of the Agency relating to family mediation services shall be transferred to and be a function of the Board.'

³⁰⁹ Dáil Debate (n 307).

consider how the facets of mediation not only facilitate access to justice, but rather how they can enhance it.

3.5.2 How Can Mediation Enhance Access to Justice?

At both a national and European level, there has been a discernible trend in the promotion of mediation as a means to improve access to justice.³¹⁰ In debating the mediation service in Ireland, Senator Trevor Ó Clochartaigh (as he was then), highlighted the direct relationship, noting that ‘Mediation procedures increase access to justice for all, but particularly for some of the most vulnerable in society, and this is more important than ever... We need to ensure that we are offering a wider range of options to suit all.’³¹¹ Additionally, the LRC in expressing its view on the matter noted that:

Self-determination and party autonomy are key features of mediation and conciliation which make them distinct from, and therefore alternative to the litigation process. Empowering parties to determine their own agreement to a dispute enhances access to justice.³¹²

This view of the LRC is particularly relevant to the current study, as it not only regards mediation as a means to enhance access to justice, but also values its intrinsic capacity to promote self-determination, which further strengthens the case for its use. Such is the importance of the capacity to self-determine that it was identified as a core theme in the thematic analysis to be presented in Chapter 4, arising from the qualitative data

³¹⁰ European Commission, *Council Directive concerning certain aspects of mediation in civil and commercial matters* (EC 52 2008). In 2008 the European Parliament enacted a Mediation Directive specifying that ‘The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods.’ See also: Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010) at paragraph 1.08. Aligning itself with the European Parliament the Law Reform Commission expressed its views on the matter, in that it ‘considers that access to justice should not only guarantee access to the courts system, but also to adequate dispute resolution processes and forums to resolve disputes in a manner which best meets the goals of the parties involved in securing access to individualised justice.’

³¹¹ Seanad Debate 4 February 2015, Vol. 237 No. 8.

³¹² Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* (LRC CP 50 – 2008) at page 115.

gathered in this study. Further assertions made by the LRC as to how ADR and more specifically mediation can enhance access to justice refer to its potential cost efficiency;³¹³ time efficiency;³¹⁴ capacity to offer non litigious outcomes such as an apology or change in administrative response;³¹⁵ and an individualised approach, given that the parties to the dispute are typically best suited to determining its outcome.³¹⁶

While the desire of the LRC to enhance access to justice via mediation is evident from both their 2008 Consultation Paper and 2010 Report, it must be noted that the advantages identified by the LRC are predominantly based upon research and experiences outside of the State, such as those outlined in the Woolf Report pertaining to civil justice in England and Wales, along with research conducted in Ontario, Canada.³¹⁷ In light of the lack of empirical research within the Irish context, it is essential to acknowledge potential limitations of mediation as a means of improving access to justice and to investigate their applicability.

3.5.3 Can Mediation Inhibit Access to Justice?

While there is international empirical support for the capacity of mediation to enhance access to justice,³¹⁸ Hamaionova outlines how this relationship is more nuanced than may be first assumed.³¹⁹ In light of this complexity, the blanket assertion that the broader concept of ADR enhances access to justice is questioned by numerous scholars.³²⁰ Central to the concerns expressed, is a challenge to mediation's capacity to facilitate justice in a substantive sense.³²¹ Jacqueline Nolan-Haley has produced

³¹³ *ibid* at page 117.

³¹⁴ *ibid* at page 120.

³¹⁵ *ibid* at page 14.

³¹⁶ *ibid* at page 76.

³¹⁷ *ibid* at page 89.

³¹⁸ Gwynn Davis, *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (LSC 2000). See also: Legal Services Commission, *Legal Aid and Mediation for People Involved in Family Breakdown* (LSC 2007).

³¹⁹ Viktoriia Hamaionova, 'The genie of autonomy: steering mandatory mediation within human-rights limits' (2025) *The International Journal of Human Rights* 1.

³²⁰ Genn (n 221). Genn opines that mediation seeks not a just settlement but rather is 'just about settlement'. See also: Nancy Welsh, 'Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories' (2004) 54(1) *Journal of Legal Education* 49. Welsh argues that mediation pays little attention to the issues of justice. See also: Owen Fiss, 'Against Settlement' (1984) 93(6) *The Yale Law Journal* 1073 at page 1075. Fiss notes that the settlement achieved by way of ADR is a 'truce more than a...reconciliation'.

³²¹ Ellen Waldman, *Mediation Ethics: Cases and Commentaries* (Jossey-Bass, 2011).

valuable work on this issue and has identified several negative features of the mediation process that ‘impair access to justice and diminish fairness. These impediments include lack of information for parties to guide them through an informed decision-making process, rushed mediation sessions, and questionable mediator behaviors.’³²² In addition, Nolan-Haley is particularly critical of mediators who describe themselves as facilitative, but in practice adopt an evaluative style.³²³ In evaluating mediation’s capacity to enhance access to justice, she opines that ‘it is not simply the availability of mediation that contributes to reform of the legal system, but the quality of justice that results from a given mediation program.’³²⁴ This position infers that it is not necessarily the mediation process that can inhibit access to justice, rather it is the manner in which this mechanism is delivered. Leonard Riskin devised a grid to describe mediators characteristics as existing on a continuum.³²⁵ On either ends of the continuum as originally devised, is the ‘facilitative’ and ‘evaluative’ mediator. While Carrel notes that this continuum was broadly endorsed, it was subject to much criticism, particular with regards to the phrase ‘evaluative’, as it could be interpreted that such mediators tell parties what to do and are essentially arbitrators.³²⁶ Riskin responded to this criticism through altering the wording from ‘facilitative’ and ‘evaluative’ to ‘elicitive’ and ‘directive’.³²⁷ Despite the terminology being altered in such a manner, Carrel notes that the original continuum of ‘facilitative’ and ‘evaluative’ is still prevalent.³²⁸ While the terminology adopted undoubtedly varies, mediators frequently differ in how directive they are in their approach. Through consideration of the empirical data in Part 2 of this chapter, it will be noted that similar to findings in other jurisdictions, while FMS mediators describe their approach as facilitative, there is also evidence of techniques that may be characterised as somewhat

³²² Jacqueline Nolan-Haley, ‘Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here’ (2018) 87(1) Fordham Law Review Online 1 at page 2-3. While Jacqueline’s research predominantly focuses on court-based mediation, this chapter primarily considers the all-issues model of mediation offered by the FMS which is distinct from their court-based mediation model. Albeit that the settings differ, the critiques remain relevant.

³²³ Jacqueline Nolan-Haley, ‘Mediation: The New Arbitration’ (2012) 17(61) Harvard Negotiation Law Review 61.

³²⁴ Jacqueline Nolan-Haley (n 322) at page 11.

³²⁵ Leonard Riskin, ‘Decision-making in Mediation: The New Old Grid and the New New Grid System’ (2003) 79(1) Notre Dame Law Review 1

³²⁶ Alyson Carrel, ‘Dismantling the “Facilitative” “Evaluative” Dichotomy: Reflecting on Riskin’s Grid and Predicting the Future’ in Art Hinshaw, Andrea Schneider, and Sarah Cole (eds), *Discussions in Dispute Resolution: The Foundational Articles* (Oxford University Press 2021). See also: Kimberlee Kovach and Lela Love, ‘“Evaluative” Mediation Is An Oxymoron’ (1996) 14(3) Alternatives 31.

³²⁷ Riskin (n 325).

³²⁸ Carrel (n 326).

directive or 'evaluative. Mediation's capacity to facilitate access to justice is therefore context sensitive, impacted by many factors such as the model employed and the particular desire of the parties to the dispute itself.

Part 2

3.6 An Empirical Evaluation of the Capacity of Legal Aid and Mediation Services to Facilitate Access to Justice

Thus far, this chapter has provided a critical exploration of access to justice through the lens of the literature, relevant legislation and case law. In doing so, it has identified the centrality of legal aid and mediation services. While tracing the development of State provided legal aid, a number of shortcomings were identified. Furthermore, in discussing the introduction of State mediation services, it was noted that there is an absence of empirical evidence supporting its capacity to facilitate access to justice within an Irish context. Drawing on both the quantitative and qualitative data obtained from this research, this section will critically explore the processes for securing marital breakdown remedies via the models provided by the LAB and FMS, through an access to justice lens.

3.6.1 Service Accessibility

Mediation services are currently offered free to all by the FMS whereas there is both a means and merits test to be satisfied in accessing legal aid, limiting its availability as a route to access to justice.³²⁹ Additionally, those in receipt of legal aid and advice will be required to pay a financial contribution, though this can be waived where deemed necessary.³³⁰ While utilising a means and merits test limits the cohort of

³²⁹ Currently under review, the present threshold to qualify for civil legal aid and advice, is that an individual have an annual disposable income of less than €18,000 and disposable assets of less than €100,000 (however there are certain allowances). The relevant qualifications for the merits test are specified in s. 24 and s. 28 of the 1995 Act.

³³⁰ Section 29 of the 1995 Act as amended by s. 80 of the Civil Law (Miscellaneous Provisions) Act 2008 outlines that the Board may 'waive any contribution payable pursuant to this section and to any other regulations under section 37, or accept a lower contribution, on the ground that a failure to do so would cause undue hardship to the applicant.'

individuals who can avail of these services, the European Commission has recognised that such limitations do not necessarily constitute a barrier to access to justice.³³¹ Although failing to provide a comprehensive rationale, the Commission in the *Airey v Ireland* case proposed the introduction of ‘a system of legal aid dependent on a means test’ with it being the norm in other jurisdictions.³³² Providing a more considered understanding, Rhode stresses that the manner in which a means test operates is a vital component in assessing access to justice.³³³ In proceeding to consider its current operation, this thesis will suggest that there are many individuals who are unable to afford private representation but equally do not satisfy the means test, thus impeding their ability to access justice.

As previously noted, concern has been expressed over the operation of the means test. For example, in its submission to the review of the civil legal aid scheme, the Citizens Information Board identified that the ‘[financial] thresholds have not kept pace with inflation or changes to the social welfare code, resulting in many on low incomes not being eligible.’³³⁴ Highlighting the consequences of the test’s rigid implementation, the Chief Executive of FLAC, Eilis Barry notes how there ‘may be a possibility of getting legal aid in family law cases but we are seeing lots of people who are outside the very strict means test and have no hope of being able to pay for a solicitor.’³³⁵ While quantitative data was unavailable regarding the number of legal aid applications denied on the basis of eligibility requirements, qualitative data was utilised to explore this issue. In discussing the current operation of the LAB means test, Solicitor 1 observed:

³³¹ European Commission of Human Rights, *Application No. 6289/73 Johanna Airey against Ireland, Report of the Commission (Adopted on 9 March 1977)* (Council of Europe 1977) at paragraph 80. Identified by the European Commission in considering the application of Josey Airey was that there is no automatic right to legal aid, rather they recommended a system of legal aid dependent on a means test.

³³² *ibid.*

³³³ Deborah Rhode, ‘Access to Justice: Connecting Principles to Practice’ (2004) 17(3) *Georgetown Journal of Legal Ethics* 369 at page 376. In her analysis, Rhodes set out a number of core principles in evaluating whether access to justice is inhibited or not. Included within these principles is that low-income individuals who cannot afford representation should have access to legal assistance and that those of moderate means should have access to affordable assistance.

³³⁴ Citizens Information Board, *Review of the Civil Legal Aid Scheme A Submission by the Citizens Information Board* (CIB 2023) at page 6.

³³⁵ Chief Justice’s Working Group (n 292) at page 83.

we are conscious here that there are people who have very low incomes, but they don't meet the criteria for legal aid. So, I believe that the threshold which is €18,000 should be increased.

The application of a means test which has not kept pace with inflation or is not regularly revised is reason for concern. Not only does it prevent individuals from accessing legal services who are otherwise unable to afford representation, but it also inhibits synergy between the FMS and LAB where a legal agreement/Rule of Court is sought. This was highlighted by Mediator 6 who noted:

a lot of the mediation agreements that come out of the [FMS] service do not end up in the Legal Aid Board at all...because we are free to all and a lot of our clients are not legally aided, either of them. So, there's a cohort of, or a very sizeable number of mediated agreements that go to private solicitors.

While the issue of service synergy is discussed in depth in Chapter 5, at present attention is drawn to the reported sizeable portion of individuals on low incomes who are denied access to legal services due to their inability to meet the financial thresholds. This access to justice issue is exacerbated due to the necessity to secure a court order where a judicial separation or divorce is sought, leaving many with the sole option of self-representing.³³⁶

Unlike legal aid which operates on the basis of a means and merits test and necessitates the payment of a financial contribution for the services received (albeit exemptions are available), mediation is absent of such requirements, making it a free service available to all. Published a year prior to the establishment of the family mediation pilot, the 1985 *Report of the Joint Committee on Marriage Breakdown* noted that:

³³⁶ For a full discussion of the necessity to secure a court order in seeking a judicial separation or divorce, see Chapter 4.

The Committee believes that access to the service should not be governed by the financial resources of those who need help...Cumbersome means-tests or entry requirements would not be acceptable and the Committee believes that the effect of this service would, by reducing the number of the couples who need to go to court at present to resolve their marital difficulties, realise a saving to the State in terms of legal and administrative costs.³³⁷

While it is beyond the scope of this thesis to determine what impact the free element of the FMS has had on State costs/savings, offering mediation in this manner can be considered as enhancing access to justice in many respects. In the absence of barriers to entry, there may be an increased willingness to participate among those reluctant to engage private services. Client 4 explained how:

I knew that the issue with paying for it privately is that we couldn't find somebody that my husband would deal with. So we tried it [the FMS] and it did work.

Whilst broadening the scope of those willing to participate, the absence of fees may reduce some conflict in the dispute resolution environment and might ultimately enhance the quality of the agreement achieved. In consideration of their experience with the FMS, Client 3 specified how:

it couldn't have been a whole lot better than it was. I thought the fact that you weren't paying, there wasn't somebody on a clock...it just gave us time to actually thrash ideas and thoughts out...I think the fact that if people could avail of a free service it does change the atmosphere in the room...it's about the kids, it's about the people in the room, and it's about the long term picture of a couple who know each other very well.

³³⁷ Joint Committee on Marriage Breakdown (n 296) at paragraph 8.17.

These experiences of clients suggest that the provision of a free service may encourage participation amongst individuals who might otherwise be unwilling to attend or even to engage with the breakdown. Furthermore, the absence of fees may facilitate a more in-depth consideration of potential solutions with an increased capacity to tailor the outcome to the needs of the parties, offering what is an individualised approach.

Both the literature and the findings from the qualitative study suggest that accessibility to services is a significant concern for those reliant upon the LAB to resolve their dispute. Unfortunately, it also impacts many of those who engage mediation services given the subsequent need for legal services to achieve a comprehensive resolution to their dispute (as will be considered on an empirical basis in the next section). While the current requirements for legal aid are under review, in order to ensure that service delivery stays abreast of inflation substantial reform is necessary.³³⁸ For this reason, it is imperative that Civil Legal Aid Review Group advocate for reform of the means test and that this is subsequently acted upon. Were the financial eligibility requirements eased, and a mechanism implemented to ensure that those who have executed mediation agreements have an automatic pathway to subsequent legal advice, it is contended that the capacity of the LAB/FMS to deliver access to justice would be greatly enhanced in the context of securing a decree of judicial separation or divorce, as will now be discussed.

3.6.2 The Necessity for Judicial Involvement

As previously noted (and as will be further examined in Chapter 5), obtaining a judicial separation or divorce requires a court order, meaning such outcomes cannot be achieved through mediation alone. This inability to seamlessly secure a court decree following a mediated agreement constitutes a limitation to this process, particularly in the context of access to justice. In light of the need for judicial involvement, the quantitative phase of this study aimed to investigate how FMS cases progress following the conclusion of mediation. Relevant data was available for the period

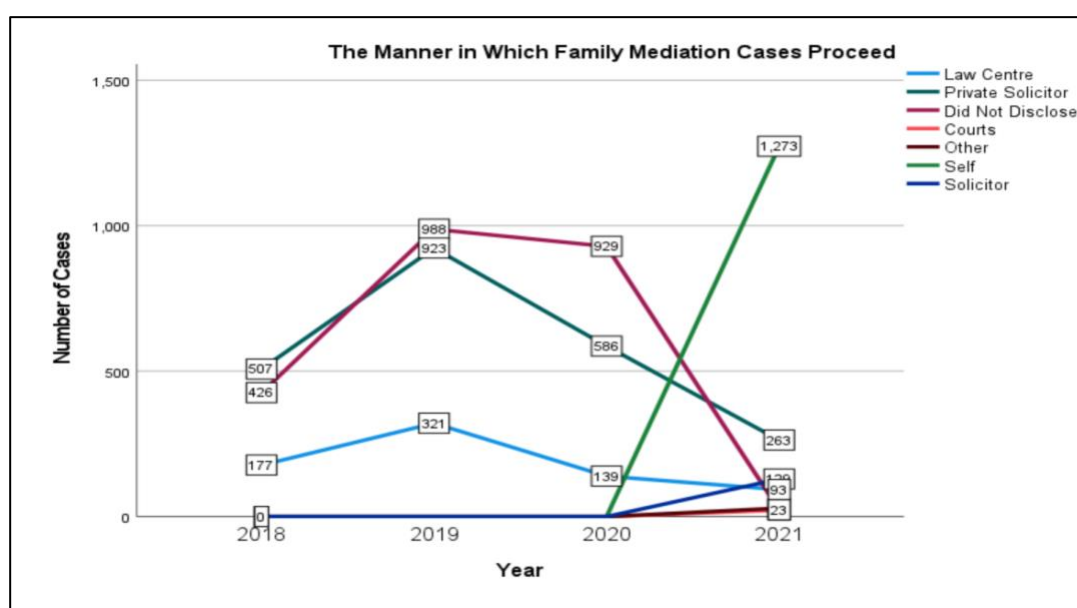
³³⁸ Chief Justice's Working Group (n 292).

2018–2021, however, data pertaining to 2021 included newly introduced metrics, leading to some inconsistencies in the information across the years.³³⁹ The categories newly introduced constituted: (i) Courts; (ii) Other; (iii) Self; and (iv) Solicitor. While data from earlier years does not include these classifications, their introduction helps to address gaps in the accuracy of previously recorded information. As the analysis below illustrates, following the implementation of these new categories, the use of the ‘Did Not Disclose Intentions’ category declined.

Table 1: The Manner in Which Mediation Cases Proceed Following Case Conclusion

Year	Law Centre	Private Solicitor	Did Not Disclose Intentions	Courts	Other	Self	Solicitor
2018	177	507	426	0	0	0	0
2019	321	923	988	0	0	0	0
2020	139	586	929	0	0	0	0
2021	93	263	23	22	29	1273	129

Figure 1: Line Graph Depicting the Manner in Which Mediation Cases Proceed Following Case Conclusion (2018-2021)



³³⁹ See preceding chapter regarding the studies methodology for a full discussion of this limitation.

Due to inconsistencies within the available data, it is challenging to draw conclusive insights. However, what can be identified, is that following the introduction of the ‘Self’ category, the bulk of the data was recorded within this measure (see Figure 1 & Table 1). Describing its constituent, Mediator 2 noted how the ‘Self’ category represents those individuals that ‘are choosing to be a lay litigant’, however, the precise motivations behind this choice are unknown. The data also shows that there is a modest proportion of individuals proceeding to law centres. From an access to justice perspective, there are two opposing arguments to consider when assessing how these cases proceed, with the position adopted likely to be premised on the subjective interpretation of what constitutes ‘justice’, as is discussed below.

While the inability to secure a judicial separation or divorce in the absence of legal services arguably operates as a limitation to the FMS process, the agreements reached are still beneficial. For example, should parties have no desire to implement a formal legal procedure, they can draft an agreement in mediation resolving their issues and subsequently implement its various aspects themselves. In describing this approach, Mediator 6 explained:

I think once they [the clients] find out they have to make it legally binding they just go, okay. They might say “can we act on it anyway? Could we sell our house? You know, could we do that?” I mean, I go, yes, you can sell your house but it's on the basis of trust. It's not on the basis of a legally binding agreement but you can go and do it.

While this approach carries risks regarding the fulfilment of agreed terms and may create vulnerability for the parties, it arguably epitomises the exercise of autonomy as the parties have self-determined the agreement without legal intervention.³⁴⁰ A further function of these agreements is that they can be used as the basis upon which to secure a formal marital breakdown remedy or court order. In describing their understanding of the capacity of mediation agreements, Client 3 noted that:

³⁴⁰ Chapter 4 discusses in depth the advantages and limitations to conveying such autonomy in a family law setting.

yeah so that [the inability to secure a court order in the absence of judicial involvement] was explained to us, that she could only do so much. She could bring us to a mediated agreement, which while it wouldn't be a legally binding agreement, it would be the basis on that you would go and do a divorce.

Expanding on this procedure, Client 3 noted that:

most of the details of the separation agreement is settled in the mediation room. So you kind of come out of the mediation sessions with a document, a mediated document of separation. It's not really legally binding but you have got your framework then to move forward into the legal stuff. But it...takes out a lot of the animosity and the, I suppose the conflicts that could occur if you have two people backed by their solicitors fighting each of their own cases.

In Chapter 5 it will be discussed how solicitors often find it easier to work with clients who have previously participated in mediation as they have had this opportunity to work through some of the emotional aspects associated with marital breakdown. While the procedure of utilising both mediation and legal services arguably constitutes the 'optimum approach' as parties self-determine their dispute from an informed perspective (discussed in depth in Chapter 5), it is noted in the coming sections that some legal service providers are reluctant to act upon mediation agreements. Having ascertained the utility of mediation agreements in this context, the role of legal services will now be considered.

As previously noted, many of those who seek to resolve their dispute by way of mediation with the FMS do not proceed to law centres (see Table 1 & Figure 1 on page 92). This undoubtedly can be problematic, as McGowan opines that 'Expecting the court to accept a mediated agreement as the basis of a consent order, particularly where no legal advice was provided during mediation, runs contrary to both the specific terms

and general tenor of the governing legislation.’³⁴¹ When adopting the view that legal representation is vital in a family law context, it would therefore be preferable were there a reduction in the number of those who fall within the remit of the ‘Self’ category and a subsequent increase in the number of those who proceed to ‘Law Centres’. The basis for this proposition is that having legal representation in securing a judicial separation or divorce decree is advantageous from both a procedural and substantive justice perspective. McGowan in describing the potential consequences for those who proceed in its absence, notes that ‘Lay litigants generally lack the resources or expertise to negotiate settlement terms or conduct a trial efficiently and may be reluctant to engage with the other party’s solicitor.’³⁴² Providing further support for this assertion, Solicitor 1 specified how:

the danger with the people who are doing it for themselves [lay litigants] is that they may miss something along the way with regard to either property or a pension for example or something like that.

While potentially altering the quality of the justice achieved, Solicitor 1 further outlined how it may negatively impact upon the manner in which justice is delivered, noting how:

ultimately the person who doesn’t get representation manages to slow things down for people.

This position supports the findings of Trinder’s et al. empirical study in which they identified the presence of litigants in person as increasing the likelihood of: (i) delays; (ii) additional hearings; and (iii) more chaotic/adversarial proceedings.³⁴³ There is also evidence of this in practice, outlined by Kalliris and Alysandratos, who have demonstrated how the increase in litigants in person following the implementation of

³⁴¹ Deirdre McGowan, ‘Reframing the Mediation Debate in Irish All-Issues Divorce Disputes: From Mediation vs. Litigation to Mediation and Litigation’ (2018) 40(2) *Journal of Social Welfare and Family Law* 181 at page 188.

³⁴² *ibid* at page 190.

³⁴³ Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader and Julia Pearce, *Litigants in Person in Private Family Law Cases* (MoJ 2014).

the LASPO Act 2012 has contributed to delays and the necessity for additional judicial resources to manage their presence.³⁴⁴ Even individuals seeking to participate to the best of their capabilities may inadvertently disrupt the process, as Mant observes that ‘over-preparation’ can make cases more difficult for judges to manage and may ultimately disadvantage the litigant.³⁴⁵ It could therefore be suggested that lay litigants may impede access to justice for both parties to the dispute and potentially receive a lesser degree of justice. For this reason, when discussing potential reforms, Chapter 5 will advocate for the introduction of a pilot scheme offering legal advice to those who have drafted a mediation agreement with the FMS and intend to use it as the basis for a court order.³⁴⁶

Having considered the arguments for legal representation when seeking a decree of judicial separation or divorce, it is necessary to reflect on any viable opposing arguments. A prominent concern conveyed by the majority of mediators throughout the qualitative portion of the study, was the manner in which mediation agreements are treated by legal professionals, namely, that they are largely disregarded. Similarly, participant solicitors reported that such agreements are not afforded much consideration. In this regard, Solicitor 6 noted that when a client walks in having previously drafted a mediation agreement that:

‘you are starting from scratch.’

Similarly, Solicitor 5 specified how:

a mediation agreement is just put on the file and just you know,
it's more to be honest with you, it's more like a statement of
intent...you know a heads of agreement, as it were. But no, I'd

³⁴⁴ Kalliris Konstantinos and Theodore Alysandratos, ‘The Effects of LASPO on Court Efficiency and the Impact of Litigants in Person: An Empirical Study’ (2022) 1(1) SSRN 1.

³⁴⁵ Jess Mant, ‘Placing litigants in person at the centre of the post-LASPO family Court process’ (2020) 32(4) Child and Family Law Quarterly 421.

³⁴⁶ Trinder, Hunter, Hitchings, Miles, Moorhead, Smith, Sefton, Hinchly, Bader and Pearce (n 343). While Trinder et al. identified that the majority of lay litigants present due to the inability to afford private representation/qualify for legal aid, there are a variety of additional circumstances that can cause an individual to self-represent.

never start from there, [be]cause I wouldn't be doing my job, you know?

Whilst such an approach arguably deters party autonomy, solicitors have a duty to act in their client's best interests. The Law Society's Guide to Professional Conduct provides that a 'solicitor owes a duty of care to each individual client, so must advise in accordance with that client's best interests.'³⁴⁷ Thus, in instances where a solicitor having reviewed a draft mediation agreement feels that the terms are not in their client's best interests, it is unlikely that they would endorse such an agreement. In contrast, under s. 8(2)(b) of the 2017 Act the mediator is required to be impartial and treat both parties fairly. Therefore, it is apparent that the service providers (i.e. solicitors and mediators) have divergent aspirations and professional responsibilities. As a result, it is unlikely that an agreement constructed with the aim of reaching a mutually agreed upon resolution would seamlessly satisfy both parties best interests, rather to reach an agreement in the majority of circumstances necessitates a compromise.³⁴⁸ In highlighting the differences between mediation and litigation, Carels outlines how mediation 'allows the parties to focus on interests rather than positions...when both parties' interests are identified, parties can reach a mutually acceptable outcome.'³⁴⁹ This is discussed further in Chapter 5.

Despite the reported reluctance of solicitors to act upon draft mediation agreements, Solicitor 5 outlined how they may still utilise some aspects of the agreement, noting that:

If there's let's say a parenting plan, I certainly would take the parenting plan. And I certainly would start with that as the basis you know, and move forward with that. Like I wouldn't be opening that up again. I would just be kind of saying are you happy with this?

³⁴⁷ Law Society of Ireland, 'Solicitors Guide to Professional Conduct' (4th edn, LSI 2022) at page 36.

³⁴⁸ Fran Wasoff, 'Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce' (2005) 3(4) Journal of Social Welfare and Family Law 237.

³⁴⁹ Monique Carels, 'An evaluation of mediation in high-conflict situations: A reflection on mediating parenting plans' (2024) 49(1) Tydskrif vir Regswetenskap 24 at page 38.

While this process can help with narrowing the issues in dispute, the majority of mediators interviewed foresaw all aspects of the settlement as central to its value, suggesting that the settlement should be seen as a holistic outcome rather than a collection of discrete elements. Describing the process of agreements being dismantled and the impact this can have, Mediator 2 noted how solicitors:

deconstruct the agreement the people have put together, to drop the information into the various affidavit of means, affidavit of welfare and that results in hard won agreements of our clients not even being made a rule of court.

This disconnect between the processes and the professionals involved, could be regarded as an impediment to access to justice given that mediation agreements are ultimately self-determined by the parties to the dispute. The importance of self-determination should not be overlooked, as for example, Diduck argues that achieving justice in a family law context is reliant on facilitating party autonomy by way of self-determination (as considered in full in Chapter 4).³⁵⁰ Therefore, while the lack of a means and merits test makes mediation more broadly available, this alone does not ensure that it meaningfully enhances access to justice in the current context, given the inability to resolve the dispute comprehensively in mediation. While the subsequent need for legal representation depends on the individual circumstances of each client, from an access to justice standpoint, the decision to seek legal advice and/or representation should be left to the parties themselves, rather than being dictated by their financial means. Further aspects of these services will now be considered from an access to justice perspective.

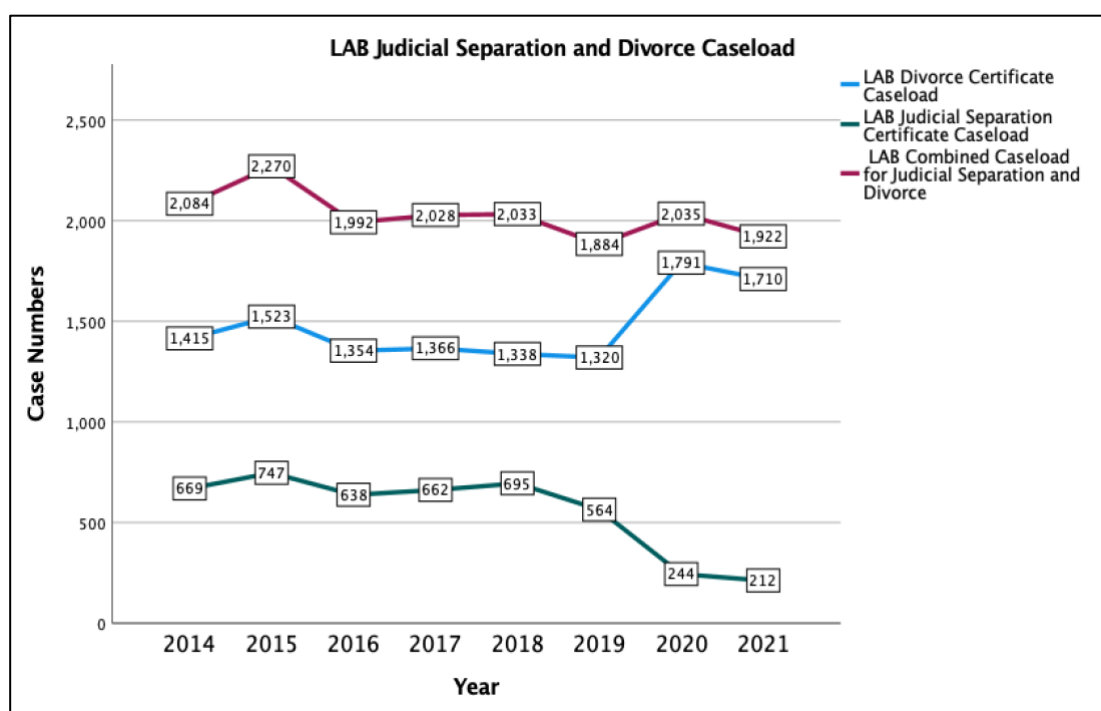
3.6.3 Service Provision Caseload

A starting point in gauging the popularity of mediation and legal aid, is identifying the degree to which these processes are being utilised and availed of. Thus, caseload levels were selected as a core metric for exploration in the quantitative phase of the study.

³⁵⁰ Diduck (n 226).

The caseload for legal services was ascertained by way of exploring the number of legal aid certificates granted on an annual basis, according to the subject matter of judicial separation and divorce. With regards to mediation services, caseload was ascertained through exploring the number of first joint mediation sessions.³⁵¹ While it was not possible to distinguish mediation files according to case type (as was done with legal services) court-based cases were excluded from the data set to improve its accuracy.³⁵² Having constructed a graphic display of the data obtained, further information distilled from the court service annual reports is presented to facilitate a greater appreciation of the process's contribution to access to justice within the State (see Figure 3).

Figure 2 - Judicial Separation and Divorce Caseload According to the Number of Legal Aid Certificates Issued



³⁵¹ Legal Aid Board, *Administrative Procedures Handbook* (13th edn, LAB) at page 3-6. During pre-mediation sessions, ‘applicants are assessed for suitability, screened for domestic violence and capacity to negotiate.’ It is only during the 1st joint mediation session that the clients actively participate in the process of mediation.

³⁵² While discussed in full in Chapter 2, court-based mediation cases were excluded from the data set as this model of mediation is a District Court initiative and thus operates in a different jurisdiction to judicial separation and divorce cases.

Figure 3 – The Number of Judicial Separation and Divorce Applications in the Irish Courts

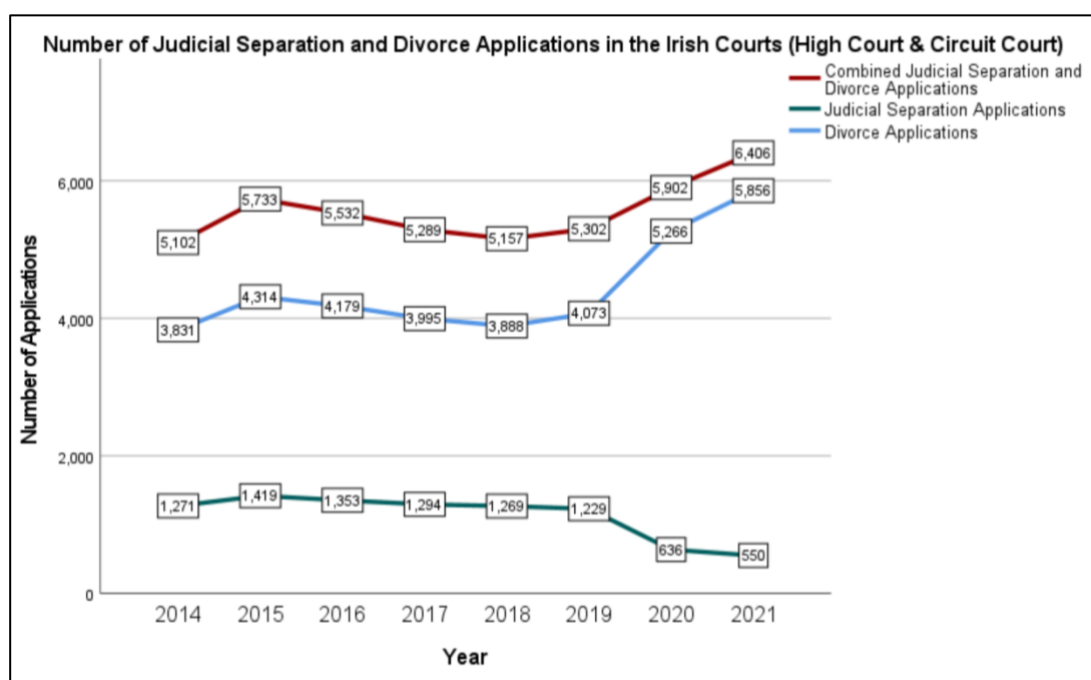


Figure 2 above demonstrates that there has been a modest decrease in the combined number of legal aid certificates granted for judicial separation and divorce disputes over the specified timespan.³⁵³ This suggests that the caseload stemming from judicial separation and divorce disputes, while substantial, is not increasing. In comparing Figure 2 and Figure 3, the data presented follows a similar trend up until 2021, at which point the number of court service applications increases while the number of legal aid certificates granted decreases. Offering a potential rationale for this trend, Solicitor 3 noted how it could be as a result of the:

hangover from the pandemic.

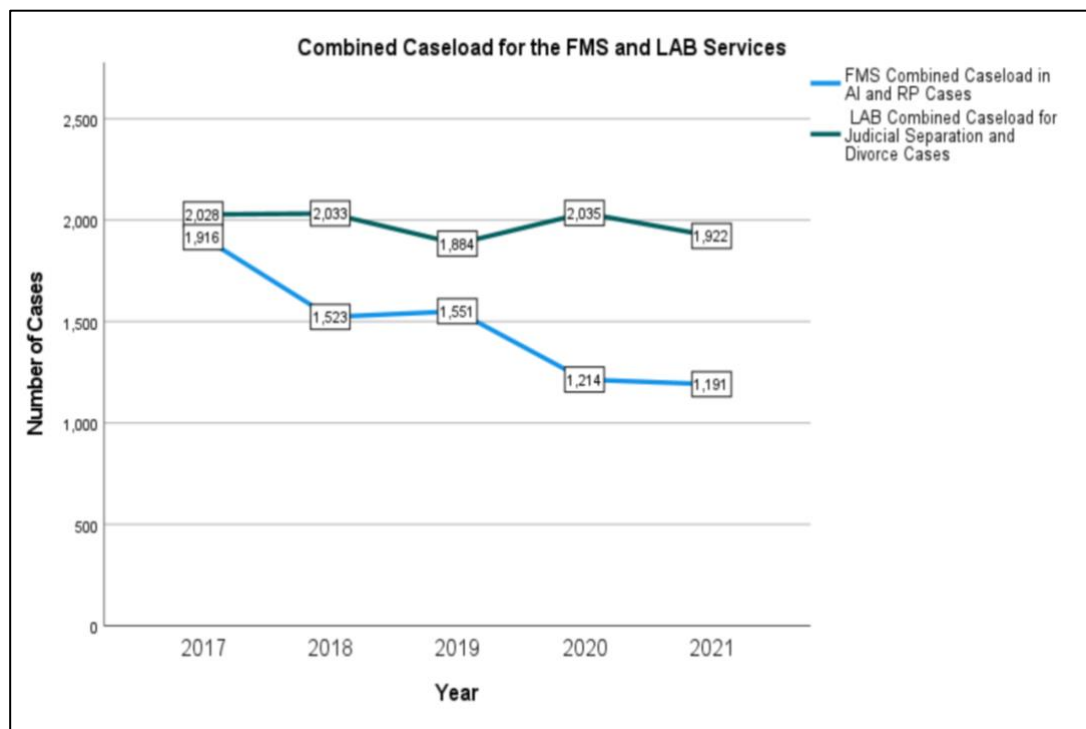
Similarly, in relation to the court service, Solicitor 1 noted how:

there is a backlog with Covid.

³⁵³ The highest number of legal aid certificates granted was in 2015 at 2,270 and the lowest number was in 1,884 leaving a maximum variance of 386 certificates. The variance between the start date of 2014 and the end date in 2021 is only 162 certificates indicating a minor decline in the total number of legal aid certificates granted.

In comparing Figure 2 and Figure 3, it is evident that legal aid provides a vital function in facilitating access to justice within the State. This assertion is premised on the number of legal aid certificates granted for judicial separation and divorce disputes equating to roughly one-third of the number of applications made for judicial separation and divorce proceedings annually. As legal aid certificates will solely be granted when instituting or defending proceedings, coupled with the minimal refusal on behalf of the court service in granting these remedies, it can be asserted that legal aid fulfils a vital function in enabling access to justice for many who seek to resolve judicial separation and divorce disputes.³⁵⁴ Consideration will now be given to mediation in this context.

Figure 4 - FMS (AI & RP) and LAB (Judicial Separation & Divorce) Caseload 2017-2021



In addition to the combined caseload for LAB judicial separation and divorce cases, Figure 4 presents data regarding the number of first joint mediation sessions in all-

³⁵⁴ Court Service, *Annual Report* (Court Service 2022). In 2022 the High Court refused no applications for judicial separation or divorce, whereas the Circuit Court refused 1 application for divorce and no applications for judicial separation.

issues (AI) cases and those on referral from law centres (RP). Unlike legal services data, cases were not distinguishable according to case type. While the inability to distinguish cases in this fashion is a limitation and has been previously discussed in Chapter 2, the FMS identifies its central area of focus as addressing the consequences of relationship breakdown, noting how the service ‘assists those involved in family breakdown and in particular couples, including married, civil partners and non-married, to negotiate the terms of their separation or divorce in the case of a marriage and dissolution in the case of a civil partnership.’³⁵⁵ Thus, the FMS predominantly deals with the specific areas of separation and divorce, along with parenting disputes, access, guardianship and maintenance. Despite the limitation of the data in this respect, valuable insights are still obtained from the information presented. Figure 4 demonstrates that the number of first joint mediation sessions is in decline, with there being a 37.84% decrease in caseload from 2017 – 2021. This trend is unfortunate as it indicates that the various reforms aimed at increasing the uptake of mediation, such as the Mediation Act 2017, are not having the desired impact.³⁵⁶ While it is challenging to confidently identify the root cause of this decrease, participants offered a number of potential rationales relating to wait times. As will be noted in the forthcoming section, significant progress has been made in reducing the LAB wait times (albeit subject to much variation on the basis of location). As a consequence of this decrease, mediation services may have lost their appeal as a more expedient alternative (in certain locations). Describing this situation, Solicitor 3 noted how:

at one stage I think people were waiting longer to get mediation then they were to get an appointment here, which probably doesn’t help the mediation process because like you know, they can come in here and off we go [with the legal process].

Given the necessity for legal involvement in securing a court order, it is arguable that if access to legal services is more prompt than mediation services, there is a potential

³⁵⁵ Legal Aid Board, *Annual Report* (LAB 2014) at page 32.

³⁵⁶ Sections 14-16 of the 2017 Act aim to increase the uptake of mediation. See also: s. 5(1)(b) of the 1989 Act (as amended by the Mediation Act 2017); s. 6(2)(b) of the 1996 Act (as amended by the Mediation Act 2017). For further reading see Chapter 5 for a full discussion on the various measures implemented to increase the uptake of FMS mediation.

for mediation to delay access to justice, thus losing its appeal and dissuading individuals from participating. A further rationale for the reduction in mediation levels likely relates to the reduction in the required period for spouses to be living apart to obtain marital breakdown remedies.³⁵⁷ Discussing this reform and its consequences, Solicitor 3 noted that:

especially since the waiting time for divorce has been reduced, most people are coming in and wanting to get divorced. So, whatever happens, it's going to be a court application at the end of it...we see a lot of people at the point where they've been separated for a couple years and are just looking to get divorced.

Thus, the findings suggest there is a short-term increase in the number of individuals who qualify for a divorce and therefore are less likely to rely upon a non-litigious intermediary step (such as mediation). This information would suggest that as access to legal services and legal remedies are more readily available, mediation is less likely to operate as a more expedient alternative. While this issue is discussed at length in Chapter 5, there is potential for this shortcoming to be mitigated through parties being fully informed of mediations 'fringe' benefits whilst solicitors fulfil their statutory duty under s. 14 of the 2017 Act. Should this position be accepted, in order to adapt accordingly, it would be advantageous to move away from the traditional position of promoting mediation on the basis of legal services inadequacies, in favour of promoting mediation on its own merit and focussing on enhancing the service available.

³⁵⁷ Following its implementation, the Family Law Act 2019 amended s. 5(1)(a) of the 1996 Act reducing the required period of separation from 'at least four years during the previous five years' to 'at least two years during the previous three years'. Providing for a decree of judicial separation, the 1989 Act when introduced set out six grounds upon which a judicial separation was available, inclusive of: (i) adultery; (ii) such behaviour on behalf of one spouse that the other spouse would not reasonably be expected to live with them; (iii) desertion for a continuous period of at least one year; (iv) that the spouses have lived apart for a continuous period of at least one year and there is consent for the granting of the decree; (v) that the spouses have lived apart for a continuous period of at least three years; (vi) the court is satisfied that normal marital relations have not existed between the spouses for a period of at least one year. These grounds have since been altered, with the Family Law Act 2019 removing the consent required in ground (iv) in addition to removing ground (v) entirely.

Despite the data highlighting that the caseload for mediation services are in decline, it is useful to examine the data in the context of the wider dispute resolution landscape. In consideration of Figure 4 (page 96), it is paramount to recognise that a LAB case represents a sole individual, whereas an FMS case represents two individuals. This distinction is a reminder that the number of individuals seeking to resolve their family dispute by way of mediation, is greater than the number of those seeking to resolve their judicial separation and divorce disputes by way of legal aid. Notwithstanding the decline in mediation caseload, given that Figure 4 (page 96) identifies that between 2,000 - 3,500 individuals annually seek to mediate their family disputes, the FMS thus continues to strongly support access to justice. This considerable volume of clients pursuing the resolution of their conflicts via mediation suggests that the process has integrated itself as a central facet of the access to justice landscape in Ireland. Consideration of the data regarding caseloads relative to overall court applications, indicates that both legal aid and mediation services are being widely availed of as a means to resolve family law disputes within the State, providing empirical support for the first and third wave of the access to justice movement as previously discussed. Having discussed the statistics relating to the uptake of these processes, an assessment of their effectiveness in facilitating access to justice will now be the primary area of focus.

3.6.4 Number of Cases Resolved Annually

To provide a deeper appreciation of the capacity of both legal aid and mediation services to facilitate access to justice, their effectiveness will now be explored with reference to the number of cases resolved annually. With regards to legal aid services, it was determined that a consideration of cases closed with the outcome of ‘Aid File Completed and Closed’ was most appropriate.³⁵⁸ In relation to mediation services, the outcome of ‘written agreement’ was identified as being the primary indicator of case resolution. Akin to the previous section, court service data is also presented to provide critical context to the Irish dispute resolution landscape.

³⁵⁸ As a legal aid certificate is required to institute court proceedings, and a judicial separation/divorce necessitates a court decree, it was determined the ‘Aid File Completed and Closed’ most closely captured the number of judicial separation and divorces disputes resolved by the LAB on an annual basis.

Figure 5: Line Graph Depicting the Number of Separation and Divorce Cases with the Outcome of ‘Aid File Completed and Closed’

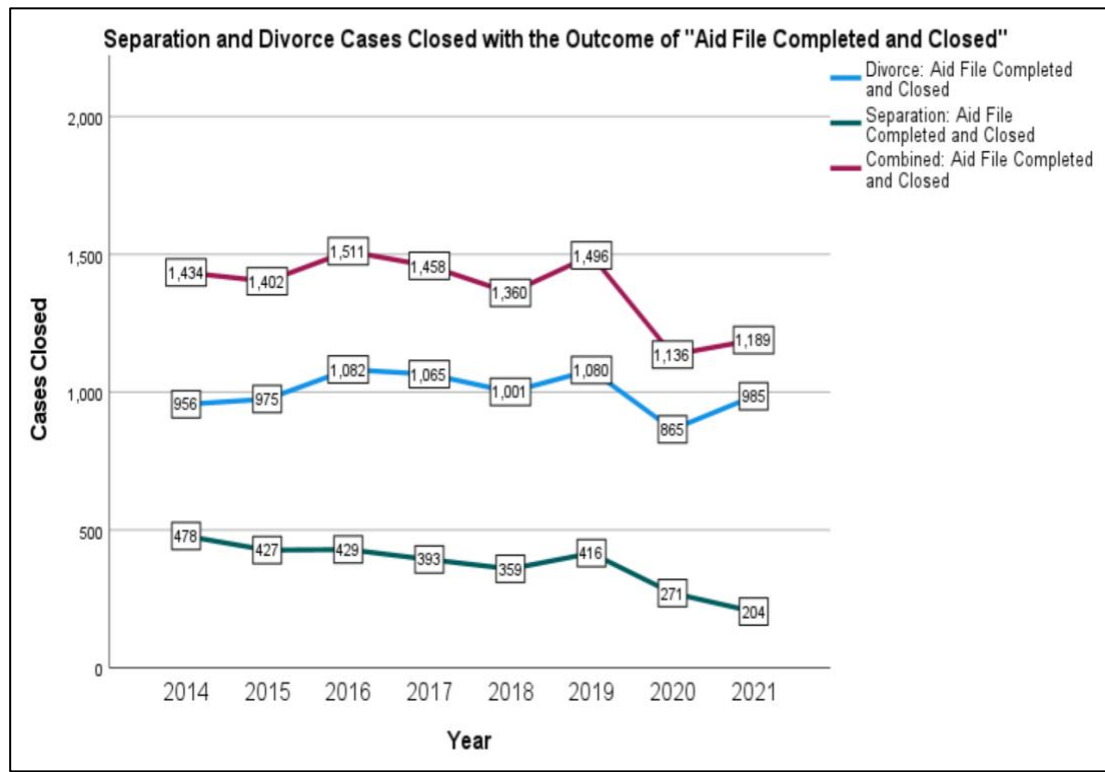


Figure 5 demonstrates that for the timespan under consideration, there has been a marginal decrease in the combined number of separation and divorce cases closed with the outcome of ‘Aid File Completed and Closed’. This trend corroborates the previous information on caseload (with it logically being assumed that caseload subsequently impacts the number cases resolved). The data indicates that legal aid is contributing to the resolution of over a thousand separation and divorce disputes on an annual basis. In order to contextualise the contribution of legal aid to the dispute resolution landscape as a whole, further information is presented on the number of decrees granted by the Irish courts annually.

Figure 6: Line Graph Depicting the Number of Judicial Separation and Divorce Decrees Granted in the Irish Courts

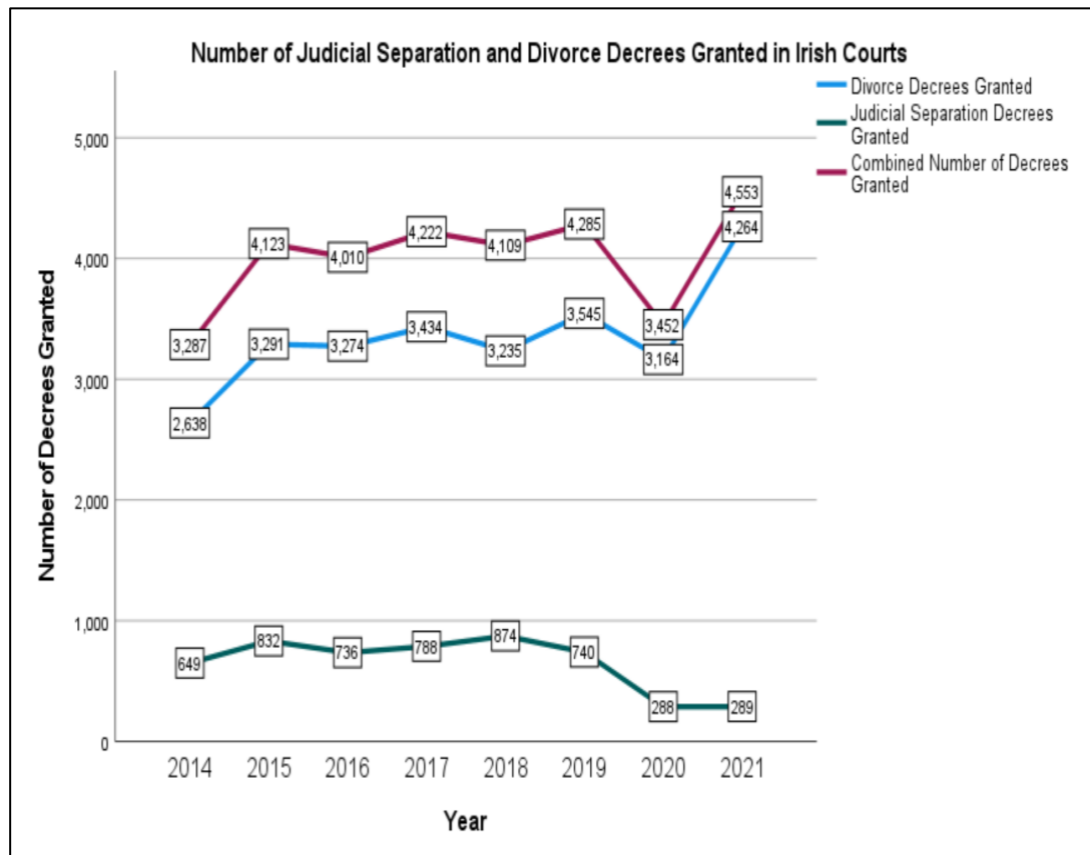
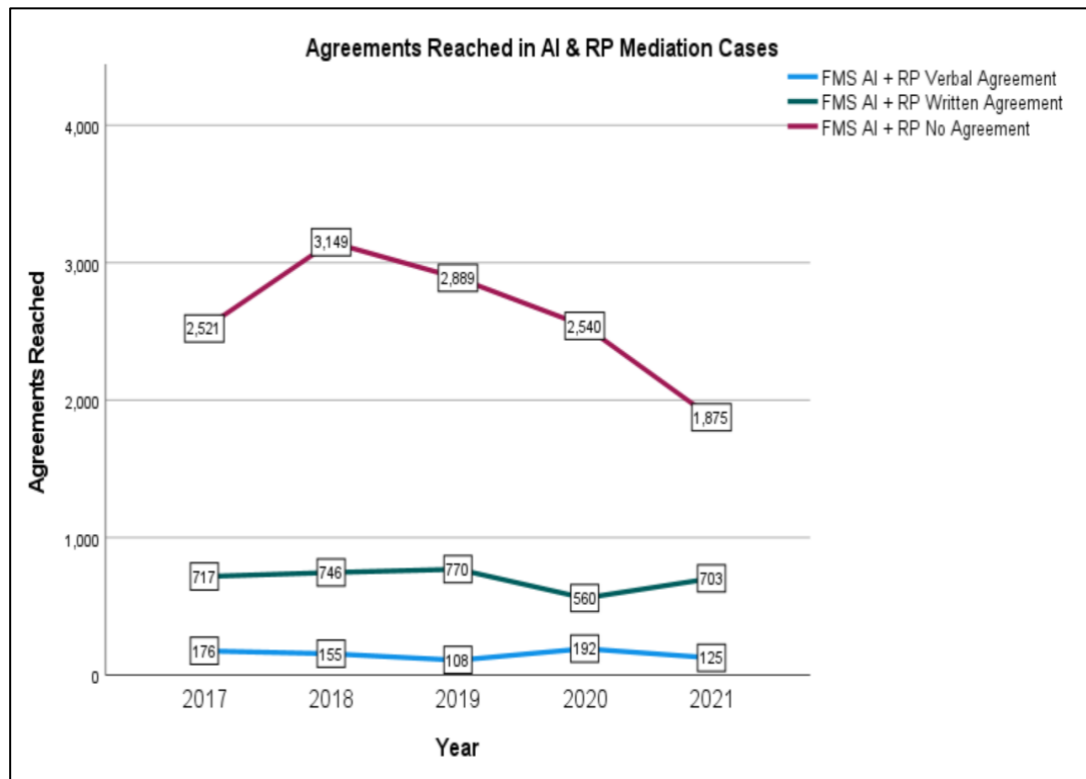


Figure 6 demonstrates that judicial separation and divorce disputes feature prominently in the Irish courts, with roughly 4,000 decrees granted on an annual basis. Consideration of this information alongside the data in Figure 5, indicates that legal aid supported cases account for approximately one quarter of the judicial separation and divorce decrees obtained annually demonstrating the fundamental contribution of this service to the access to justice landscape. Having considered legal aid, data relating to mediation will now be explored.

Figure 7: Line Graph Depicting the Combined Number of AI and RP Mediation Cases on the Basis of Outcome



Comparable with caseload, it is only those cases where at least one joint mediation session was attended is of consideration in the data set for this target area. Figure 7 illustrates that mediation cases can be closed in one of three ways: (i) no agreement; (ii) verbal agreement; and (iii) written agreement. Figure 7 highlights that the combined number of AI (all-issues mediation) and RP (cases on referral from law centres) cases that result in no agreement is substantially higher than the number of written and verbal agreements. This calls into question the effectiveness of mediation as a dispute resolution mechanism. While this trend is discouraging, and is further discussed below, it is promising that following 2018 there has been a steady decrease in those cases closing on the basis of 'no agreement'. While it cannot be definitively stated, it is likely that the implementation of the Mediation Act 2017 is a contributing factor to this decline. Section 2 of the 2017 Act defines a mediation settlement as 'an agreement in writing reached by the parties to a dispute during the course of a mediation and signed by the parties and the mediator.' By statutorily introducing the requirement that a mediation settlement be written, those practicing have had to adapt

accordingly. Demonstrating the impact of the 2017 Act in this respect, the FMS Family Mediation Procedures Handbook specifies that:

When all aspects of the separation have been negotiated to the agreement of both parties, the mediator draws up these agreements into a Mediated Settlement (template available on database ilab – policies and procedures). To be compliant with the Mediation Act it is now Board policy for all final Mediation Settlements to be signed with the wording in the Standard Clauses.³⁵⁹

In referencing and responding to the 2017 Act, it is arguable the FMS is placing a greater emphasis on formalising their model. While this development is promising, the quantitative findings indicate that a significant number of cases continue to be recorded as not having reached an agreement. However, insights from the qualitative phase revealed that several participants identified shortcomings in the system used to record such cases. As such, it is difficult to infer the true number of cases that have reached agreement or no agreement.

Though concern may be expressed over the number of ‘no agreement’ cases, a partial over representation was identified and explained during the qualitative interviews as Mediator 2 explained:

we have a policy that says if there’s inactivity on a file for three months, it has to close. So this month alone, I think I have closed down four, four clients, all of whom have been waiting to get legal advice, and we’ve gone past the three months, and I’m going to close them and close them with no agreement. And that looks like the mediation statistically, that the mediation service is not achieving an agreement. And statistically I have no option when I’m filling out the outcome

³⁵⁹ Legal Aid Board, *Family Mediation Procedures Handbook* (3rd edn, 2023) page 1-7.

of the questionnaire form, I have nothing to say, closed due to case management.

In such instances the case file is closed and categorised with no agreement, while in practice, the case may still be in the process of being resolved. Mediator 2 expanded further on the process for the recording of data for this category, and how it is not entirely indicative of the holistic utility of mediation in facilitating access to justice:

cases can close because we have increased people's understanding of their situation and sign posted them to a MABS appointment [Money Advice & Budgeting Service]. And then after the MABS appointment they come back, and they go okay what I thought was going to happen can't happen. So, we'll decide just to continue as we are for a while. That's closing with no agreement, but it's not shown any of what we have done in that engagement with clients.

It is important that this contribution of information provision and signposting is not overlooked, as MacLean, Eekelaar and Bastard note the centrality of knowledge, advice and support in facilitating accessing justice.³⁶⁰ Such is its value that Mediator 1 identified information provision as one of the 'principles' of the process, emphatically highlighting 'information, information, information'. Client 3 expressed their appreciation over this aspect of the process noting that:

once we had decided we would give it a go, the first meeting was...talking about options, talking about what we can achieve out of it, setting out goals and expectations in the whole process. Yes, so it was good.

The fact that mediators have taken on this responsibility of information provision and signposting is a positive development from an access to justice perspective. This is

³⁶⁰ Maclean, Eekelaar and Bastard (n 227).

especially significant given the failure of the State to establish dedicated information hubs, as previously recommended by the Pringle Committee.³⁶¹

While the empirical data collected suggests that legal aid is a more effective means of securing ‘access to justice’ given its ability to secure a court order, this fails to account for the variety of benefits stemming from mediation which may ultimately contribute to an individual’s perception of ‘justice’. In her meta-analysis comparing mediation and litigation outcomes in divorce, Shaw noted that the findings ‘indicated that mediation had a more positive effect than litigation on spousal relationships.’³⁶² Anderson et al. further support this position, highlighting ‘mediation improved compliance levels and post-divorce cooperation.’³⁶³ These studies illustrate how mediation serves to focus on the spousal relationship with it being renegotiated for the future taking account of both parties’ needs. This too was identified by a number of participants in the semi-structured interviews, namely the importance and benefits of obtaining ‘justice’ in a non-adversarial manner. Highlighting how legal representation was not an appropriate avenue in their circumstances, Client 2 noted how they:

have kind of special circumstances...So I felt like I had to kind of not fight with and alienate all my exes family...the [private] solicitors I approached were very aggressive, they wanted to fight and they wanted it to be, you know, what you say, they just wanted it to be particularly aggressive and it just would have ended up being particularly unhappy for everyone. So that’s why I started researching mediation.

Under these circumstances, it is arguable that the less adversarial mechanism was the more appropriate means of achieving access to justice for Client 3. Further demonstrating the necessity for clients to be able to avail of a ‘wider menu of choices’ to enhance access to justice,³⁶⁴ Client 3 noted how:

³⁶¹ Committee on Civil Legal Aid and Advice (n 265) at page 24.

³⁶² Lori Shaw, ‘Divorce Mediation Outcome Research: A Meta-Analysis’ (2010) 27(4) Conflict Resolution Quarterly 447 at page 464.

³⁶³ Dorcas Quek Anderson, Eunice Chua and Yilin Ning, ‘To negotiate, mediate or litigate? Examining the durability of divorce outcomes in the Singapore family courts’ (2022) 60(3) Family Court Review 434.

³⁶⁴ LRC (n 310) at page 13.

there were [private] solicitors engaged for a short period of time and we found that they were super aggressive and really not what we wanted and as consequence then it was very much a case of pulling back from that.

Unlike litigation which is partisan and results in a judgment, mediation as a method of dispute resolution encourages collaboration, and emphasises party autonomy. Though these advantages do not lend themselves to a quantitative analysis, they are appropriately captured through qualitative research and are discussed in depth in Chapter 5. As mediation is established upon an alternative framework to adversarial litigation, individuals may be willing to engage with the mediation process where they had previously been unwilling to participate in litigation. Additionally, this setting may more likely contribute to the construction of agreements that are tailored to the parties' individual circumstances.³⁶⁵ However, mediation is not a panacea. It is necessary therefore that the 'alternative' aspect of this alternative dispute resolution process is not overlooked, as Cappelletti identifies the importance of selecting the most appropriate method of dispute resolution in consideration of the individuals' circumstances.³⁶⁶ Given that access to justice necessitates an appreciation of individual circumstances, it is vital that both mediation and legal aid are perceived as intrinsic to the access to justice landscape. While central in this respect, further means of assessing these processes contribution to access to justice will now be considered, namely wait time and case duration.

3.6.4 Wait Time for Service Accessibility

An integral facet of access to justice is timely access to dispute resolution services, as encapsulated by the oft-cited legal maxim that 'justice delayed is justice denied'.³⁶⁷ Illustrating its significance, Article 6 of the ECHR affirms that 'everyone is entitled to

³⁶⁵ Shaw (n 362)

³⁶⁶ Mauro Cappelletti, 'Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform' (1992) 109(1) South African Law Journal 22 at page 26. In evaluating access to justice, Cappelletti highlights the importance of 'the impact that the phenomenon exercises upon individuals, groups and society.'

³⁶⁷ Tania Sourdin and Naomi Burstyner, 'Justice delayed is justice denied' (2014) 4(1) Victoria University Law and Justice Journal 46.

a fair and public hearing within a reasonable time...’ The direct impact of delay was explored in the seminal case of *Marie O’Donoghue v Legal Aid Board* where the plaintiff had been subject to a 24 month wait for a LAB solicitor to support her application to vary a maintenance order.³⁶⁸ Following this first consultation, it was a further month before she received her legal aid certificate. Premised on the constitutional right of access to the courts, the plaintiff issued proceedings against the LAB, seeking damages for negligence and the breach of statutory duty.³⁶⁹ In court the Legal Aid Board demonstrated that the demand for services had exceeded its resources and that if wait times were to be dealt with appropriately, additional resources were required.³⁷⁰ Setting out its own aspirations, the LAB outlined as a target, that those seeking legal aid should not be subject to a waiting period exceeding two to four months to receive legal services.³⁷¹ As it was demonstrated that the applicant had suffered a pecuniary loss because of the undue delay, Kelly J awarded Marie O’Donoghue a sum of £7,080 to compensate her for the stress incurred along with the amount of maintenance she would likely have received during the duration of the case.³⁷² While the ability of the LAB to offer its services in a timely manner will remain reliant on the resources available, there is reason to be cautious in relying on this stance ubiquitously.³⁷³ Given the centrality of wait times to the issue of access to justice quantitative data on wait times will now be presented.

³⁶⁸ *Marie O’Donoghue v Legal Aid Board* [2006] 4 IR 204.

³⁶⁹ *ibid.*

³⁷⁰ *ibid* at page 205 and 214. The Legal Aid Board noted that it had received a grant for £8.3 million in 1997, however, to meet the demand for its services, in excess of £10 million was necessary.

³⁷¹ *ibid* at page 236.

³⁷² *ibid* at page 236-237.

³⁷³ *Zimmermann v Switzerland* [1983] App No. 8737/79. In the ECtHR case of *Zimmermann v Switzerland* it was noted how significant workloads and backlogs may ultimately violate Article 6 of the Convention if this issue pertains over a persistent period of time.

Figure 8: Line Graph Depicting the Average Wait Time in Weeks for FMS & LAB Services at End of Year

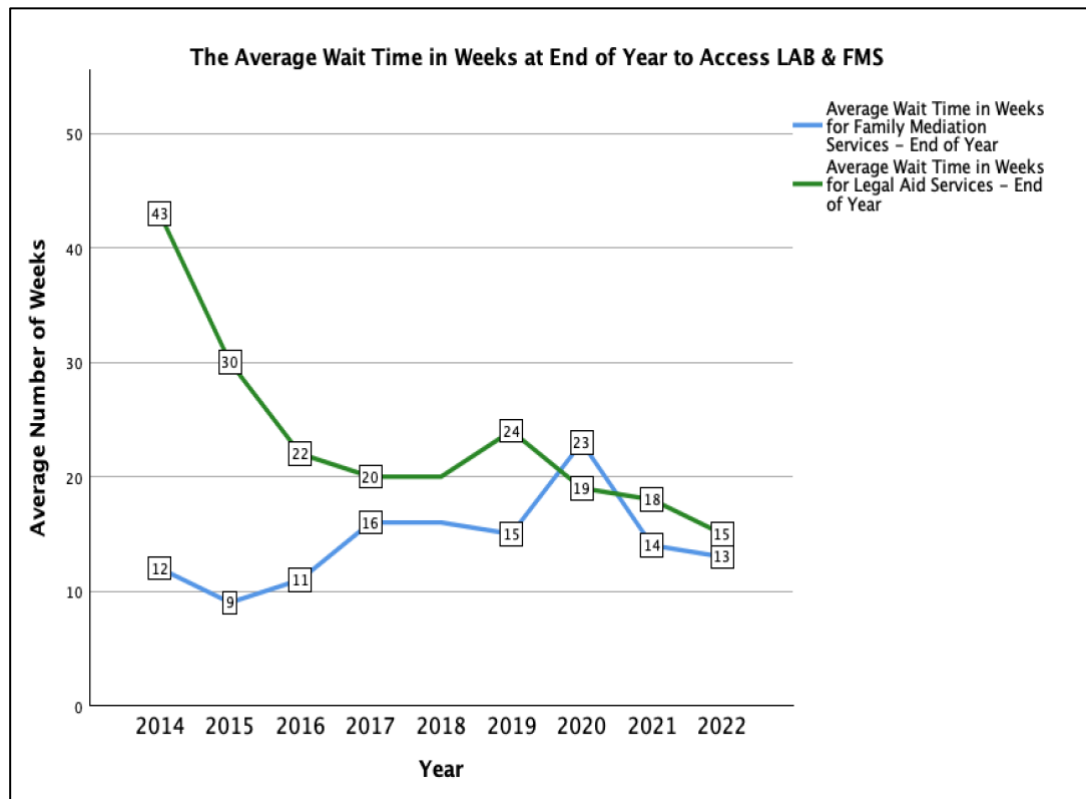


Figure 8 illustrates the average wait time across all centres/offices at the end of the year on an annual basis. In 2022 the average wait time for legal services was 15 weeks, aligning LAB service delivery with its own aspiration of 2-4 months for the first time in the timeline considered. Additionally, Figure 8 demonstrates that the claim of mediation (as offered by the FMS) operating as a quicker alternative to legal representation (as offered by the LAB) has lessened in recent years. It is evident that significant progress has been made in reducing the wait time for legal services, as the average period was cut from 43 weeks in 2014 to 20 weeks in 2018. Following this period, the average wait time rose slightly to 24 weeks in 2019 prior to falling again to 15 weeks in 2022. In providing a rationale for this trend, the LAB noted in its 2015 Annual Report that the private practitioner scheme was re-introduced in 2015 for separation and divorce disputes, vastly improving the wait time to access services.³⁷⁴ While demonstrating the progress made in this area, it evidences the direct relationship

³⁷⁴ Legal Aid Board, *Annual Report* (LAB 2015) at page 12.

or impact of resourcing on service delivery, as asserted by the LAB in the *Marie O'Donoghue v Legal Aid Board* case.³⁷⁵ Given the reduction in wait times, it is suggested that the LAB has substantially improved its capacity to facilitate access to justice in this respect. Contrasting with legal services, the FMS has not experienced equivalent improvements in this area, as the mean wait time increased from 9 weeks in 2015 to 23 weeks in 2020, following which there was a decrease to 13 weeks in 2022. Despite the rise in average wait times, the overall increase is minor with the discrepancy between 2014 and 2022 constituting a period of one week.

Though a consideration of the combined wait time is useful in facilitating direct comparisons between the services, a further in-depth analysis is necessary to account for variations between individual centres. Highlighting this variation in the timeliness of service delivery (an issue further discussed in relation to resource availability), Mediator 3 noted that:

waiting lists vary hugely from office to office, depending on
what part of the country you are in.

Illustrating this, additional data is presented on the maximum and minimum wait times to access services across Ireland in Table 2 below.

³⁷⁵ *Marie O'Donoghue v Legal Aid Board* (n 368) at page 214.

Table 2: Maximum and Minimum Wait Time for Family Mediation Services in Weeks
According to Location (End of Year)

Year	Location of Minimum Wait Time	Minimum Wait Time in Weeks	Location of Maximum Wait Time	Maximum Wait Time in Weeks	Variance in Weeks Between Max & Min
2014	Castlebar	4	Cork	22	18
2015	Sligo/Dundalk/ Jervis House	4	Limerick	16	12
2016	Sligo/Galway/ Letterkenny	4	Tralee	20	16
2015	Raheny	4	Waterford	32	28
2018	Tralee/Waterford	6	Dundalk	36	30
2019	Waterford	6	Castlebar/P ortlaoise	24	18
2020	Letterkenny	8	Athlone	49	41
2021	Waterford	4	Castlebar	26	22
2022	Tralee	2	Athlone	32	30

Table 3: Maximum and Minimum Wait Time For Legal Services in Weeks According to Location (End of Year)

Year	Location of Minimum Wait Time	Minimum Wait Time in Weeks	Location of Maximum Wait Time	Maximum Wait Time in Weeks	Variance in Weeks Between Max & Min
2014	Dundalk	10	Tallaght	111	101
2015	Portlaoise	2	Athlone	91	89
2016	Blanchardstown/Tullamore	4	Cork South Mall	62	58
2017	Tullamore	5	Cork South Mall	41	36
2018	Tullamore	6	Longford	55	49
2019	Newbridge	7	Finglas	50	43
2020	Blanchardstown	6	Navan	45	39
2021	Tullamore	3	Athlone	54	51
2022	Finglas/Galway-Francis St	5	Castlebar	34	29

An in-depth exploration of the data according to the location of centres, demonstrates how wait times fluctuate substantially. With regards to mediation services, the largest variance was experienced in 2020 where there was a difference of 41 weeks between the wait time in Letterkenny and the wait time in Athlone (see Table 2). With regards to legal services, the variance exceeded that of mediation services, with there being a difference 101 weeks between the wait time in Dundalk and the wait time in Tallaght in 2014 (see Table 3). In exploring the difference in wait times with participants during the qualitative phase, the impact of resourcing was universally identified by participants. Describing this situation, Mediator 3 highlighted with regards to wait times how it depends:

on what part of the country you are in, depending on the time of the year, depending on how many mediators are around and all the rest.

Mediator 7 identified resourcing as a significant issue, noting:

we struggle to get to employ enough mediators and to keep them. And that's partly to do, well hugely to do with salary.

The challenges of employee recruitment and retention are frequently raised within public services, particularly in relation to legal aid.³⁷⁶ Denvir et al. highlight that, in England and Wales, low remuneration is a major factor discouraging many solicitors from engaging in legal aid work.³⁷⁷ Among those who do choose to provide legal aid despite this, a strong 'sense of calling' is often cited as a key motivation.³⁷⁸ As such, increasing remuneration has been identified as a way to improve both recruitment and retention. In addition to higher salaries through improvements in the funding model, the provision of education and training opportunities has also been linked to greater employee retention within the public sector.³⁷⁹ For this reason, it is essential that the LAB/FMS continue to invest in the development of their training programmes, as will be discussed in detail in Chapter 5. Reflecting the experience in England and Wales, Solicitor 7 reported:

it would be good to have more resources in the law centres because then the workload would be spread more evenly, and your day will be more manageable.

Though resourcing was an issue highlighted by both groups, there was an awareness amongst certain mediators of the heightened pressure that LAB solicitors are under. In discussing the referrals that take place between the law centres and the mediation offices, Mediator 3 noted that:

³⁷⁶ Emma Cooke, 'The Working Culture of Legal Aid Lawyers: Developing a 'Shared Orientation Model'' (2022) 31(5) *Social & Legal Studies* 704; Denvir, Kinghan, Mant and Newman (n 256).

³⁷⁷ Denvir, Kinghan, Mant and Newman (n 256).

³⁷⁸ *ibid* at page 113.

³⁷⁹ *ibid* at page 198.

I'm sure they'd be absolutely delighted to hand over half their clients to mediation, they really would because they're so overworked.

In Ireland, the issue of resourcing has long been noted, with former Minister for Justice and Equality Alan Shatter commenting in 2011 that 'Waiting times fluctuate depending on demand and the capacity of the law centre or board to offer appointments to new clients at a particular point in time.'³⁸⁰ Despite fluctuation in wait times having been curtailed as previously noted, this statement continues to be relevant to the present day. Given the substantial variation that exists, it is arguable that were resources increased and distributed more evenly throughout the State with regards to demand, it could potentially ameliorate the wait periods and facilitate more timely access to justice. In recent years the LAB/FMS has received increased funding. Outlined by the then Minister for Justice Helen McEntee is that:

the funding allocation to the Legal Aid Board for 2024 was approximately €59.1m, which was an 11.4% increase from the 2023 budget of €53.060m. There was a further 8.5% increase in the recent budget allocation for the Legal Aid Board for 2025, with an allocation of €64.122m for the year.³⁸¹

Although the most recent data on wait times available to this thesis is from 2022, it will be important to assess the impact of the increased funding between 2023 and 2025 on service delivery once the relevant annual reports are released.

While substantial variance has long been associated with these services, the data presented suggests that this deviance has been curtailed with regards to legal services with the difference between the maximum and minimum wait time constituting 29 weeks in 2022 (see Table 3 on page 116). In light of the reduction in mean wait time and wait time variability, currently, it would be inaccurate to definitively state that

³⁸⁰ Dáil Debate 27 September 2011, Vol. 741 No. 3.

³⁸¹ Dáil Debate 5 November 2024, Written Answers Nos. 802-821.

access to mediation services is more expeditious than access to legal services. Consequentially, due to the variations that present according to the specific location, it is advisable that clients consider their locality when determining what process to engage with and avail of as their means to secure access to justice. However, the effectiveness of this proposal relies on improving citizens' legal literacy, a matter explored later in this thesis.

While timely access to justice is important, sufficient time must also be allowed to enable disputants to reflect critically on their position.³⁸² In discussing wait times with participants, it was noted that allowing a certain period of time to elapse prior to engaging services may be advantageous to the overall process, particularly in the case of mediation. For example, Mediator 1 noted that if clients are:

on our waiting list for maybe about 12 to 14 weeks, quite often they'll go through the process more smoothly than if we take them right away. See people are too fresh... There's got to be a period of processing the separation as a real thing. So quite often what you find is if they're on the waiting list, that processing is happening and by the time they come into mediation they're ready to roll.

This sentiment was further shared by Mediator 3 who specified how:

an optimum waiting list for mediation would be somewhere in the region of maybe 8 to 12 weeks... So in general, that kind of waiting period isn't a bad thing for mediation because they have been sent out some information. They're being, I suppose, encouraged to think about the longer term. I suppose tempers become a little less frayed, the conflict becomes a little softer hopefully, and they're beginning to think about what it is that

³⁸² Barlow, Hunter, Smithson and Ewing (n 226); Catherine Houlston, Abigail Millings, Penny Mansfield and Shannon Hirst, 'Development and Practical Use of an Emotional Readiness Assessment for Support in Family Justice Processes' (2019) 57(3) Family Court Review 332. An absence of emotional readiness has been identified as a barrier to engagement with or successful outcomes in family dispute resolution mechanisms.

each of them needs to be able to move forward in a divorce or separation.

While advantageous in some respects, Mediator 3 did recognise that there is a threshold of time, beyond which it can become problematic noting that:

when you get up on waiting lists that are over six months, that's very problematic obviously because they're waiting so long...the conflict may have escalated. They may have tried things that won't work for them, and they may be getting frustrated.

Thus, a careful balance is required. The analysis of the qualitative data reveals the importance of emotional readiness and how this can impact the clients' ability to progress through the process. This was also recognised by clients, for example, Client 2 acknowledged how:

it's important to have a little gap because, I suppose when any event like that happens to you, you need a bit of time to process it and sometimes at the first meeting you might not understand things in the same way that you might understand it given a little bit of time.

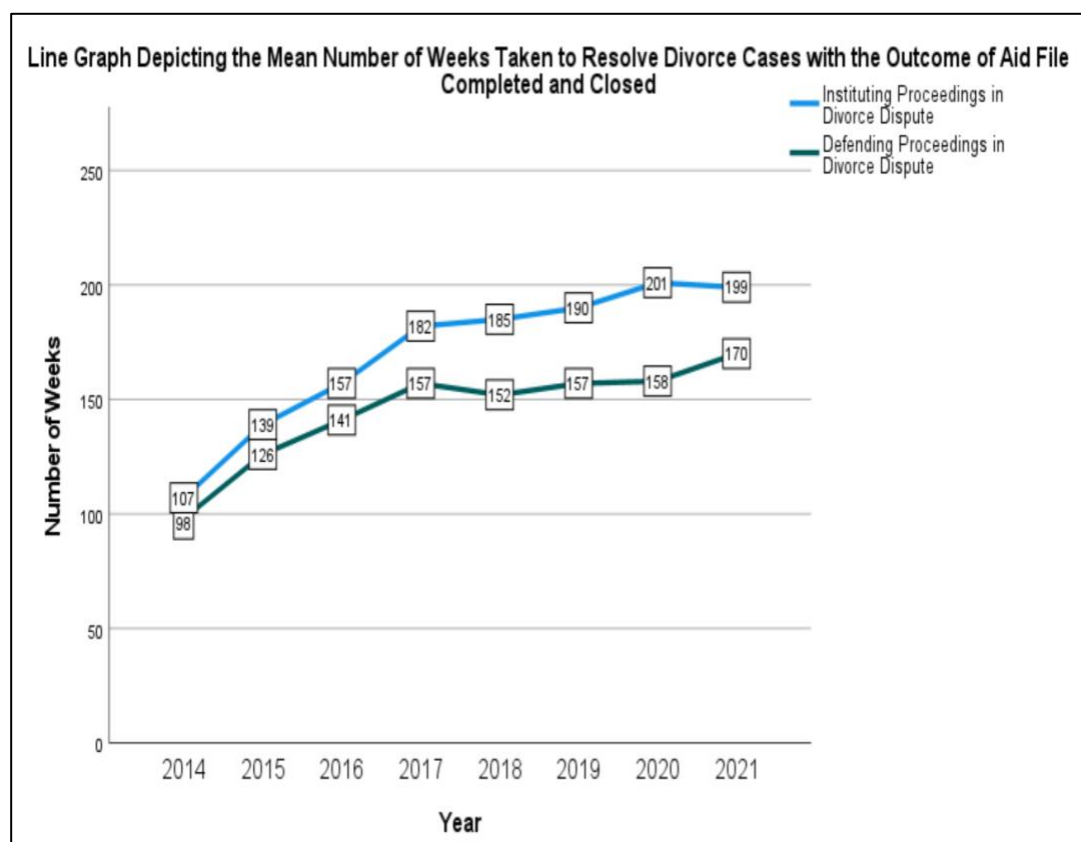
Whilst the views expressed pertain to mediation, they may also be relevant to the negotiation process that takes place when engaging legal services in the context of separation and divorce.³⁸³ Though delays may occur in accessing dispute resolution services, this is not the sole stage at which the timeliness of service delivery can be affected. Adopting a holistic approach, empirical data on case duration will now be explored in assessing the capacity of these processes to facilitate access to justice.

³⁸³ Discussed in Chapter 5 are those benefits (both emotionally and procedurally) where clients attend mediation prior to legal services.

3.6.5 The Duration of Disputes

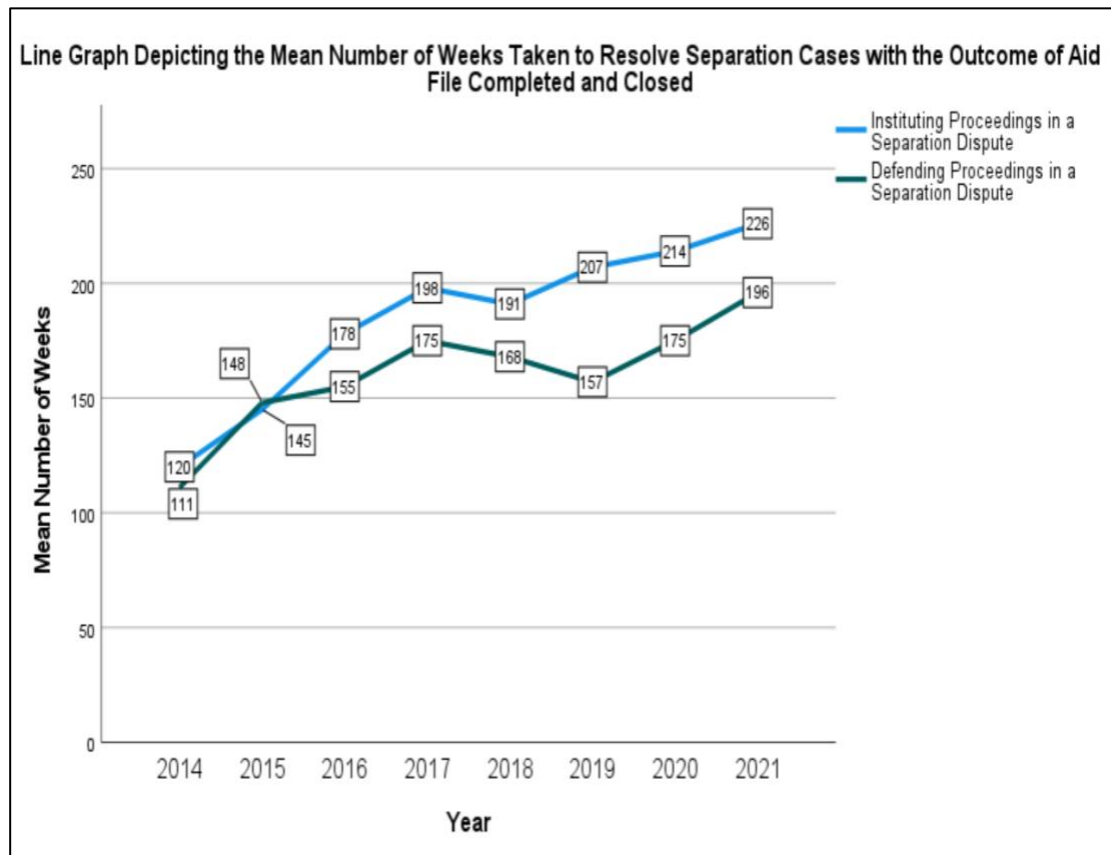
Cappelletti specifies that cost, duration and societal effects are fundamental determinants in evaluating mechanisms that facilitate access to justice.³⁸⁴ Recognising this centrality, a core area of exploration during the quantitative phase of the study was to assess the average case duration for both litigation and mediation. Unfortunately, it was not possible to explore this shared target area in an equivalent manner. With regards to legal aid cases, case duration was determined by calculating the average period of time elapsing from the date of the application having been received and approved by the LAB to the date of file closure. In contrast, case duration for mediation services was determined based on the number of joint mediation sessions in accordance with additional supplementary qualitative data.

Figure 9: Line Graph Depicting the Mean Number of Weeks Taken to Resolve LAB Divorce Disputes



³⁸⁴ Cappelletti (n 366) at page 26.

Figure 10: Line Graph Depicting the Mean Number of Weeks Taken to Resolve LAB Separation Disputes



In Figures 9 and 10 above, case duration periods are shown to have increased in legal aid cases for both separation and divorce disputes. This growth would appear to be substantial as there is an increase of over a year in all instances (i.e. for both separation and divorce along with whether the client is instituting or defending proceedings) for the timespan under consideration. Experiencing the most significant growth are separation cases where the client is instituting proceedings, as the increase exceeds two years from 2014 – 2021 (see Figure 10). Despite the substantial increase in the time taken to resolve these disputes, there was a clear desire amongst the majority of those interviewed in delivering a resolution in as short a timeframe as possible. Solicitor 4 noted how the:

Faster throughput of cases is essential, I mean this thing of divorce going on for three or four years is ludicrous, you know?...I mean years ago we used to get our cases through

faster, you know, and it definitely made our job easier as well because it's just, it's really benefiting nobody just having the case in limbo and nothing happening on it.

Given the substantial increase in case duration periods, it is necessary to further explore this increase in duration. As case duration is calculated from the date the application is categorised as a 'case type' on the EOS system to the date the case file is closed, it will be impacted by the wait time to access legal services.³⁸⁵ However, as identified in the previous section, there has been a reduction in wait times, indicating that alternative factors are now contributing more significantly to the prolonged duration of cases. A further issue that can be identified as contributing to the increase observed, is the wait time to access the Circuit Family Court.³⁸⁶ An analysis of the court service annual reports reveals that wait times for Circuit Court family law cases have risen substantially in the period from 2017 – 2021.³⁸⁷ The impact of court delays was also highlighted by participants in the qualitative phase of this study. Discussing the rise in case duration periods and the subsequent impact they can have on parties to the dispute, Solicitor 3 observed that:

one of the big problems is delays in the court system. Like it's just, taking forever these days to kind of get a case concluded and that doesn't help. That can actually just foster resentment.

This rise in case duration periods is far from trivial as not only can it heighten the conflict between the parties, the empirical data collected would suggest that it is contributing to clients' decisions as to what remedy to seek. Considering the period of

³⁸⁵ LAB (n 351). Applications are categorised as an 'enquiry' prior to satisfying the means and merits test.

³⁸⁶ Section 38 of the 1996 Act and s. 31 of the 1989 Act as amended by the Civil Liability and Courts Act 2004. While both the High Court and Circuit Court have concurrent jurisdiction for judicial separation and divorce disputes, due to the operation of the means test as previously discussed, the vast majority of legal aid cases (and judicial separation and divorce cases in general) are dealt with in the Circuit Court. Where heard in the High Court, with regards to both remedies, the market value of the land will exceed that of €3,000,000. See also: Court service, *Annual Report* (Court Service 2022) at page 62-63. Outlined in the 2022 Court Service Annual Report is that there were 18 applications for a judicial separation in the High Court whereas there were 468 applications in the Circuit Court. With regards to divorce, there were 53 applications in the High Court whereas there were 5498 applications in the Circuit Court.

³⁸⁷ Court Service, *Annual Report* (Court Service 2017) at page 99; Court Service, *Annual Report* (Court Service 2021) at page 113.

separation required to obtain a divorce has been reduced to two years, coupled with the data above demonstrating that the resolution process takes on average a minimum of three years, it calls into question the utility of a judicial separation being used as a precursor to divorce. Despite its eroding utility, the necessity to retain this remedy will be further discussed in Chapter 4, as it is vital for those who decide to separate but do not desire a divorce. This increase in case duration periods coupled with the 2019 reforms was considered by Mediator 2 as they explained:

People want a divorce. Why would you duplicate it? Why would you, if you could just hold out another six months to make your application, why would you be doing it all over and duplicating costs?

Additional support for this observation can be seen in Figure 2 (on page 99) regarding caseload, as following 2019 there was a significant decrease in those seeking a judicial separation while there was a corresponding increase in those seeking a divorce. Interestingly, it could be argued that as divorce becomes the main remedy pursued, access to justice is increased as the system becomes less convoluted because of the removal of a layered approach to remedies, and thereby more efficient (albeit within the context of case duration periods increasing). Having assessed case duration with regards to legal services, mediation services will now be examined in this context.

Figure 11: Line Graph Depicting FMS Mean Case Duration to the Exclusion of Pre-Mediation

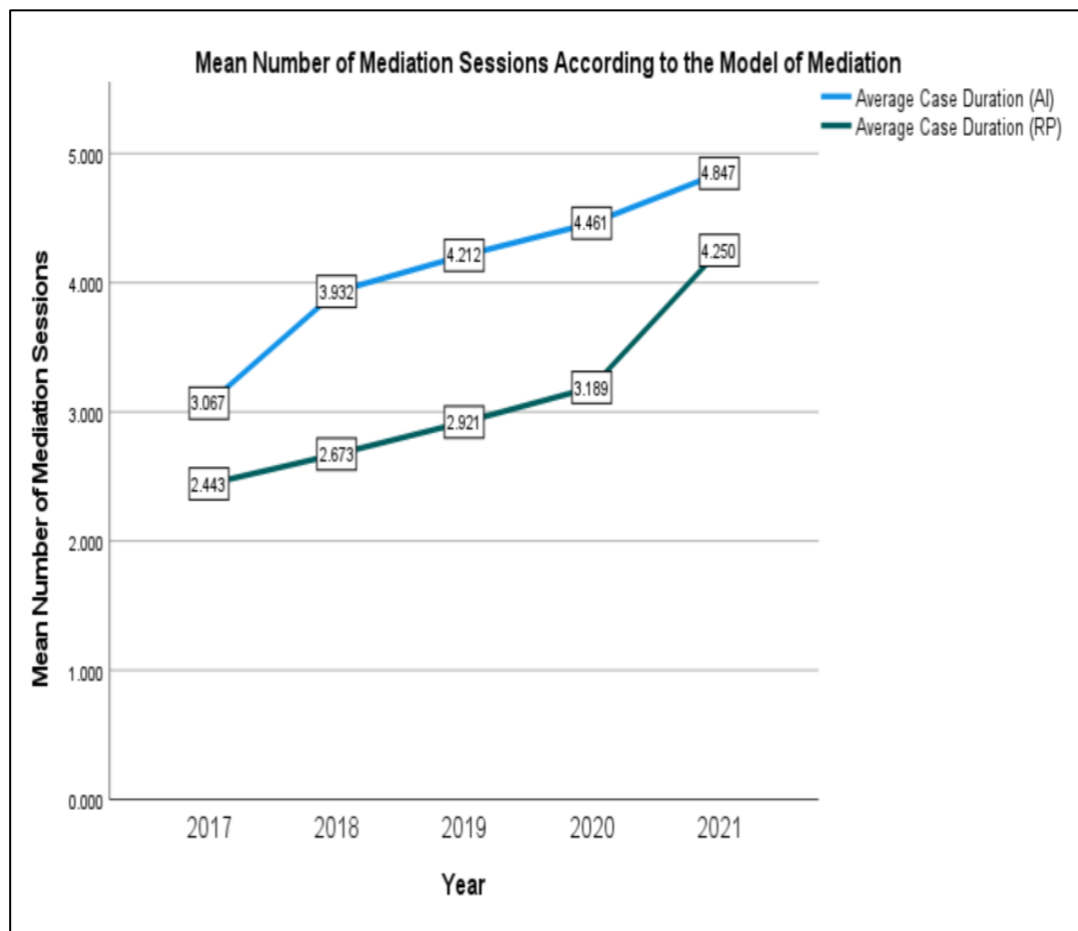


Figure 11 presents data on the average number of sessions that occur in mediation cases, to the exclusion of ‘pre-mediation’.³⁸⁸ In exploring the process of mediation, supplementary data was sought during the qualitative portion of the study, pertaining to the frequency of appointments scheduled by mediators. While aspirational and subject to variation, Mediator 2 noted that:

our general rule of thumb is to schedule appointments with clients every two weeks.

Expanding on the rationale for this approach, Mediator 2 explained that:

³⁸⁸ See LAB: (n 351).

there's a kind of practice...around that. So, because it's decision making, because it's tense, because of et cetera we'll never schedule appointments one week on top of the other because it's just, it's too soon for people to have digested what has happened.

In adopting this two-week approximation, it would suggest that the average mediation case duration is 6-10 weeks (this calculation is premised in light of Figure 11 above). There are however limitations with this estimation, as in exploring the number of sessions which occur in mediation, it was not possible to isolate only those cases where a written agreement was achieved.³⁸⁹ Given this shortcoming, data on the average number of mediation sessions is distorted by instances where parties attend a minimal number of joint sessions but subsequently decide not to proceed with the process as their primary method of dispute resolution. Due to the limitations of the quantitative data in this regard, it was necessary to draw upon this issue further during the qualitative phase. As a source of supplementary information, participants discussed the average time taken to resolve separation and divorce disputes. Mediator 5 noted that:

generally the rule of thumb for me at least anyway, is get them seen from that first phone call within the week...and hopefully wrap the whole thing up then, I suppose on average, what might be about three months if at all possible.

In providing a description of the process, Mediator 3 explained how they inform their clients that they are:

going to be in here for the next 5-6 [joint] sessions. You know, over a period of months.

Further insights are obtained from Mediator 7, who noted that:

³⁸⁹ See Chapter 2 on the studies limitations for a full discussion on the inability to isolate the quantitative data in such a manner.

Mediation isn't quick. You know, we would tend to see clients for, you know, those cases where there's a family home, where there are savings, assets, children, you know, those cases could conceivably easily go on for six months.

In addition to mediators discussing the amount of time taken to reach a resolution, Client 5 who came to a successful mediation agreement, noted how they had:

thought it would be four [joint sessions]. I think we were told it would be three to four months or something. But it was probably like six to eight months. And we were probably in the room about six or seven times maybe. I don't know, I think it was around that, but it was definitely way more than four. So that was slightly frustrating. But also, I can't remember, it could have been on our part as well that it was dragged out, that we didn't come to agreements or didn't get things rushed in time.

The qualitative data provided suggests that it takes between 4-12 sessions to reach a draft agreement. While not deviating excessively, these estimates are more substantial than those specified by the LAB, Court Service, and within the legal scholarship. The FMS specifies that 'Mediation usually takes between three and six sessions. Each session lasts approximately one hour.'³⁹⁰ This timeframe is also outlined by the Court Service.³⁹¹ Furthermore, Amato notes that divorce mediation usually takes six to nine hours.³⁹² While the empirical data illustrates that cases can be resolved within this timespan, it also indicates that it can take four times as long (if not more with the potential for outliers).

³⁹⁰ Legal Aid Board, 'How Mediation Works' <<https://www.legalaidboard.ie/en/our-services/family-mediation/how-mediation-works/>> accessed 20 March 2025.

³⁹¹ Court Service, 'Mediation' <<https://services.courts.ie/Family-Law/getting-help/mediation#:~:text=During%20mediation%2C%20you%20can%20meet,changed%20or%20amended%20as%20needed>> accessed 20 March 2025.

³⁹² Paul Amato, 'Research on Divorce: Continuing Trends and New Developments' (2010) 72(3) Journal of Marriage and Family 650.

Though mediators expressed a clear desire to resolve cases in a prompt fashion, fulfilling their obligation under s.8(2)(c) of the 2017 Act, the primary determinant in dictating the case duration is the approach of the parties to the dispute, giving rise to substantial variation. In spite of mediators' statutory obligation in this context, certain service providers highlighted the importance of slowing the process down at times, a position supported by Baitar et al.³⁹³ Further to specifying how they 'like to move relatively quickly' Mediator 5 noted how this objective must concede to the clients' individual needs, stressing how:

there's a lot to be said for slowing it down when people are particularly unsure on key decisions. Time can help, so again it's each to their own.

While resolving disputes in a timely fashion is a crucial component of access to justice, its importance does not supersede the clients' individual needs. It is vital therefore that service providers seek to facilitate a timely service but remain cognisant of the necessity to tailor the service provided to the client. While the above extracts present insights into the average time taken to resolve mediation cases, they serve to highlight the variability that exists and how it can be entirely dependent on the approach and needs of the parties to the dispute. Though there is a capacity for clients to progress through the mediation process in an expedient fashion supported by the mediator, should they seek a formal recognition of judicial separation or divorce, they cannot circumvent court procedures which will impact upon the time taken from breakdown to resolution.

Drawing on the quantitative and qualitative data collected during the present study, this section provided a critical overview of the FMS and LAB dispute resolution services with regards to their capacity to facilitate access to justice. While direct comparisons could not always be achieved in the analyses, this challenge is not entirely surprising as the foundations and nature of these services differ in many

³⁹³ Rachid Baitar, Jan De Mol and Peter Rober, 'Exploring Helpful Tensions between Divorce Mediators and Clients: A Relational Dialectical Analysis' (2016) 34(1) Conflict Resolution Quarterly 7.

respects.³⁹⁴ Owing to their discrepancies and the variability that occurs with service provision, it is not appropriate to claim that one process supersedes the other. Rather, the predominant factor determining the suitable method of accessing justice is the clients' particular circumstances thus there is a need to select the 'appropriate' method of dispute resolution.³⁹⁵ For this reason, it is desirable that mediation and legal services continue to be integrated with one another as is the focus of Chapter 5. The next section of this chapter will examine additional avenues for enhancing access to justice in separation and divorce cases, all of which fall within the scope of the 'third wave' of the access to justice movement.

3.7 Enhancing Access to Justice: A Holistic Approach to Access to Justice

While the third 'wave' of the access to justice movement is concerned with ADR processes, it is regarded as adopting a holistic perspective to dispute resolution through focusing 'on the full panoply of institutions and devices, personnel and procedures used to process, and even prevent, disputes in modern societies.'³⁹⁶ This broad scope is evidenced in their Comparative General Report where Cappelletti, Garth and Trocker describe the third 'wave' as encouraging:

the exploration of a wide variety of reforms, including, inter alia, changes in forms of procedure, changes in the structures of courts or the creation of new courts, the use of lay persons and paraprofessionals both in the bench and in the bar, modifications in the substantive law intended to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms.³⁹⁷

Pivotal to this perspective is in introducing simplifications in dispute resolution procedures and enhancing accessibility to supports. While not specifically referenced in the above extracts, it is arguable that given the desire to adopt a holistic approach,

³⁹⁴ See Chapter 5 for an in depth discussion of the differing roles/capacities of these processes.

³⁹⁵ LRC (n 312).

³⁹⁶ Cappelletti, Garth and Trocker (n 240) at page 705.

³⁹⁷ *ibid* at page 705.

legal literacy is implicitly a key part of the scope of this third ‘wave’. This proposition is not novel, rather its centrality is well documented.³⁹⁸ McDonald notes that:

Critical to improving access to law and justice system processes is understanding of how people see (or do not see) the full "legal" sphere of law, the justice system, and associated web of institutions. Legal here is used to refer to the iceberg of legality in its entirety rather than just the tip. It is intended to refer to wider consciousness, awareness, and understanding of law and legality, entailing what may be needed to frame, characterize, or perceive law as relevant to troubles of everyday life, in the mundane as much as adversity, and events and circumstances that are potentially justiciable.³⁹⁹

Similarly, the UNDP definition specifies that ‘There is no access to justice where citizens, especially marginalized groups, fear the system, and see it as alien...where they do not have information or knowledge of rights.’⁴⁰⁰ Through a consideration of the quantitative and qualitative data collected, (i) simplifications in procedure; (ii) accessibility to supports; and (iii) improvements in legal literacy, will now be discussed as a means to enhance access to justice in Irish civil law disputes.

3.7.1 Procedural Simplification: An Unmet Need

Cappelletti, Garth and Trocker identify procedural simplification as essential to the access to justice movement.⁴⁰¹ Procedural complexity is an issue that presents at almost all stages of the civil procedure, whether it arises in respect of: (i) comprehending the law and court rules;⁴⁰² (ii) comprehending and completing

³⁹⁸ Chief Justice’s Working Group (n 292); Chief Justice’s Working Group (n 294).

³⁹⁹ Hugh McDonald, ‘Assessing Access to Justice: How Much "Legal" Do People Need and How Can We Know?’ (2021) 11(3) UC Irvine Law Review 693 at page 696-697.

⁴⁰⁰ UNDP (n 251) at page 5.

⁴⁰¹ Cappelletti, Garth and Trocker (n 240).

⁴⁰² Department of Justice, *Review of the Administration of Civil Justice* (DoJ 2020) at page 38.

documentation;⁴⁰³ (iii) coming to terms with the language and terminology used;⁴⁰⁴ or (iv) simply navigating the court buildings and layout.⁴⁰⁵ Highlighting the challenging nature of the legal procedure for the clients in judicial separation and divorce disputes, Solicitor 7 noted how:

the paperwork is definitely an issue because it is hard for them to go through it. Even when we are going through it, you sit down, you go through the civil bill once it's been drafted and what it means. You know the Affidavit of Means, the Affidavit of Welfare, it can be hard for some people to grasp what is needed of them. Even the vouching documentation that they have to provide. You know there is that sense of, I have already given you all this document, and you have to give everything again on the day, you know a week before the court hearing.

Convolved procedures are a limitation of service delivery that has commonly plagued court-based dispute resolution systems both nationally and internationally.⁴⁰⁶ With reference to the Irish family law system it has been noted that there is 'a general consensus amongst stakeholders that the current family law system in Ireland is beset by a number of difficulties. Many of these arise from the current structure of the family law courts.'⁴⁰⁷ This issue is far from novel, rather the desire to simplify and reform the Irish family law system has been live since the 1990's when it was described by the LRC as a 'system in crisis'.⁴⁰⁸ Despite the lack of progress, there is evidence to suggest that developments are forthcoming. Outlined in the Family Justice Strategy are numerous goals targeting improvements in service delivery and pertain to areas such as: (i) digitalisation; (ii) facilities & infrastructure; (iii) services and supports; (iv)

⁴⁰³ Trinder, Hunter, Hitchings, Miles, Moorhead, Smith, Sefton, Hinchly, Bader and Pearce (n 343) at page 42.

⁴⁰⁴ DoJ (n 402) at page 37.

⁴⁰⁵ Trinder, Hunter, Hitchings, Miles, Moorhead, Smith, Sefton, Hinchly, Bader and Pearce (n 343) at page 106.

⁴⁰⁶ DoJ (n 402). Within the jurisdictions considered, complex or overly-convoluted procedures was a prevalent theme.

⁴⁰⁷ JAE (n 288) at page 21.

⁴⁰⁸ Law Reform Commission, *Report on Family Courts* (LRC 52 – 1996) at page (i). This aspiration to reform the courts was set out in explicit detail and advocated for was a dedicated and specialised family courts service.

information and awareness etc.⁴⁰⁹ Further evidence of the State targeting this aspect in service delivery is the enactment of the Family Courts Act 2024 (hereafter the ‘2024 Act’), which accounts for dedicated family law courts within the existing court structure. While a streamlined family court service has great potential, this should not be the sole aspect in which to pursue procedural simplification.

In the report published at the conclusion of the work of the *Review of the Administration of Civil Justice*, chaired by the former president of the High Court Kelly J, it was recommended by the LAB that:

consideration be given to the introduction of a simplified, standard set of civil procedure rules covering the High Court, the Circuit Court and the District Court and to the introduction of more “lay-friendly” terminology – for example replacing “plaintiff” with “claimant”.⁴¹⁰

The necessity and practicality of this proposal is apparent when considering that the that District, Circuit and High Courts have different procedures, with FLAC expressing the view that the procedure of the lower courts can often be more complex.⁴¹¹ In a similar vein, both the Law Society of Ireland (LSI) and the Dublin Solicitors Bar Association (DSBA) have recommended the ‘use of plain modern language and uniform terms across the rules of court...’ as it ‘will increase accessibility and promote clarity and understanding.’⁴¹² As Part 6 of the Family Courts Act 2024 regards ‘Rules of court in respect family law proceedings’ it is arguable that there is a foundation/platform upon which to implement a standardised set of rules, however, whether or not this occurs is another matter that is yet to be seen and will

⁴⁰⁹ Department of Justice, *Family Justice Strategy 2022-2025* (DoJ 2022).

⁴¹⁰ DoJ (n 402) at page 115. See also: Department of Justice, *Civil Justice Efficiencies and Reform Measures: A Civil Justice System for the 21st Century* (DoJ 2022).

⁴¹¹ Free Legal Advice Centres, *Review of the Administration of Civil Justice* (FLAC 2018) at page 13. Specified by FLAC in its submission is that ‘In the High Court, to commence civil proceedings, it is only necessary to have the relevant papers stamped and filed and served in the appropriate manner on the respondent. Only one visit to the Central Office is involved at the initial stage. Whereas in the District Court for most civil matters, it is necessary to first issue the relevant summons / notice, then effect service, then prepare a statutory declaration in relation to service, before returning to the Court office to lodge the summons and declaration, and it is only at that point that the matter is listed.’

⁴¹² DoJ (n 402) at page 114.

likely be determined by the Family Courts Practice and Procedure Committee when established.⁴¹³

As this thesis continues to examine complex structures and procedures from an empirical perspective, it is important to clarify a key distinction. While the LAB and the Courts Service are closely connected in practice, the LAB is a separate and independent organisation. Although the primary focus of this thesis is on the LAB and the FMS, participants also shared their perspectives on the operation of the Courts Service, reflecting the close relationship between these entities. A central topic in these discussions was the Family Courts Bill 2022, which has since been enacted and is referred to throughout this thesis as the Family Courts Act 2024. In presenting qualitative data on court operations and access to justice, any relevant differences between the 2022 Bill and the 2024 Act will be noted.

3.7.2 Irish Courts Service

Participants in this study reported perceived inefficiencies with the current operation of the Irish family law courts. While numerous issues were highlighted, it was apparent that case management was the predominant concern. Expressing their dismay at the removal of timeslots (a temporary reform implemented during the Covid-19 pandemic), Solicitor 2 noted that:

there could be better management, better case management by the Court Service, you know? Definitely things should be given their individual times, that should be kept from Covid. That's excellent.

Expanding on the nature of the case management issues, Solicitor 2 noted the necessity for:

incremental improvements in terms of getting digitisation properly done, E filing, being able to file documents. You know, being able to have fillable forms. It's all this simple stuff.

⁴¹³ Part 6 of the 2024 Act.

Mediators further shared in this sentiment, as Mediator 3 noted that this:

paper business as well, it's just bonkers. Do you know what I mean like, that's ridiculous. That amount of paperwork. Mad stuff like, you know it should be electronic.

And that if it were electronic, it would facilitate a more:

straightforward, more streamlined process.

The views expressed clearly highlight the fundamental necessity for the Court Service to modernise its case management system.⁴¹⁴ Such modernisation has the potential to streamline procedures more effectively and, in turn, significantly enhance access to justice.

While concern was expressed over the operation of case management, this was not the sole issue identified by participants with regards to the Court Service. Considering the challenges encountered by their clients, Solicitor 7 highlighted how the legal procedure itself is difficult for clients to grasp and how it can subsequently impact on the negotiation process. In discussing the legal framework of judicial separation and divorce disputes, Solicitor 7 noted how court proceedings are:

very complicated to explain to people. You know, you talk about, well first we need to do the civil bill and even if we don't want everything we are asking for, we still have to ask for everything...it is a very confusing thing like I have a, now it actually will be a consent that I am working on at the moment, and the couple, like no spousal maintenance, nothing from each other's pension, nothing. But I had to explain to her, look when I am drafting the civil bill I have to ask for spousal

⁴¹⁴ DoJ (n 409); Family Courts Act 2024. The value placed on case management is discernible through its identification as a guiding principle in s. 8 of the 2024 Act.

maintenance even though we are not going to ask for it on the day. I have to ask for his pension even though we are not going to ask for it on the day. People find that very misleading and it can actually lead to a further breakdown in relations, like that couple that I have, they have a very good relationship with each other in terms of resolving the dissolution of their marriage but you know if someone gets a piece of paper in the post that says I am coming after you for X, Y and Z even though I told you I wasn't, like what are you supposed to believe.

In response to being queried on the necessity for this approach, Solicitor 7 specified how:

it's a good safety net but it's very confusing having to explain this to clients because they are looking at me being like, but I don't want spousal maintenance and now I'm telling him on this piece of paper that I am looking for it?

While it may be challenging for clients to grasp the particularities of litigation, it is arguable that this approach can further escalate the conflict between the parties and enable adversarial tactics. Additionally, such inadequacies undoubtedly place those without legal representation at a significant disadvantage and impede their ability to achieve a just resolution (both procedurally and substantively). In recognising the shortcomings of this approach, it is arguable that the 2024 Act has the capacity to rectify this issue in the context of judicial separation and divorce. Section 78 of the 2024 Act amends s. 2 of the 1989 Act to introduce a joint application for judicial separation. This application will also be available for divorce with s. 83 of the 2024 Act amending s. 5 of the 1996 Act. While it is unknown whether this revised procedure will reduce or even eliminate adversarial proceedings in such cases, on the basis of the empirical data presented, there is evidence to suggest that it holds potential.

While the 2024 Act is now enacted, as previously noted, the qualitative interviews were conducted at a time when the legislation was being developed and thus the discussions related to the Family Courts Bill 2022, as opposed to the 2024 Act, with a

core distinction between them now discussed. Further to the establishment of dedicated family courts, the Family Courts Practice and Procedure Committee, and the joint application procedure, the Family Courts Bill 2022 intended to alter the jurisdiction for judicial separation and divorce disputes below a monetary limit, enabling them to be addressed in the less formal District Court. While altering the jurisdiction of judicial separation and divorce disputes was described by the BAR of Ireland as ‘well intentioned’,⁴¹⁵ it was met with much concern, resulting in mixed views amongst the legal profession. In support of the intended reforms, Solicitor 4 asserted that:

when it [the Bill] please, please, please, please, please comes into law and you know you have the District Court doing divorces. We should really be able to. I won’t use the word ring them in, but like...there's no point in making a row or making extra paperwork where it's not necessary, you know?

In rationalising this view, Solicitor 4 noted how:

we have a big problem at the moment. I’d say it's countrywide, but in terms of delays, getting the most straight forward matter dealt with is ridiculous. And so really, there would be a big sweep of all the straight forward cases. Get them through the system and then try and figure out a way of trying to progress the more complex ones.’

Further sharing in this sentiment, Mediator 8 specified that:

I think it’s going to allow for possibly...an all-issues divorce to be ruled on in the District Court, where people don't have any significant assets worth talking about. And I think, you

⁴¹⁵ Bar of Ireland, *Submission on the Family Courts Bill 2022* (Bar of Ireland 2024) at page 2. It is noted that their primary concern is ‘with one aspect of the Bill where we have genuinely held concerns that the proposed reorganising of jurisdiction for the hearing of family law proceedings, so that most of the divorce and judicial separation cases will be heard and disposed of in the Family District Court, is not in the best interest of families who find themselves interacting with the family justice system.’

know, that is a perfect model for ruling in the District Court. And that's a situation that we would encounter, you know, a great deal...to avail of this service, you have to qualify for the Legal Aid Board, you know for civil legal aid. Which means the nature of the person who presents for legal aid, I mean they do not have a significant income and they have no assets worth talking about. And why in goodness name would you drag people like this through the Circuit Court? It makes no sense whatsoever.

Despite the endorsement by some, a more conservative perspective on the potential impact of the Family Courts Bill 2022 was expressed by Solicitor 7, in noting that:

if it means that they can be done faster but in a way that doesn't affect the quality of the proceedings then I suppose I would be in favour of it. And then if you need to appeal, then you are just going to Circuit which might be more manageable. But then are you overloading the District Court, which you would be. I mean there is quite a lot of divorce cases happening. The District Court is already understaffed and over run when it comes to childcare, access and maintenance.

Participants in this study expressed support for dealing with the majority of judicial separation and divorces disputes in a less formal manner. Where trepidation/concern arises, however, is whether the current structures have the capacity to cope with this proposed reform. In an apparent acknowledgement of these concerns, the State in enacting the Family Courts Act 2024 altered s. 69 of the Act. Deviating from the stance where judicial separation and divorce cases below a monetary limit could be heard in the District Court,⁴¹⁶ the revised approach provides that it is only where an agreement has been reached and the parties consent to the jurisdiction, that such cases can be heard.⁴¹⁷ The revision of the legislation is to be welcomed, as it demonstrates a more

⁴¹⁶ Section 69 of the Family Courts Bill 2022.

⁴¹⁷ Section 67 of the 2024 Act.

considered approach and a willingness to be guided by those who are experts within the field. While the 2024 Act is a clear demonstration of the desire to reform the conduct of family law proceedings, in order to further improve the client experience, it is important that the LAB/FMS implement their own reforms in tandem with the State's revisions, as discussed below .

3.7.3 Irish Legal Aid Board and Family Mediation Service

Whilst there is a necessity to update and simplify the procedures of the Court's Service, reform is also needed in relation to the operation of the LAB/FMS. In considering how to alter the procedures to good effect for the benefit of users, participants identified the intake process as in need of improvement. Scrutinising the current method of client registration, Mediator 1 noted that:

I think we have a number of problems. The first one is you cannot apply for both services together. We do not have a joint applications process.

Expanding on this issue, Mediator 1 specified how when you:

walk in the door to a law centre, you register for the law centre, you cannot register for mediation. You can be referred to mediation by the law centre and some people do that, but if you could actually walk into the law centre, get information on mediation and register for both, it is 1 less step.

Expressing a similar sentiment, Solicitor 7 noted how:

there needs to be sort of more streamlined services, rather than two very distinct routes that split at the start and come back at the end type of thing. I don't think that that is beneficial for anyone.

If implemented, this proposed joint application procedure may simplify the process for clients. Additionally, it has the potential to increase synergy between the LAB and FMS, a topic that will be discussed in depth in Chapter 5. Taken together, these observations underline the importance of an integrated and user-focused intake system, one that reduces procedural barriers and fosters better coordination between services.

Further to endorsing a dual application process, additional reforms of the intake process were offered by Solicitor 3 who expressed frustration at the necessity for both clients to contact the mediation service independently.⁴¹⁸ This requirement contrasts with the approach adopted in England and Wales where a party can be invited to attend a Mediation Information Assessment Meeting.⁴¹⁹ Rationalising the preference to implement an invitation procedure, Solicitor 3 noted that certain individuals may be willing to participate in mediation but need encouragement. In such circumstances, getting the person to contact the mediation service themselves can be an additional barrier to participation and ultimately delay access to justice. In describing such a situation, Solicitor 3 noted that they had given the details of the FMS to an individual who indicated that they would contact the service, but after a prolonged period, it came to their attention that no appointment had been made. Becoming increasingly frustrated over the situation, Solicitor 3 sought to:

get them [FMS] to ring him. You know what I mean? But they weren't going to do it, they didn't want to do it. They kind of said, no, no, it's got to be him. It's got to come from him. And it was like, well, he's not going to do it. So maybe they need to have a little bit more compulsion.

⁴¹⁸ LAB (n 351) at page 7-10. Specified in the Handbook is that 'The reason for this is that mediation is a voluntary process and therefore can only be embarked on if both parties are willing to attend.'

⁴¹⁹ In the UK there is a requirement (although there are certain exceptions) to attend a Mediation Information Assessment Meeting (MIAM) prior to issuing family law proceedings. In order to demonstrate that this requirement is fulfilled, it is necessary to submit an FM1 Form. Specified in s. 8 of this FM1 Form is that 'You should give the mediator the contact details of the other person so that the family mediator can contact them to invite them to attend a MIAM, either with you or separately.' While this section regards an invite to attend a MIAM, it is ultimately an invite to consider mediation.

Interestingly the necessity for both clients to make contact is not universal across the FMS, in court-based mediation, clerical staff can contact the second party directly. Using pseudonyms to describe this alternative intake process, Mediator 1 noted how:

traditionally, when we are dealing with marriage where separation was happening, so Johnny would go home or Johnny would lift the phone to Mary and say, look, I signed up with the Family Mediation Service so we can go there to get our divorce sorted. Would you give them a ring and register? So that still happens, but we also have another model which is really a District Court model, where Johnny has walked in the front door to make an application to the court, he's directed to our service, he's given the same information as he would if he phoned up, but the difference is we ask for Mary's details and we get in touch with Mary.

In discussing whether or not to extend this practice beyond court-based mediation to include all issues mediation, it is useful to consider the LRC Consultation Paper on ADR. The LRC identifies how 'the issue of "voluntary" or "compulsory" is not really an "either, or" choice but rather a matter of a gradual spectrum which depends on the form of referral.'⁴²⁰ In exploring this spectrum, it describes four positions: (i) parties propose ADR; (ii) judge encourages ADR; (iii) judge encourages ADR with threat of cost sanctions; and (iv) compulsory ADR.⁴²¹ While compulsory ADR is not mandated in this jurisdiction, the degree to which the other approaches are implemented in practice in the Irish context is not precisely known. The 2017 Act provides a statutory basis for judges to invite parties to consider mediation as a means to resolve their dispute with an additional capacity to award costs where there is 'any unreasonable refusal or failure by a party to the proceedings to consider using mediation...' and 'any unreasonable refusal or failure by a party to the proceedings to attend mediation...'⁴²² It is arguable therefore that were FMS staff permitted to contact Party 2 and invite them to mediate (in the absence of cost sanctions), whilst also reiterating

⁴²⁰ LRC (n 312) at paragraph 3.10.

⁴²¹ LRC (n 312) at paragraph 3.11.

⁴²² Section 21 of the 2017 Act.

the voluntary nature of the process, this procedure would not contravene the voluntary nature of mediation as provided for in the 2017 Act, nor extend beyond procedures that are currently in place for court-based mediation. As this procedure is already implemented in practice, albeit in relation to the court-based model of mediation as offered by the FMS, the argument that this stance is against the ethos of mediation is greatly diminished. In light of the minimal financial risk posed, it would be interesting to ascertain by way of a trial pilot, whether this proposal would impact participation levels. Having considered the potential of simplified procedures with regards to both the Court Service and the LAB/FMS, the next section will consider accessibility to supports, a further aspect of the third 'wave'.

3.7.4 Accessibility to Supports & Increased Interdisciplinarity

Family law disputes are complex, multi-faceted, and can concern a vast array of issues. Due to their nature, supports in addition to legal representation are often needed to bring the conflict to a resolution. In such instances it is not solely the lawyer or even the courts that facilitate justice, rather it can be a collective effort that depends upon the parties, lawyers, mediators, relatives, social workers, state agencies, guardian ad litem etc. Highlighting the range of supports commonly drawn upon, Solicitor 3 identified how:

you're sending people off all over the place. You're kind of saying, look, you have go to MABS to sort out a debt problem and need to get some advice from Citizens Information about social welfare. You need to contact the Council to get on the housing list.

Similarly, Mediator 1 noted that:

from the word go, we're saying, get in touch with Citizens Information. Talk to MABS. Get in touch with a legal solicitor or you know FLAC do a free service.

While utilising these services may aid in the resolution of a dispute, it can also contribute to the achievement of an outcome that is tailored to the parties' individual needs. From a client perspective, Client 4 highlighted the complementary utility of additional supports, specifying that:

in general terms what had been worked out in the mediator's office is what went to the financial person who said "that looks alright", then they tweaked bits and bobs about, you know? "Well, if you get this percentage of that instead of that percentage then that makes the cash flow easier" so we did bits and bobs like that but for the most part we were using these principles laid down [in mediation].

It is evident that the collective contributions of all are what often facilitates access to justice in the family law context and demonstrates that access to justice in practical terms requires so many contributing elements in order to truly secure access to the courts. In appreciation of this necessity to adopt a holistic approach, Cappelletti and Garth highlight in relation to the third 'wave' that the:

focus is on the full panoply of institutions and devices, personnel and procedures, used to process, and even prevent, disputes in modern societies. We call it the "access-to-justice" approach because of its over-all scope; its method is not to abandon the techniques of the first two waves of reform, but rather to treat those reforms as only several of a number of possibilities for improving access.⁴²³

While an array of supports was identified as having utility in a marital breakdown context, it was evident from the qualitative phase of the study that the two most common barriers encountered by clients in this context are accessibility to housing

⁴²³ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27(1) Buffalo Law Review 181 at page 222-223.

and welfare reports. Where these services are inaccessible to individuals, they can create additional barriers to accessing justice.

Securing suitable accommodation presents a significant issue to those involved in marital breakdown disputes and can negatively impede their ability to achieve a resolution to their conflict. Describing their own personal experience, Client 5 noted how:

money and stability have a massive impact and I think that is the other massive contributing factor to the whole thing, is to be able to afford to live...to both be able to have your children stay with you and I think in our current housing crisis that is just off the cards. If you aren't wealthy, you are kind of screwed.

Reflecting on the dispute resolution process, Client 5 explained how:

financial security out the other side of it, all the practicalities were a big worry...I think that is maybe one of the things that is missing here, is that that [having suitable housing] allowed us to do this very civilly.

It is clear that having appropriate accommodation was pivotal to Client 5 achieving a just resolution in their particular circumstances. Describing the impact of housing upon the dispute resolution process itself, Solicitor 3 specified how:

accommodation is a huge issue to be honest you know, and especially for people on legal aid. I mean, very often there's not many options for people in terms of housing and that could, that can be very difficult to sort out, you know, and it's just quite often that there is not enough money to go around. And if it were easier I suppose, access to accommodation for somebody when they're separated, that would help massively.

These findings suggest that focusing solely on the dispute resolution process is short-sighted. If meaningful reform is to be achieved, it is essential to adopt a holistic approach, one that not only addresses the legal and procedural aspects of marital breakdown but also recognises the profound influence of practical factors such as housing and financial stability. Without adequate support in these areas, the ability of individuals to engage constructively in resolving their disputes can be significantly compromised.

In addition to the impact of housing, a predominant concern expressed by participants was the difficulty in obtaining professional welfare reports. In family disputes, parents may be required to furnish the court with independent child welfare reports carried out by a child psychologist or some other expert appointed by the court.⁴²⁴ Concern has been expressed over the procurement of these reports, with the Department of Justice recently publishing the *Review of the Role of Expert Reports in the Family Law Process*, which is discussed further below.⁴²⁵ These reports are often pivotal to the resolution of certain disputes and where they are inaccessible, they can operate as an access to justice barrier. Emphasising their importance, Solicitor 3 noted how the absence of a report is:

a massive disadvantage because (a) the case is delayed and (b) you've got a lot of contentious court hearings when there could be some really sort of serious issues that have to be kind of addressed and the judges won't do it without a report being available. So, this is why a lot of these cases go on for a long time, you know.

⁴²⁴ JAE (n 288) at page 19. It is noted that 'There are two types of report utilised in family law - section 47 and section 32 reports. Section 32 reports exist under the Children and Family Relationships Act 2015, apply to private family law proceedings and are regulated by the Guardianship of Infants Act 1964 (Child's View Expert) Regulations. These reports provide the courts with the specific views and wishes of the child, whereas section 47 reports report on the welfare of the child as per the opinion of the expert. Section 47 reports originated in the Family Law Act 1995 but were never commenced to operate in the District Courts.' See also: Court Service, 'Reports About Children' <[https://services.courts.ie/Family-Law/reports-about-children#:~:text=The%20law%20allows%20a%20judge,%2C%20%22child%20welfare%20reports%22](https://services.courts.ie/Family-Law/reports-about-children#:~:text=The%20law%20allows%20a%20judge,%2C%20%22child%20welfare%20reports%22>)> (accessed 15 November 2024). It is up to the parties to the dispute to finance the cost of these reports, with the judge determining how much each party is to pay.

⁴²⁵ Department of Justice, *Review of the Role of Expert Reports in the Family Law Process* (DoJ 2024).

Proceeding to highlight how the LAB does not provide sufficient support for these reports, Solicitor 3 noted that the:

cost is astronomical, and legal aid doesn't cover it [entirely]...So having money to cover the cost of the access report would be really helpful because legal aid used to cover the cost of the reports, not anymore. You could be almost 1000 euros short, depending on how many children there are.

Expressing a more considered view on the challenge of accessing such reports, Solicitor 6 stressed how:

there's a huge shortage of psychologists and social workers that are qualified to do these reports. A massive shortage and even if you apply for the legal aid certificate to cover half of it, then who covers the surplus? So, I think the Legal Aid Board could maybe, I don't know if they would have funding to have people that are qualified specifically to do these reports. Because in [X], certainly the judge refuses to hear evidence from the child in chambers so it leaves you in a difficult situation I suppose.

While increasing the funding available could improve accessibility to these reports, addressing the issue in full necessitates broader developments. Further to the availability of increased funding, it would be desirable if the LAB were to have a dedicated register of those individuals they recommend or ideally employ to facilitate these services, ensuring they are both available and working to the appropriate standard. In adopting a comparable approach, the Family Court of Australia has court employed Family Consultants who 'are psychologists or social workers with specialist expertise in child and post-separation family issues who are appointed to conduct child and family assessments for Child Impact Reports...or Family Reports...ordered by the court in parenting order proceedings.'⁴²⁶ Furthermore, the Court does not

⁴²⁶ Rae Kaspiew, Rachel Carson, Helen Rhoades, Lixia Qu, John De Maio, Briony Horsfal, and Emily Stevens, *Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers* (ANROWS 2022) at page 6.

encourage the use of private reports, specifying how it ‘is the Court's experience that these reports suffer from having only had input from one side, and they can easily come across as biased and methodologically flawed.’⁴²⁷ It would appear that the Department of Justice has recognised many of these concerns, as not only does it recommend an increase of funding for the Legal Aid Board for report provision, but it also recommends the establishment of a dedicated panel of assessors to prevent individuals from ‘expert shopping’.⁴²⁸ In light of the contemporary increase in funding for the LAB, as previously noted, it will be interesting to see whether this recommendation is implemented in the coming years. Complementing this increased availability and reputability, it would also be advantageous to have family law judges trained in such a manner as to be more competent in ascertaining the best interests of the child. Consideration of this aspiration is timely, with the Family Courts Act 2024 providing for dedicated family court judges with mandatory training and development.⁴²⁹ This capacity would enable the judiciary to both understand and corroborate the findings of the reports with the parties where necessary.

The findings of this research suggest that the inability to access necessary supports can operate as an access to justice barrier. While making funding more widely available may lead to their increased availability, this should not be the sole avenue of reform. More advantageous again would be to adopt a holistic approach to dispute resolution. Dr Geoffrey Shannon, in recognising the approach of other jurisdictions and the inadequacies of the Irish system, has advocated for the introduction of an interdisciplinary service which involves:

an acceptance that simply making a court order is not sufficient, that further work needs to be undertaken by specialists with a range of non-legal skills to ensure that the needs of clients are met. It would require a problem solving court where, for example, judges would be in a position to

⁴²⁷ Alastair Nicholson and Margaret Harrison, ‘Specialist but Not Unified: The Family. Court of Australia’ (2003) 37(3) Family Law Quarterly 441 at page 455.

⁴²⁸ DoJ (n 425) at page 50.

⁴²⁹ Section 57 of the 2024 Act. While the 2024 Act statutorily accounts for the training and professional development of family court judges, it fails to specify the type or manner of training.

order a mental health assessment. Without this addition, any new system remains as flawed as the current one.⁴³⁰

This necessity to adopt a holistic interdisciplinary service was stressed by Solicitor 2 as they identified how they would like to see:

better supports available to them [clients] if they need those, you know? A more linked up system of supports and then if there was a case that the Legal Aid Board would be better resourced to have that kind of multidisciplinary approach...You know those things should be more readily available to clients of the Legal Aid Board. The whole thing needs to be much more I suppose, focused on the client...but that's not the way it's set up at the minute.

Solicitor 2 proceeded to describe that:

in an ideal world you'd have a multidisciplinary team on everything...you would have access to an accountant, you would have access to, you know, people who are writing these Section 47, Section 32 reports. You would have a multidisciplinary team, psychological experts, support advocates. You'd have your mediators and you'd have your lawyers and you'd have them all working together. That is how it should be.

Certain jurisdictions such as the Family Division in Baltimore, USA, have adopted such a holistic approach to family disputes and there is evidence to suggest that the Irish State is also moving in this direction.⁴³¹ Healy is a strong proponent of a

⁴³⁰ Geoffrey Shannon, 'Joint Committee on Justice and Equality 13 March 2019' <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/submissions/2019/2019-03-13_opening-statement-dr-geoffrey-shannon-special-rapporteur-on-child-protection_en.pdf> accessed 18 October, 2023. See also: JAE (n 288).

⁴³¹ Connie Healy, 'Reform Within the Family Courts: Lessons From Baltimore' (2021) 59(3) Family Court Review 444.

therapeutic approach to dispute resolution ‘where the law is used to find the best solution possible for the parties involved, based on their particular issues at a point in time.’⁴³² Supporting families in this manner, can not only aid in the resolution of disputes in a more protective manner, but early access/intervention can also prevent dispute escalation.⁴³³ Recognising the value in this approach, Goal 5 of *Family Justice Strategy Progress Report* regarding People Development considers the need for interdisciplinary training to support families. The Report considers the range of issues that can present in family disputes and the need to advance and further corroborate with other professionals/services in order to appropriately support families. It is specified that there is a need to establish ‘formal networks and develop online learning hubs to develop collaborative learning and interdisciplinary awareness across professions and within the system.’⁴³⁴ While articulated as an aspiration, other services have set in place procedures demonstrating a commitment to this multi-disciplinary approach. Barnahus Ireland implements the leading European model of responding to child sex abuse and integrates ‘health, medical, child protection, therapeutic, and policing services for children and young people.’⁴³⁵ In failing to recognise the contribution of the support services, individuals may be placed in a vulnerable position and impede their ability to access justice. It is apparent that access to justice is not solely reliant on legal representation, rather, genuine access to justice in family disputes extends far beyond the courtroom. It depends on weaving legal, therapeutic, and social supports into a single, responsive framework. Although Ireland’s services remain largely siloed for now, the policy signals and existing models show that a coordinated, multidisciplinary system is both viable and urgently needed. The real measure of progress will be how quickly these aspirations translate into everyday practice for families in crisis.

3.7.5 Legal Literacy

As previously noted, legal literacy should be considered within the scope of the third ‘wave’ of the access to justice movement. White in seeking to provide a considered

⁴³² *ibid* at page 449.

⁴³³ *ibid*.

⁴³⁴ Department of Justice, *Family Justice Strategy Progress Report* (DoJ 2024) at page 14.

⁴³⁵ Tusla, ‘Barnahus Ireland’ < <https://www.tusla.ie/barnahus/> > accessed 20 March 2025.

understanding of legal literacy notes that there are a range of possible interpretations determined on a contextual basis.⁴³⁶ He explains how legal professionals who have studied the field for years could be considered legally literate, but so too could individuals with no experience of the law who nonetheless have the capacity to recognise legal language. Thus, determining whether or not someone is legally literate will depend on the group/cohort being considered. Thus, various conceptualisations of legal literacy can be considered as existing on a spectrum.⁴³⁷ Of central position on White's spectrum of legal literacy are ordinary citizens who have the ability 'to understand and use the law in their everyday lives in a degree of competence that enables them to protect their interests, know when to turn to a specialist, and understand public debates.'⁴³⁸ Paramount to the creation of these individuals is information provision. Consequentially, the legal literacy of this cohort is primarily improved and ultimately achieved by way of public legal education (hereafter 'PLE').⁴³⁹ Providing empirical support for this position, Febrianty et al. highlight the value of 'expanding legal education initiatives to promote a more informed and engaged society, ultimately strengthening public participation in legal and civic processes.'⁴⁴⁰ In recognition of this importance, the Civil Legal Aid Act, 1995 places a statutory obligation on the LAB to disseminate information on its services and the availability of those services.⁴⁴¹

Numerous academic studies highlight the role of information in enabling individuals to exercise their rights both within family disputes and a variety of other contexts.⁴⁴² Irish commentary has long noted the function of information in enabling access to

⁴³⁶ James White, 'The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education' (1983) 54(2) *University of Colorado Law Review* 143.

⁴³⁷ *ibid.*

⁴³⁸ Lotem Perry-Hazan and Eden Tal-Weibel, 'On Legal Literacy and Mobilization of Students' Rights from a Disempowered Professional Status: The Case of Israeli Teachers' (2020) 90(1) *Teaching and Teacher Education* 1 at page 2.

⁴³⁹ Richard Grimes, 'Evaluating Legal Literacy Programmes - Aims, Challenges, Models and a Call to Action' (2018) 2(1) *International Journal of Public Legal Education* 28.

⁴⁴⁰ Yenny Febrianty, Ariyanto, Hidayati Fitri and Nadya Restu Ryendra, 'The effect of legal education on public legal awareness' (2025) 5(1) *Journal of Public Representative and Society Provision* 204.

⁴⁴¹ Section 5(2) of the 1995 Act. In articulating this obligation, it is noted that the 'The Board shall, to such extent and in such manner as it considers appropriate, disseminate, for the benefit of those for whom its services are made available, information in relation to those services and their availability.'

⁴⁴² Jonathan Crowe, Rachael Field, Lisa Toohey, Helen Partridge and Lynn McAllister, 'Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolutions' (2018) 40(3) *Sydney Law Review* 319. See also: Stephanie Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System Disability-Inclusive Development' (2010) 17(2) *ILSA Journal of International & Comparative Law* 281.

justice, repeated throughout the Pringle Report is a persistent emphasis on the need to establish a formal mechanism of legal information provision to the Irish public. The Report notes that ‘Equality of access to the law is hindered not only by lack of money but also by lack of information’ prior to specifying that the ‘education of the public as to their legal rights and remedies is clearly within the ambit of the type of scheme we are discussing.’⁴⁴³ Having identified the importance of information provision, the Report suggested that the State establish information hubs allocated with this responsibility, however, this recommendation was not acted upon.⁴⁴⁴ Following the publication of the Pringle Report, the 1996 LRC Report on the Family Courts advocated for the establishment of dedicated diversion and family court information centres with the role of:

providing to those who have begun, or are considering the institution of, family law proceedings impartial, objectively presented information relating to available alternatives to litigation, implications of separation, court processes and case management information and information on available support services. Any legal information received should be information only, and not advice.⁴⁴⁵

While the call for legal information has long been present, meagre progress has taken place since the establishment of the LAB. Eilis Barry, the Chief Executive of FLAC has repeatedly expressed concern over the legal literacy of citizens within the State noting that ‘there is a huge unmet need for legal information and advice, especially in the areas of family law and employment, which is not otherwise available.’⁴⁴⁶ Similarly, this issue was highlighted in the 2019 *Report on Reform of the Family Law System* which observed ‘that there is insufficient knowledge of and dissemination of general information about the family law system. There is a significant gap in knowledge and understanding of the system, not only amongst the general public, but even amongst members of the legal profession...’ and that ultimately there is a need

⁴⁴³ Committee on Civil Legal Aid and Advice (n 265) at page 24.

⁴⁴⁴ Whyte (n 254).

⁴⁴⁵ LRC (n 408) at page 132.

⁴⁴⁶ Eilis Barry, *Access to Justice 2021 Conference An Overview Of Unmet Legal Needs* (FLAC 2021) at page 7.

to ‘launch of a national public information campaign.’⁴⁴⁷ The importance of such campaigns cannot be overlooked, especially in the current context, as Wintersteiger et al. note how they can ‘help those with lower legal capability find and access the information they need to get their legal need addressed.’⁴⁴⁸ Though calling for more research into the field, their systematic review ultimately identified the potential of these public legal education initiatives to impact on peoples actions and behaviours.⁴⁴⁹

Despite the failure to establish dedicated legal information centres, the State has sought to explore other means of disseminating information to the public. Section 14 and 15 of the 2017 Act sets out the statutory duty on barristers and solicitors to advise and inform their clients about the prospect of resolving their disputes via mediation prior to issuing proceedings. The utility of this approach from a PLE perspective is however questionable, as it is only at the point where individuals arrive at legal services that they are provided with such information.⁴⁵⁰ More desirable are those methods that make information available prior to the engagement of a formal dispute resolution mechanism. This favourable approach is adopted by the statutory body Citizens Information, along with other organisations such as FLAC and the Family Law Information Portal operated by the Family Law Clinic in University College Cork.⁴⁵¹ While these organisations have a vital role in improving legal literacy through the provision of information, an increased means of targeting the masses is required.

Throughout the qualitative portion of the study, the majority of participants (both solicitors and mediators) noted how clients vary substantially in terms of their legal awareness. Demonstrating this variability, Solicitor 4 specified how they:

⁴⁴⁷ JAE (n 288) at page 45.

⁴⁴⁸ Lisa Wintersteiger, Sarah Morse, Michael Olatokun and Christopher Morris, *Effectiveness of Public Legal Education initiatives A literature review* (Legal Services Board 2021) at page 1.

⁴⁴⁹ *ibid.*

⁴⁵⁰ Penelope McRedmond, *Mediation Law* (Bloomsbury 2018) at paragraph 3.107. This position is further criticised on the basis that solicitors may not be well placed to explain the process of mediation appropriately.

⁴⁵¹ Louise Crowley, ‘The Family Law Clinic at UCC – Understanding the Law, in the Classroom and Beyond’ (2020) 27(1) *International Journal of Clinical Legal Education* 176; University College Cork, ‘Family Law Information’ < <https://www.ucc.ie/en/familylaw/> > accessed 30 July 2024. The Family Law Information Portal provides information to the general public on the topic of family law. The portal was established by Professor Louise Crowley and is partially run by UCC family law students. The aim of the portal as noted on the website is ‘to collate and better convey existing information, resources and services in Ireland, thereby ensuring that anyone seeking information will be able to access all related sources.’ This portal stands as a rich source of information that is widely available to all in an accessible manner.

would get clients at every stage in the spectrum...as in we could have people who would be very overwhelmed or they might have poor intellectual ability...I mean, you'll have people who come in here nearly telling you what you're doing and people then who come in here literally going you know, please can you help me? And they're completely clueless in relation to what we are and what we can do for them.

Although some do seek out the LAB & FMS with a good knowledge of dispute resolution, Solicitor 7 noted that:

for the most part clients have absolutely no idea of any of the processes available, court procedures or mediation. A lot of them just don't know anything. They don't know how long it takes, they don't know what's involved. Some of them think you can just go in and be like okay does that mean I can go in next month and get my divorce, they don't understand how it's quite a lengthy process.

Notwithstanding the variability identified, the findings suggest that the legal literacy of citizens who are absent of legal training (i.e. those presenting in the middle of the spectrum) is lacking within the State. One of the predominant challenges stemming from an absence of legal awareness is that clients often have inflated expectations or misconceptions of the process they are seeking to avail of. Describing this situation, Solicitor 3 specified that:

there's definitely a lack of understanding, well people don't really know what to expect. I suppose most people's exposure to the legal system is from the TV, so there's a lot of misconception about the amount of time that's going to be given to the case once it reaches court. I mean that's a big one I think. That's a big thing that people don't realise, is that the actual ins and outs of what's happened are not necessarily gone

into in any great detail. It's just literally what's going to happen moving forward. And so, we would spend quite a lot of time, I suppose managing people's expectations about like, actually what's going to happen.

While information provision was identified by participants as a central function of both services, numerous suggestions were made as to the necessity to increase the information conveyed to the public. Mediator 5 explained:

there is a lack, I suppose of general awareness out there, maybe in terms of what mediation is. Certainly, from a general public, broad sweeping awareness point of view, there's certainly a bit of work that could happen to make the general public more aware of mediation. I don't think people even realise it's there in many cases, either through ourselves, or through another provider.

Evidencing this absence of awareness, Client 4 was of the belief that there should be better:

advertisement of it [FMS] or the public awareness of it. Cause I did always feel like, like are we truly expected to be, you know, not expected but are we truly eligible for this service....What I would have felt a little bit more assured for, if I could have seen some kind of government advertising saying this is meant for everybody at every social class and every social level regardless. It's a free service and the aim of it is to try and ensure that there is more autonomy, more insight, more interaction with people who are looking to separate.

It is therefore reasonable to argue that increasing public awareness of these services may enhance participation levels and could better limit inaccurate misconceptions of the role of the services available. While the State has to a large extent abdicated the

responsibility of increasing legal literacy, recently its significance has been highlighted by Chief Justice Donal O'Donnell in noting:

“access to justice” is not a single issue but is multi-factorial and involves issues such as education and outreach to inform people of the law and their rights, as well as what is traditionally understood as legal assistance and legal aid.⁴⁵²

For the State to improve access to justice, targeting legal literacy must be viewed as paramount to reforms. While organisations such as FLAC seek to address this need, significant improvements could be made by the LAB, as identified by Keith Walsh SC, ‘On the issue of awareness...it is important to recognise the work done by the Community Law Centres, FLAC, and NGOs, but more resources and greater involvement of the Legal Aid Board is required’,⁴⁵³ thus it is arguable that a well formulated PLE campaign could enhance access to justice within the State.

3.8 Conclusion

This chapter explored justice as an evolving concept shaped by shifting societal values. Current interpretations have progressed beyond both utilitarianism and liberalism in favour of an egalitarianist perspective promoted by the likes of John Rawls. In light of its present meaning, justice has become synonymous with fairness, requiring both fair procedures and outcomes. This evolving meaning has prompted reforms within the Irish civil legal system, particularly to ensure rights can be vindicated by those facing economic or social disadvantage, reflecting Rawls’ difference principle. The development of access to justice was mapped through the Florence Access to Justice Project, with advancements identified as occurring in three consecutive ‘waves’. Though delayed in their introduction, it was noted that dispute resolution systems falling within the remit of the 1st and 3rd ‘waves’ are currently available in an Irish family law context, provided for by the Legal Aid Board and the Family Mediation Service. Despite these services striving to enable access to justice for thousands of

⁴⁵² Chief Justice’s Working Group (n 292) at page 15.

⁴⁵³ *ibid* at page 41.

individuals on an annual basis, numerous reforms were identified as a means to enhance accessibility and effectiveness. As jurisdictions persistently seek to implement reforms of this nature internationally, the provision of access to justice evolves and can vary in both definition and breadth. Despite these variations, the UNDP was identified in this chapter as providing an appropriately holistic definition. The comprehensiveness of this definition was regarded as sufficiently broad to cover the 1st and 3rd ‘waves’ of the access to justice movement as they relate to legal aid and alternative dispute resolution services. Furthermore, it was noted how the UNDP more appropriately accounts for the various facets of access to justice in contemporary society through its inclusion of simplified procedures, various non-legal support services and the provision of legal information. While these particular facets have been largely overlooked within the Irish access to justice movement, there is evidence to suggest that their value is increasingly being recognised. Drawing on empirical data, this chapter identified how the Irish State has the foundations for the establishment of an effective framework which vastly enhances access to justice. While Rawls theory of justice is seminal to this chapter, it will further be identified as aligning with the Irish State’s conceptualisation/understanding of autonomy in a family law context, as is now discussed.

Chapter 4: From Autonomy Perceived to Autonomy Achieved

4. Introduction

Having critically explored clients' lived experiences of access to justice, this chapter examines the second key theme identified in the empirical analysis - autonomy i.e. the ability of parties to self-determine the outcome of their dispute. How autonomy is conceptualised in Irish family law is pivotal to this thesis, insofar as it determines the balance between individual rights and family responsibilities within the marital breakdown framework. Identifying an appropriate point of equilibrium between rights and responsibilities is exceedingly challenging, however, family law is not static but rather develops in accordance with societal views and individual circumstances creating capacity for progress in line with social norms and demands. In highlighting the elevated position of the marital family and the longstanding historical reluctance to introduce divorce, this chapter will argue that the Irish State has traditionally favoured the protection of the family unit and its associated responsibilities at the expense of individual autonomy. Through a consideration of the qualitative data, the expression of autonomy in practice is both highlighted and evaluated. Despite a continued support for the family unit, recent legal reforms reflect a growing acknowledgment of personal autonomy and the aligning of family law with contemporary societal values and individual rights. It will be argued that this shift demonstrates that the exercise of individual autonomy isn't always at the cost of the rights of others within the family unit. In exploring the intricacies of the Irish family law regime and more specifically the law's approach to relationship breakdown, the chapter illustrates that relational autonomy is at its foundation. Through a consideration of the empirical data, it will be argued that were more guidance and support given to clients, the present regime may be altered in such a fashion as to retain the fundamental safeguards currently employed to protect the family unit and the needs of any vulnerable members, while enabling the exercise of autonomy beyond the theoretical to the individual lived experience. It is anticipated that through a critical examination of this intersection between autonomy and family law, insights will be garnered as to how legal frameworks may better support the independence and self-

determination of family members, while fostering a supportive and equitable environment for all, thus attaining a point of equilibrium. To provide the necessary context for this discussion, Part 1 of this chapter aims to develop a comprehensive understanding of autonomy, beginning with its theoretical foundations and its evolution within the legal sphere, with a particular focus on family law. It will also consider whether autonomy is always desirable in this context, and examine how family law remedies in cases of marital breakdown have been structured to reflect and respond to these complexities. Part 2 will then explore the concept of autonomy within the mediation context, evaluating how the process might be reformed to enhance parties' experience of autonomy while addressing potential shortcomings.

Part 1

4.1 Theories of Autonomy

Derived from the Greek language, the literal meaning of 'autonomy' is 'the having or making of one's own laws.'⁴⁵⁴ While the origins are to be found in ancient Greece, autonomy has been the subject of great interest in contemporary moral and political philosophy.⁴⁵⁵ Although a detailed exploration of the prominent theories is outside the scope of this thesis, a brief overview is warranted in order to assess the cohesiveness between the theoretical and legal spheres. A prevalent distinction amongst theories of autonomy, is whether the philosophical perspective is moral or social. A leading voice in this area is Immanuel Kant, who sought to define moral autonomy, specifying that 'The will is therefore not merely subject to the law, but is so subject that it must be considered as also making the law for itself and precisely on this account as first of all subject to the law (of which it can regard itself as the author).'⁴⁵⁶ Woolf seeks to

⁴⁵⁴ Joel Feinberg, *Harm To Self: The Moral Limits of the Criminal Law* (Oxford University Press 1989) at page 27. Initially this definition did not pertain to the individual, rather the ability of the city-state to self-govern and was thus historically viewed as a political concept concerning collective entities. See also: Lucas Swaine, 'The Origins of Autonomy' (2016) 37(2) *History of Political Thought* 216; Louise Campbell, 'Kant, autonomy and bioethics' (2017) 3(3) *Ethics, Medicine and Public Health* 381.

⁴⁵⁵ Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988).

⁴⁵⁶ Immanuel Kant, *Groundwork of the Metaphysics of Morals: Translated and Edited by H.J. Paton* (London and New York: Routledge 1991) at page 93.

interpret Kant's somewhat convoluted views, noting that 'moral autonomy is a combination of freedom and responsibility; it is a submission to laws which one has made for oneself. The autonomous man, insofar as he is autonomous, is not subject to the will of another.'⁴⁵⁷ Through assessing how autonomy is experienced in practice, it will be demonstrated that not being 'subject to the will of another' operates as a central caveat to the ubiquitous promotion of autonomy in family law. In appreciation of this influence, which will be discussed as being ever-present,⁴⁵⁸ it will be argued that the regulatory framework governing marital breakdown in Ireland, by mandating judicial supervision, acts as a safeguard against parties self-determining outcomes where their capacity to reach an appropriate or legally just settlement is impeded.

Personal autonomy is of particular interest in social and political philosophy given the influence of state regulation on citizens. In political philosophy, autonomy has been central to the notion of liberalism and the justification of descent from paternalism.⁴⁵⁹ John Stuart Mill, in his seminal work *On Liberty*, seeks to investigate what degree of paternalism is justifiable, noting 'That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'⁴⁶⁰ Although in favour of individual freedom, where there is a definite risk of damage either to an individual or the public, Mill was of the opinion that 'the case is taken out of the province of liberty, and placed in that of the morality of law.'⁴⁶¹ While primarily associated with political philosophy, this chapter will demonstrate that these contrasting positions lie at the heart of a contentious debate in contemporary Irish family law. Through an exploration of the client experience, it will be seen that there is a growing appetite for liberalism, however, this may leave many prone to exploitation.

While autonomy is open to a vast array of interpretations due to its contextual nuances, it is arguable that one of the most comprehensive definitions is provided by Joseph

⁴⁵⁷ Robert Wolff, *In Defense of Anarchism* (Harper & Row 1970) at page 14.

⁴⁵⁸ Alison Diduck, 'Autonomy and vulnerability in family law: the missing link' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014).

⁴⁵⁹ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011).

⁴⁶⁰ John Stuart Mill, *On Liberty* (Batoche Books, Kitchener 2001) at page 13; See also: Gerald Dworkin, *Mill's On Liberty: Critical Essays* (Rowman & Littlefield Publishers 1997).

⁴⁶¹ John Gray and G. W. Smith (eds), *On Liberty in focus* (Routledge 1991) at page 96.

Raz, a contemporary theorist of liberal perfectionism.⁴⁶² For Raz ‘The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.’⁴⁶³ Raz conceives personal autonomy as having both a primary and secondary aspect,⁴⁶⁴ both of which are to be commended as they increase the application of a theoretical conceptualisation of autonomy. In line with the traditional liberalist interpretation, self-governance constitutes the primary aspect whilst the secondary aspect is operational, respecting that not all individuals are capable of acting autonomously by reason of capacity or living conditions.⁴⁶⁵ This secondary aspect is of great significance given that it highlights the potential indirect or unintentional interference with the ability to self-govern, which must be both recognised and accounted for.⁴⁶⁶ In his seminal work *The Morality of Freedom*, Raz describes the secondary aspect of autonomy as the ‘conditions of autonomy’,⁴⁶⁷ or on occasion as the ‘capacity for autonomy’.⁴⁶⁸ Raz’s work is highly influential, with the role of capacity now well established in the fulfilment of autonomy. Although capacity had previously been utilised to limit the expression of personal autonomy in Ireland,⁴⁶⁹ there is now a presumption of capacity following the enactment of the Assisted Decision-Making (Capacity) Act 2015 (hereafter the ‘2015 Act’).⁴⁷⁰ While capacity is statutorily accounted for in the 2015 Act, in discussing the regulation of separation and divorce in Ireland, it will be argued that the present regime does not recognise personal autonomy even where no such incapacity has been demonstrated, thereby establishing a disconnect between theory and practice. While this chapter will continue to draw upon the contributions of Kant, Mill and Raz, given the central objective of this thesis, the application and influence of autonomy in family law will now be considered.

⁴⁶² Naresh Dadhich, ‘Freedom in Contemporary Political Theory: An Analysis’ (2019) 5(2) Political Discourse 115.

⁴⁶³ Joseph Raz, *Morality of Freedom* (Oxford University Press 1986) at page 369.

⁴⁶⁴ *ibid* at note 5; page 369-37; page 409-410.

⁴⁶⁵ *ibid* at page 372. See also: Jeremy Waldron, ‘Autonomy and Perfectionism in Raz’s Morality of Freedom’ (1989) 62(3) Southern California Law Review 1097.

⁴⁶⁶ Gideon Parchomovsky and Alex Stein, ‘Autonomy’ (2021) 71(1) The University of Toronto Law Journal 61.

⁴⁶⁷ Raz (n 463) at page 372. These conditions constitute: (i) certain mental capacities; (ii) accessibility to a range of appropriate options; and (iii) to come from a position of independency from others thus absent of coercion.

⁴⁶⁸ Raz (n 463) at page 372.

⁴⁶⁹ Marriage of Lunatics Act, 1811. This statute (which has since been repealed) unilaterally deprived individuals of their right to marry on the basis of their capacity.

⁴⁷⁰ Assisted Decision-Making (Capacity) Act 2015. Section 7 of the 2015 Act repeals the Marriage of Lunatics Act 1811.

4.2 The Centrality of Autonomy to Family Law

While autonomy is the subject of much philosophical debate, the manner in which it is conceived, interpreted and promoted is experienced directly by citizens, none more so than in the context of family law. Family law is unique in that it regulates the inter-relationship between the public and private sphere.⁴⁷¹ Crowley and Joyce note that ‘Family law is often viewed as a unique dichotomy of public and private law, a balancing act between familial autonomy and the state obligation to protect vulnerable family members.’⁴⁷² Respect for this private sphere (discussed further in this chapter with regards to Constitutional rights) is evidenced by its express recognition as a right in Article 8 of the ECHR.⁴⁷³ Establishing a direct connection between this right to privacy and the concept of autonomy, is the published instruction on its application providing that ‘The notion of personal autonomy is an important principle underlying the interpretation of Article 8.’⁴⁷⁴ Further to this directly identified relationship, Article 8 of the ECHR provides for ‘respect for his private and family life’ drawing a fundamental distinction between the notion of personal and family autonomy. In the discussion which follows, this discrepancy will be explored and its impact in the development of Irish family law discussed, illustrating a reluctance on the part of the State to recognise personal autonomy.

A respect for autonomy ought to fundamentally influence family law regulation, limiting state enforced provisions which interfere with the private sphere, permissible only where necessary to protect citizens and uphold the ‘common good’.⁴⁷⁵ In the Irish

⁴⁷¹ Martha Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 Yale Journal of Law and Feminism 1 at page 5. Fineman identifies how the ‘state [is] cast as the quintessential public entity and the family cast as essentially private.’ See also Martha Fineman, ‘What Place for Family Privacy?’ (1999) 67(1207) The George Washington Law Review 1207.

⁴⁷² Louise Crowley and Marianne Joyce, *Family Law* (2nd edn, Roundhall 2023) at page 719.

⁴⁷³ Article 8 of the ECHR specifies that ‘Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

⁴⁷⁴ European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights* (Council of Europe – 2022) at page 66.

⁴⁷⁵ *Norris v Attorney General* [1984] IR 36. In this case, O’Higgins CJ notes that the unenumerated constitutional right to privacy (as yet to be discussed) is not however ‘absolute’ on the basis of the need to uphold the ‘common good’ thus facilitating some degree of intervention.

context, pertaining to personal rights, Article 40.3 (discussed in the next section as recognising the unenumerated right to privacy) of the 1937 Constitution outlines that:

The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

With regards to the family, Article 41.1.2 specifies that ‘The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.’ Furthermore, Article 41.3 outlines that ‘The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.’ Despite the overt statements of respect for familial autonomy, also present within these relevant articles is the identification of the protective duties of the State. This protectionist role, which when implemented can limit both individual and familial autonomy, is identified by Anderson and Honneth as central to liberal social justice.⁴⁷⁶

As family law is pivotal in protecting the family unit (along with the individuals within this unit), as mandated by the Irish Constitution, this may require an encroachment on family autonomy. How it is navigated is determined by the conceptualisation and interpretation of autonomy, as it dictates the parameters and extent of the State’s capacity for protectionism. Where protectionism becomes a matter of contention, is the degree to which it enables a state to be excessively paternalistic in its governance of its citizens. Consequentially, autonomy is central to any exploration of family law as ‘society continues to use the ideal of the private family to orient policy.’⁴⁷⁷ In proceeding to discuss the regulation of relationship breakdown in Ireland, this chapter

⁴⁷⁶ Joel Anderson and Axel Honneth, ‘Autonomy, Vulnerability, Recognition, and Justice’ in Joel Anderson and John Christman (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press 2005).

⁴⁷⁷ Frances Olsen, ‘The Myth of State Intervention in the Family’ (1984) 18 *University of Michigan Journal of Law Reform* 835 at page 835.

will critique both the historical and present family law regime from the perspective of it being overly paternalistic, thereby stifling the attainment of and right to personal autonomy. Drawing on these learnings, it will be suggested that the necessity for this protectionist role could be limited through the provision of more instruction and support to clients in the resolution of their disputes.

4.3 The Development and Conceptualisation of Autonomy in Irish Family Law

Having discussed the theoretical development of autonomy and its centrality within family law, this section will now explore the manner in which it is conceived, identified, and developed from a legal perspective covering both legislative provisions and relevant judicial rulings. It will become evident that a universal consensus of autonomy is absent, perhaps unsurprisingly given that Feinberg identifies autonomy as potentially a capacity, a condition, a right, and/or an ideal.⁴⁷⁸ In exploring its progressive development in the legal sphere, it will be observed that the Irish State has been reluctant to recognise individual or personal autonomy, particularly with regards to marital disputes. Rather, the preferred stance of the State remains the promotion of family autonomy in alignment with relational autonomy (discussed later in this chapter). In order to appreciate these intricacies, it is necessary for this discussion to commence with a consideration of unenumerated rights, given that they established the basis for personal autonomy in Irish law.

4.3.1 Article 40 and the Introduction of Unenumerated Rights

While autonomy is not expressly defined or even referenced in the 1937 Constitution of Ireland, there are certain provisions which have been interpreted to infer a respect for, or a right to, autonomy. In the absence of direct reference, it is the judiciary who have largely developed the recognition of autonomy in Irish law. The bedrock that has facilitated such judicial activism predominantly stems from Article 40.3 of the Irish Constitution regarding personal rights.⁴⁷⁹ Investigating the extent of inferred respect

⁴⁷⁸ Joel Feinberg, *Harm to Self: The Moral Limits of the Criminal Law* (Oxford University Press 1989).

⁴⁷⁹ Article 40.3 of the 1937 Constitution of Ireland (as amended) provides that 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of

for autonomy in the interpretation and application of Irish law, begins with the 1965 case of *Ryan v Attorney General* which had far reaching consequences from a constitutional perspective, establishing the foundations upon which a respect for individual autonomy exists.⁴⁸⁰ The case, albeit unsuccessful in its outcome for Ryan, did establish an unenumerated personal right of bodily integrity under Article 40.3.1 through consideration of the wording ‘in particular’.⁴⁸¹ Interpreting Article 40.3.1 in such a manner commenced the development of what would later be recognised as unenumerated rights in a series of cases, conveyed under Article 40.3 of the Constitution.⁴⁸² Whilst subsequent cases sought to limit their expansion, these unenumerated rights are currently accepted amongst the judiciary.⁴⁸³ Although establishing a basis for personal autonomy, this method of statutory and Constitutional construction is not without flaw, namely the absence of consistent terminology. The conflation of terms is exemplified by the views of Lynch J in *Re Ward of Court (withholding medical treatment) No. 2*,⁴⁸⁴ which involved an individual in a near persistent or permanent vegetative state receiving continued life support. Lynch J outlined that ‘despite the fact that the right to life ranks first in the hierarchy of personal rights, it may nevertheless be subjected to the citizen's right of autonomy or self-determination or privacy or dignity, call it what you will...’⁴⁸⁵ Evident within the views of Lynch J is the interchangeability or conflation of terms to infer or describe

the citizen. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen. Provision may be made by law for the regulation of termination of pregnancy.’

⁴⁸⁰ *Ryan v Attorney General* [1965] IR 294. The plaintiff Gladys Ryan challenged the legality of the State imposition of fluoride introduction into the public water supply, relying upon her rights identified in Articles 40.3, 41 and 42 of the 1937 Constitution of Ireland.

⁴⁸¹ *ibid* at page 313. Per Kenny J ‘The words “in particular” show that sub-s. 2 is a detailed statement of something which is already contained in sub-s. 1 which is the general guarantee. But sub-s. 2 refers to rights in connection with life and good name and there are no rights in connection with these two matters specified in Article 40. It follows, I think, that the general guarantee in sub-s. 1 must extend to rights not specified in Article 40. Secondly, there are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40 at all—the right to free movement within the State and the right to marry are examples of this. This also leads to the conclusion that the general guarantee extends to rights not specified in Article 40.’

⁴⁸² Gerard Hogan and Gerard Whyte, *JM Kelly: The Irish Constitution* (4th edn, Butterworths, 2003) at page 1389 – 1494. Hogan and Whyte detail the breath of these unenumerated rights following *Ryan v Attorney General* [1965] IR 294.

⁴⁸³ *O’T v B* [1998] 2 IR 321 at page 370. Keane CJ noted that ‘Save where such an unenumerated right has been unequivocally established by precedent, as for example in the case of the right to travel and the right of privacy, some degree of judicial restraint is called for in identifying new rights of this nature.’ See also: *TD v Minister for Education* [2001] 4 IR 259 at page 281. The views of Keane CJ were reiterated in *TD v Minister for Education*, a case which involved consideration of the constitutional duty of the State to provide accommodation for children with additional behavioural needs.

⁴⁸⁴ *Ward of Court (withholding medical treatment) No. 2* [1996] 2 IR 79.

⁴⁸⁵ *ibid* at page 94.

autonomy. Arguably, this absence of consistency devalues the utility of autonomy in a legal setting as it increases the scope for judicial discretion, as will be discussed later in this chapter.

4.3.2 The Unenumerated Right to Privacy

Central to the legal concept of autonomy is the unenumerated personal right to privacy gradually recognised by the Irish judiciary as implicitly included in the Article 40.3 protections. While unenumerated in Irish law, previously noted was its express reference in Article 8 of the ECHR,⁴⁸⁶ along with the identification of privacy's direct relationship with autonomy as an underlying concept.⁴⁸⁷ In an Irish context, numerous cases have identified privacy rights to varying degrees, demonstrating an inherent respect for both marital and personal autonomy with a steady, progressive expansion in scope.

Highly influential in establishing privacy as a right, *McGee v Attorney General* involved a challenge to the legislative ban on the importation and sale of contraceptives.⁴⁸⁸ The plaintiff Mary McGee had been unsuccessful in her application to the High Court where O'Keeffe P was of the view that the right to privacy was not included within Article 40.3.1 as had been contended.⁴⁸⁹ In a subsequent appeal to the Supreme Court, a challenge to the constitutionality of s.17(1) of the Criminal Law (Amendment) Act 1935 was upheld on the basis of marital privacy as opposed to personal privacy (a fundamental distinction to be discussed below). This decision was groundbreaking in that it introduced the novel concept of privacy rights into the Constitution. Budd J noted that:

⁴⁸⁶ Article 8 which regards respect for privacy and family life outlines '(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

⁴⁸⁷ Council of Europe (n 474) at page 66. The guide for Article 8 regarding the right to privacy, identifies its direct relationship with autonomy, specifying that 'The notion of personal autonomy is an important principle underlying the interpretation of Article 8.'

⁴⁸⁸ *McGee v The Attorney General* [1974] IR 284. The plaintiff, Mary McGee, sought access to contraceptives after receiving medical advice that another pregnancy could endanger her life. However, at the time, the use of such contraceptives was illegal.

⁴⁸⁹ *ibid.*

Whilst the “personal rights” are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally recognised and accepted with possibly the rarest of exceptions, and that the matter of marital relationship must rank as one of the most important of matters in the realm of privacy.⁴⁹⁰

Such marital privacy was also recognised by Walsh J who asserted that:

In [his] view, Article 41 of the Constitution guarantees the husband and wife against any such invasion of their privacy by the State. It follows that the use of contraceptives by them within that marital privacy is equally guaranteed against such invasion and, as such, assumes the status of a right so guaranteed by the Constitution.⁴⁹¹

Whilst the privacy or autonomy of the family was highlighted, Walsh J noted that it is not unbounded, specifying that ‘the joint decision of the husband and wife and one into which the State cannot intrude, unless its intrusion can be justified by the exigencies of the common good.’⁴⁹² Consideration of personal privacy as a right was studiously avoided by the judiciary in their deliberations, in the majority judgment, marital privacy was recognised based on both Article 40.3 and 41. While it could be contended that Budd J made reference to personal privacy, this remains unclear as Article 41 was cited first in his judgment and thus he may have similarly avoided expressing a direct view on the notion of personal privacy. A variety of rationales can be offered as to the specific approach of the judiciary in this case. One such basis is that due to the failure to successfully rely on personal autonomy in the High Court, the appeal was more likely to succeed in the Supreme Court through a reliance on the elevated rights conveyed on a statutory basis to the marital family. An alternative premise is that this approach enabled the judiciary to navigate a delicate issue with far

⁴⁹⁰ *ibid* at page 322.

⁴⁹¹ *ibid* at page 313.

⁴⁹² *ibid* at page 312.

reaching consequences, given the Catholic Church's condemnation of contraceptives. Within this ambit, the outcome of this case was logically assumed to be influential in consideration of the legal standing on abortions, adding further weight to the potential severity of the outcome.⁴⁹³ A final proposition (as will be discussed in the coming sections with regards to marital breakdown) is that the recognition of marital over personal autonomy enabled the State to obviate their welfare role. While the judiciary's rationale cannot be definitely ascertained, it is undeniable that there was a definite reluctance to address/identify the fact of personal autonomy, albeit this would not persist indefinitely.

Primarily associated with the development of personal privacy in an Irish context is the case of *Kennedy v Ireland*,⁴⁹⁴ which concerned the unjust tapping of telephones of political journalists who claimed 'that the actions of the servants of the State amounted to a breach of their personal right to privacy and freedom from unlawful and unwarranted intrusion guaranteed by Article 40 the Constitution.'⁴⁹⁵ Although confirming the right to individual privacy, Hamilton P proceeded to outline that 'the right of privacy...is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality.'⁴⁹⁶ From this judgment it is evident that the unenumerated rights conveyed to citizens will always be considered on a contextual basis and that no rights are absolute. Furthermore, the right to privacy, inferring a respect for autonomy, necessitates consideration of other relevant rights on a hierarchical basis. Thus, notwithstanding the need for contextual application, it appears that autonomy is to be afforded significant weight in the decision-making process as evidenced in *Fleming v Ireland*.⁴⁹⁷ In this case Kearns J stated that while autonomy is central to Article 40:

⁴⁹³ David Gwynn Morgan, *A Judgement Too Far? Judicial Activism & The Constitution* (Cork University Press 2001).

⁴⁹⁴ *Kennedy v Ireland* [1987] IR 587.

⁴⁹⁵ *ibid* at page 587.

⁴⁹⁶ *ibid* at page 592.

⁴⁹⁷ *Fleming v Ireland* [2013] IEHC 2. Due to her MS condition which rendered her physically helpless and in need of full-time assistance, coupled with the desire to bring an end to her life, Fleming sought to determine whether an individual who provided her with such assistance would subsequently face criminal prosecution.

At the heart of this application lie novel and difficult questions as to whether constitutional provisions which guarantee personal liberty and autonomy in Article 40 of the Constitution are interfered with by a statutory prohibition which prohibits even a citizen in deep personal distress and afflicted by a terminal and degenerative illness to avail of an assisted suicide.⁴⁹⁸

In its role as Amicus Curiae, the Human Rights Commission (hereafter the ‘HRC’) made a submission to the High Court in this case, noting how ‘The personal rights guarantee under Article 40.3 in the Constitution expressly encompasses a right to life but also encompasses unspecified rights such as the right to personal autonomy/self-determination, bodily integrity and the right to privacy.’⁴⁹⁹ Of note in relation to this extract is that the HRC provided references for both bodily integrity and privacy yet failed to do so for autonomy/self-determination, arguably demonstrating a desire rather than a legal basis.⁵⁰⁰ Kearns P noted that ‘On behalf of the Human Rights Commission it was submitted that a person has a right, flowing from their personal autonomy rights, to take their own life in “defined and extreme” circumstances’⁵⁰¹ yet he ultimately refuted this stance.⁵⁰² Despite the plaintiff’s subsequent unsuccessful appeal to the Supreme Court, the judgment delivered by the court placed significant weight on the value of autonomy. Denham CJ in the Supreme Court regarded autonomy as a value founded upon constitutional rights, however, the interference in this instance was justified due to public protection considerations. Thus, Denham CJ specified that whether the:

⁴⁹⁸ *ibid* at page 1-2.

⁴⁹⁹ Human Rights Commission, *High Court Submission on Behalf of the Human Rights Commission* (HRC 2012/10589) at page 19.

⁵⁰⁰ With regards to bodily integrity the HRC referenced *State (C) v Frawley* [1976] IR 365. In the case of the right to privacy, the HRC referenced *Norris v Attorney General* [1984] IR 36.

⁵⁰¹ *Fleming v Ireland* (n 497) at page 6.

⁵⁰² *Fleming v Ireland* (n 497) at page 27-28. In refuting the stance of the HRC, Kearns P outlined that ‘Inasmuch, therefore, as the plaintiff advances a conscientious and considered decision to seek the assistance of others to take active steps to end her own life in the face of a terminal illness which has ravaged her body and rendered her life one of almost complete misery, we consider that such a decision is in principle engaged by the right to personal autonomy which lies at the core of the protection of the person by Article 40.3.2. In that respect, therefore, such a decision is not really properly to be regarded as either an implied constitutional right in its own right or a right derived from an implied constitutional right in the manner discussed (and rejected) by the US Supreme Court in *Washington v Glucksberg* 521 U.S. 207 (1997): it is rather a facet of that personal autonomy which is necessarily protected by the express words of Article 40.3.2 with regard to the protection of the person.’

values of autonomy, self-determination and dignity, as they find expression in the rights guaranteed by the Constitution, provide constitutional protection for the performance of specific acts depends on a concrete analysis of the impact of any law which is impugned in a particular case on the life of the individual, and a careful consideration of the provisions of the Constitution and the values it protects in the rights it guarantees.⁵⁰³

Thus, in utilising the subjective interpretation of the common good/public protection exception, there will always be a capacity for judicial discretion to be exercised in a fashion that limits the expression of autonomy.

Evidently, autonomy has been considered by the Irish judiciary on numerous occasions, yet it is arguable that there has been a conscious reluctance to establish personal autonomy as an unenumerated right under the Article 40 of the Constitution. On the basis of the cases considered (primarily *Fleming v Ireland*), the implications for establishing individual autonomy as a right ‘would sweep very far’,⁵⁰⁴ thus it is suggested that recognising autonomy as a constitutional value from which the right to privacy flows, is a more conservative and curtailable stance for the judiciary to adopt. However, this approach results in an inconsistent interpretation of autonomy as a critical aspect of the right to privacy, always determined on a contextual basis. Through conceiving autonomy as an underlying principle or value, the judiciary in a subjective manner has considered autonomy to varying degrees that best suits the circumstances of the case. While this may be perceived as widening the scope of autonomy, it is arguable that its malleable nature devalues its legal utility.⁵⁰⁵ Having considered autonomy as a personal right, this chapter will now explore judicial approaches to family autonomy.

⁵⁰³ *Fleming v Ireland* [2013] IESC 19 at page 32.

⁵⁰⁴ *ibid* at page 35.

⁵⁰⁵ Conor O’Mahony, ‘There Is No Such Thing as a Right to Dignity’ (2012) 10(2) International Journal of Constitutional Law 551. While O’Mahony’s primary focus is on the right to dignity, given the interchangeability of terms and the lack of a statutory basis, the argument he presents is further relevant to the unenumerated right to autonomy.

4.3.3 Article 41 and the Development of Family Autonomy

Article 41 is also associated with the development or appreciation of autonomy in Irish family law. Article 41.1 specifies how:

The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

Unlike the gradual development of autonomy stemming from Article 40, it is arguable that the express wording of Article 41 identifies the family as a bearer of marital, parental and/or family autonomy, given its elevated status.

Central to the development of family autonomy was the decision in *McGee v The Attorney General* which identified the unenumerated right to marital 'privacy'.⁵⁰⁶ Walsh J noted a reluctance to intervene with such family autonomy, specifying that 'It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire.'⁵⁰⁷ Walsh J further confirmed this position when asserting that 'The private morality of its citizens does not justify intervention by the State into the activities of those citizens unless and until the common good requires it.'⁵⁰⁸ Where considered by the judiciary, it is clear that there is a heightened obligation to uphold marital autonomy given its express reference in the Constitution, than there is individual autonomy. Having identified this judicial

⁵⁰⁶ *McGee v The Attorney General* (n 474) at page 322. Noted by Budd J was that 'The State guarantees as far as practicable by its laws to vindicate the personal rights of the citizen. What more important personal right could there be in a citizen than the right to determine in marriage his attitude and resolve his mode of life concerning the procreation of children? Whilst the "personal rights" are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally recognized and accepted with possibly the rarest of exceptions, and that the matter of marital relationship must rank as one of the most important of matters in the realm of privacy.'

⁵⁰⁷ *ibid* at page 313.

⁵⁰⁸ *ibid* at page 312.

mandate on the basis of Article 41, the rationale for such favourability will now be discussed.

4.4 In Support of Family Autonomy

Central to the State deference to family autonomy is the array of perceived benefits such autonomy affords to members within the unit, coupled with the potential for unintended ramifications where State interference takes place. Doyle notes that ‘in general-parents are better placed than the State to make decisions for their children.’⁵⁰⁹ Extending this view beyond the care of children to spouses, Baker notes that ‘the justifications for non-interference in marital relationships are rooted in the same kind of practical and pluralistic concerns as is the parental autonomy doctrine.’⁵¹⁰ Thus, when assessing a contract or agreements between marital parties, there is a necessity to recognise and respect that those involved are in a greater position to assess the particulars of their circumstances than someone unknown to them. This position has also been recognised by the Irish judiciary where Binchy J in the case of *KC v TC* noted that:

since the terms of settlement were freely entered into between the parties, with the benefit of legal advice, and were then made an order of the court on consent, that it is implicitly acknowledged that these orders make proper provision for the parties in the circumstances. I accept this submission, because the Court does not usually in such cases embark on an inquiry as to what is proper provision, since the parties have already, following negotiations, decided this for themselves, and they are better positioned than the Court to arrive at such a decision.⁵¹¹

⁵⁰⁹ Oran Doyle, ‘Family Autonomy and Children’s Best Interests: Ireland, Bentham, and the Natural Law Symposium on the Jurisprudence of the Family’ (2010) 1(1) *International Journal of the Jurisprudence of the Family* 55 at page 55.

⁵¹⁰ Katharine Baker, ‘Equality and Family Autonomy’ (2022) 24(1) *University of Pennsylvania Journal of Constitutional Law* 412 at page 450.

⁵¹¹ *KC v TC* [2019] IEHC 198 at paragraph 28. This case regarded an appeal made in relation to orders granted in a judicial separation case that had been sought on the basis of consent.

Empirical support for this position was further provided by participants in this study. Mindful of the legal processes' limitations, Solicitor 2 opined that:

I don't think we're good at dealing with children and with access and that kind of stuff...I think it's the wrong form [of approach]...for that stuff.

This observation is not novel, rather some of the participant clients were quite certain of their superior position to make decisions, with Client 1 noting how:

the primary concern was the welfare of the children. And that concern is lost on a third party who doesn't even know the names of our children.

Amongst all 3 participant cohorts, there was a strong desire for the retention of marital and familial/parental autonomy. Highlighting its importance, Solicitor 2 noted that:

It's quite a risk like letting your conflict go into litigation...part of our initial spiel for want of a better word...it's like, keep control of the process as much as you can yourself, because once it goes outside, you don't know.

Aligning with the theoretical perspective, the central rationale for this stance was a recognition of the judiciary being ill-suited to determine the relationship of others unknown to them. In querying the current dispute resolution regime, Mediator 4 specified how:

You know, it's crazy to say to this person, who I've spent the last 20 whatever years of my life with, okay we're not getting on anymore or I find it difficult to be around them, so I'm going to tell somebody else my solicitor or tell somebody else my barrister who's going to tell somebody else a judge, my side of the story. And my wife, who I've spent the last 20 whatever years together with, a wedge is getting continuously driven

between us because she's told somebody else who told somebody else who's telling the same judge and judge is trying to make the decision. It's utterly bonkers.

While participants expressed a strong desire for the retention of parental and familial autonomy, that is not to say its value is held universally. Evidencing the variability that exists in client profiles, Solicitor 5 outlined how:

I mean to engage in mediation or even negotiations requires, again, a commitment, you know, in terms of your time, your attention, the level of information you provide. But I think the biggest thing is actually you taking responsibility for the decision. A lot of people don't actually want to take responsibility for their decisions. They would often say let the judge decide.

This contrasting view demonstrates the impact that client individuality/subjectivity can have on the dispute resolution process. Thus, while it is logical or at least advisable to structure the system so that autonomy is at its core, given the potential impact of emotions on decision making,⁵¹² it is necessary to have a range of dispute resolution mechanisms. This highlights the critical role performed by the FMS, both as an element of the State framework of remedies and as an alternative approach to adversarial litigation.

The recognition of family autonomy is a means of respecting the intricacies of family unity and indeed family disputes, and the variabilities that can exist in such circumstances, making objective assessments of best outcomes challenging for many.⁵¹³ While non-intrusion is desirable, there are instances where the State deems it necessary, or it is objectively necessary to encroach on the private sphere to protect vulnerable members of the family unit. Doyle, having noted the superiority of family-based decision making, proceeds to specify that 'most people would also accept that

⁵¹² Janet Weinstein and Ricardo Weinstein, 'I Know Better than That: The Role of Emotions and the Brain in Family Law Disputes' (2005) 7(2) *Journal of Law & Family Studies* 351. Janet Weinstein and Ricardo Weinstein argue that 'high conflict' family law cases necessitate consideration of brain function, as one is unable to think in a rational manner by virtue of their biological response.

⁵¹³ Baker (n 510).

parents' authority over their children cannot be absolute. The State retains a residual concern for children who are abused, neglected, or failed by their parents, whether through misconduct or personal inadequacy.⁵¹⁴ In a similar manner, Baker notes that:

the doctrine of family autonomy is supposed to protect family relationships from meddlesome, overbearing, and probably not-very-effective state efforts to control intimate lives, but not all state interference is so oppressive. Whatever the benefits of non-interference might be, it diminishes the ability of those with less power within a relationship to invoke the law's protection.⁵¹⁵

It is evident that while family autonomy has a crucial role to play in modern society, it is not without risk. Thus, family autonomy cannot be absolute, rather it can necessitate limitations on that autonomy to protect members within the family and at times, the broader common good. Such instances will now be considered as a means of exploring and assessing the State reluctance to recognise personal autonomy.

4.5 Challenging Personal Autonomy

Having ascertained the strengths of family autonomy, it is further necessary to consider the State's historical reluctance to recognise personal autonomy within the context of relationship breakdown. O'Sullivan notes how 'marriage breakdown is a "significant social issue" in Ireland...' ⁵¹⁶ given the numerous financial and care concerns posed.⁵¹⁷ Likewise, Crowley highlights that:

The relevant public policy issues of concern to the courts in the context of marital disputes range from the enforcement of spousal and parental obligations, to the state's capacity to

⁵¹⁴ Doyle (n 510) at page 55.

⁵¹⁵ Baker (n 496) at page 435. See also: Emily Buss, "'Parental' Rights' (2002) 88 Virginia Law Review 635.

⁵¹⁶ Kathryn O'Sullivan, 'Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities' (2016) 36 Legal Studies 111 at page 112.

⁵¹⁷ Lucy-Ann Buckley, 'Irish Matrimonial Property Division in Practice: A Case Study' (2007) 21(1) International Journal of Law, Policy and the Family 48.

enforce maintenance obligations to avoid a spouse transferring his/her dependency from the other spouse to the state.⁵¹⁸

Due to the traditional gender-based roles established and still present within the Constitution,⁵¹⁹ such concerns are more pressing for women given the related impact on financial opportunities during marriage and post relationship breakdown, where they have fulfilled this role exclusively or in part.⁵²⁰ Burley and Regan note how concern for the financial implications for dependent spouses following relationship breakdown was a strong influence in the resistance to the introduction of divorce.⁵²¹ It is contended that part of the State's reluctance to recognise individual autonomy in this regard stems from its preference for the family unit to maintain responsibility for the welfare of the family, even post marital breakdown. Thus, Murray J highlights the 'Irish state's minimal welfare effort...and reliance on family or voluntary networks of care.'⁵²² He further specifies how it is:

Evident in the 1922 and 1937 constitution making processes, successive Irish governments prioritised securing stable capital flows for dominant class interests. The result was comparatively low living standards and levels of welfare effort combined with increased reliance on institutionalisation and on

⁵¹⁸ Louise Crowley, 'Sheltering the Homemaker in Irish Family Law: Ireland's Failure to Evolve with the Shifting Social and Family Norms Ireland' (2018) 2018(1) *International Survey of Family Law* 271 at page 286.

⁵¹⁹ Article 41.2 of the Constitution states that 'In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.' The Fortieth Amendment of the Constitution (Care) Bill 2023 sought to alter the wording of Article 41.2 through the introduction of gender neutral language. The referendum was ultimately unsuccessful and failed to pass with 73.93% of the electorate voting no to the introduction of such language. In retaining this position there is a clear disconnect between Article 41.2 and the position of women in modern society.

⁵²⁰ Buckley (n 517); O'Sullivan (n 516).

⁵²¹ Jenny Burley and Francis Regan, 'Divorce in Ireland: The Fear, the Floodgates and the Reality' (2002) 16 *International Journal of Law, Policy and the Family* 202.

⁵²² Thomas Murray, 'Economic and Social Rights in Ireland' in David Farrell and Niamh Hardiman (eds), *The Oxford Handbook of Irish Politics* (Oxford University Press 2021) at page 48.

voluntary, highly gendered forms of care, notably provided by the Catholic Church and by the family.⁵²³

It was never likely that the State, in creating a divorce framework would do so on the basis of personal autonomy, to do so could relieve spouses of their obligations to support family members, thereby making them a charge on the State. In adopting an alternative approach (discussed in full in the next section of this chapter) through the promotion of *inter parte* financial support obligations and equitable asset distribution, the State aims to ensure economic stability for both spouses, reduce the welfare burden, and protect the welfare of children, all of which contribute to broader social stability and cohesion. Crowley notes that ultimately, the establishment of the potential for lifelong inter-dependency provides a ‘protective safety net for spouses who are encouraged to make choices and sacrifices for the family and public good.’⁵²⁴ Whilst operating as a purported safeguard, this legal route has established a position whereby ‘a marital union that is not necessarily binding, but a financial commitment [that] is’,⁵²⁵ demonstrating a clear preference for supporting the home-maker spouse and dependents rather than a right to post-divorce independence, a rigid approach which fails to account for the variable circumstances of those who seek relationship breakdown remedies. In seeking to reform the regulatory framework (with the intent of adopting a more liberal approach), it would be favourable to develop a system that has the capacity to be tailored to the requirements of those seeking the resolution of their dispute. Prior to considering such reforms, the current regulatory framework will first be outlined with regards to the evolving capacity for the exercise of autonomy.

⁵²³ Thomas Murray, ‘Contesting Family, Education, and Welfare Rights’ in Thomas Murray (ed), *Contesting Economic and Social Rights in Ireland: Constitution, State and Society, 1846-2016* (Cambridge University Press 2016) at page 246.

⁵²⁴ Crowley (n 518) at page 285.

⁵²⁵ *ibid* at page 273.

4.6 Evolving Recognition for Individual Autonomy Through Marital Breakdown Remedies

Described as one of the absolute values of liberalism is the ‘right to exit’.⁵²⁶ Hoffmann notes that this right to exit is premised on the:

centrality of autonomy to liberal thought and signifies a person's right to detach oneself from a relationship with another person. The right to exit is fundamental to the liberal ideal of being the “author of one's own life”, entailing an individual's capacity to make autonomous decisions about her life without constraint, including establishing, revising, and pursuing one's own ends.⁵²⁷

While the right to exit is a clear expression of individual autonomy, such capacity in a marital breakdown context was expressly unattainable in Ireland for many years following the deliberate insertion of Article 41.3.2. in the 1937 Constitution of Ireland, prohibiting the enactment of laws to dissolve a marital union.⁵²⁸ Though divorce may now be secured in the Irish courts, the capacity to exit the marital union and be relieved of all ties is not as yet envisaged by the regulatory statutory framework.

4.6.1 Divorce a Mensa Et Thoro

Prior to 1989, the sole relationship breakdown remedy available, apart from a private inter parte contract, was a decree of *divorce a mensa et thoro*. This remedy relieved parties of their obligation to cohabit, affording them autonomy over their living situation but not their marital status. Solely available on the basis of fault, it required

⁵²⁶ Hanoch Dagan and Michael Heller, ‘The Liberal Commons’ (2001) 110(4) Yale Law Journal 549. See also: Leslie Green, ‘Rights of Exit’ (1998) 4(2) Legal Theory 165.

⁵²⁷ Ayelet Hoffmann Libson, ‘Not My Fault: Morality and Divorce Law in the Liberal State’ (2019) 93(1) Tulane Law Review 599.

⁵²⁸ Prior to the 15th amendment of the Constitution, which in 1996 introduced the remedy of divorce, Article 41.3.2 provided that ‘no law shall be enacted providing for the grant of a dissolution of marriage’ meaning an absence of accessible remedies for those seeking to dissolve their marriage.

evidence of cruelty, adultery or unnatural practices.⁵²⁹ Remedies secured on the basis of fault are of particular relevance to discussions on autonomy, as the right to exit is dependent upon proof of such behaviour. This evidential necessity therefore operated as a direct impediment to autonomy as parties were unable to choose to obtain a *divorce a mensa et thoro* where no such fault had occurred.

Notwithstanding the fault based criticism, the *divorce a mensa et thoro* remedy is to be commended for giving the court jurisdiction to award alimony payments in favour of the wife (only, and not if she was the cause of the unacceptable behaviour), providing a much needed source of financial relief for the vulnerable homemaker prior to the enactment of the Family Law (Maintenance of Spouses and Children) Act 1976 (hereafter the '1976 Act').⁵³⁰ Where awarded, the provision of alimony was pivotal in enabling the dependent spouse to operate in a more autonomous fashion. Such support is vital, Moore highlights the direct relationship between access to financial resources and the capacity to act autonomously.⁵³¹ Paradoxically, however, such provision limits the autonomy of the payer spouse, as they are financially bound.

4.6.2 Judicial Separation

Changing social norms and the eventual recognition of marital breakdown in Irish society established an undeniable necessity for reform.⁵³² In 1987 TD Alan Shatter (as he was then) published the Judicial Separation and Family Law Reform Bill as a Private Members Bill, noting on presentation of the Bill to the Dáil that 'the current

⁵²⁹ Law Reform Commission, *Report on Divorce A Mensa et Thoro and Related Matters* (LRC 8 1983).

⁵³⁰ *ibid.*

⁵³¹ Elena Moore, 'From Traditional to Companionate Marriages: Women's Changing Experience of Marriage and Divorce in Ireland' (2012) 1(3) *Families, Relationships and Societies* 345.

⁵³² Joint Committee on Marriage Breakdown, *Report of the Joint Committee on Marriage Breakdown* (Dublin: Stationary Office 1985) at paragraph 5.2. In recognising the fact of marriage breakdown in Irish society, a submission by the Life Education and Research Network to the Joint Committee, observed that 'With an increase in mobility and a greater emphasis on personal autonomy, the concept of exclusive commitment to another person for life may not be as attractive at the present time as it was in the past.' As a rationale in favour of the view that perceptions of family relationships and marriage were changing, the Joint Committee proceeded to note the 'increase in the rate of birth of illegitimate children and the numbers of single mothers who now keep their children.' Furthermore, while sufficient empirical evidence in support of this societal shift was not available at the time of drafting the 1985 Report, a year later the 1986 Census for the first time sought information on citizens' de facto situation as opposed to their legal marital status. To the exclusion of widows, the 1986 Census identified 37,245 separated persons in the State. See: Central Statistics Office, *Census 86 Volume 2* (CSO 86 2 - 1989) at page 14.

law provides no legal remedy for many spouses whose marriages have totally collapsed and who require legal intervention to resolve the consequences of such a collapse.⁵³³ In essence there was no accessible ‘right to exit’ available to those seeking relief.⁵³⁴ The Judicial Separation and Family Law Reform Bill, which had overwhelming cross party support, became the first Private Member’s Bill to be enacted in over thirty years, demonstrating a recognition of its fundamental necessity.⁵³⁵ Crowley notes that as the remedy did not ‘conflict with the Constitutional protection of marriage, it was able to move more benignly through the parliamentary process, avoiding drawing attention and thus any controversy as to the powers it created.’⁵³⁶ While the remedy could be granted on the basis of spousal fault, it could also be secured through a ‘proof of breakdown’ i.e. lack of normal marital relationship, thereby removing a core impediment to autonomy through the vindication of a right to exit, albeit subject to a time requirement of at least 1 year.⁵³⁷ Further, the Judicial Separation and Family Law Reform Act, 1989 equipped the courts with the enduring capacity to make a much broader range of financial and property orders to provide support and thus capacity for individual autonomy to be secured for the dependent spouse. Akin to a *divorce a mensa et thoro*, the reliefs introduced under this remedy established a necessary suppression of the payer spouse’s individual autonomy to enable the financially dependent spouse to operate autonomously of the bread-winner spouse (despite remaining financially dependent) insofar as was possible. Although Chapter 3 identified a substantial reduction in those who seek out this remedy in light of divorce becoming more readily available, it still performs an important role for those who may seek to separate, but a divorce does not align with their values or circumstances. Aspasia notes that in common law jurisdictions, legal separation

⁵³³ Dáil Debate 2 February 1988, Vol. 377 No. 3.

⁵³⁴ William Duncan, ‘Desertion and Cruelty in Irish Matrimonial Law’ (1972) 7(2) Irish Jurist 213. The sole remedy available at the time was a *divorce a mensa et thoro* which could only be obtained on the basis of fault, along with it being a challenging remedy to obtain financially. See also: Kathryn O’Sullivan, ‘Spousal maintenance in Ireland: past, present and future’ (2022) 44(1) Journal of Social Welfare and Family Law 63.

⁵³⁵ Alan Shatter, *Family Law* (4th edn, Butterworths 1988) at page 340. See also: Dáil Debate 3 February 1988, Vol. 377 No. 4. In the parliamentary debates minimal discussion was afforded to the necessity for the Bill, arguably demonstrating that its utility was assumed and a reluctance on part of the Government to introduce the Bill themselves. TD Brian Cowen (as he was then) noted that the ‘Bill in principle has universal approval’.

⁵³⁶ Louise Crowley, ‘Irish divorce law in a social policy vacuum – from the unspoken to the unknown’ (2011) 33(3) Journal of Social Welfare and Family Law 227 at page 230.

⁵³⁷ Section 2 of the 1989 Act (as enacted). It must be noted the ‘irretrievable breakdown of the marriage’ was the sole ground upon which the Joint Committee had advocated for, prior to the remedies introduction. See also: Joint Committee on Marriage Breakdown (n 532).

provides a means for individuals to conclude their relationship while remaining legally married, which may be preferable in situations where divorce is discouraged through religious beliefs.⁵³⁸ Despite its declining use, Mediator 2 highlighted the majority view that it remains a crucial offering:

it [judicial separation] should always be in the mix because it's for clients to determine what their needs are...you know, maybe for religious reasons.

The continued availability of judicial separation as a remedy for marital breakdown arguably reflects an acknowledgment that the law should not serve only the majority but rather recognise the importance of individual circumstances. Its retention supports greater autonomy in the context of marital breakdown, allowing parties to self-determine how they conclude their relationship, appreciating the need for a client-centred approach. While pivotal in this respect, as Figure 2 & 3 (on page 99) demonstrates, divorce is the predominant remedy sought as it provides parties with autonomy over their relationship status. Mediator 3 in illustrating this preference notes:

I mean, nobody wants a judicial separation anymore. Why would you, because divorce is so easy?

In offering parties autonomy over their marital relationship, the introduction of divorce and its requirements will now be considered.

4.6.3 Divorce

The absence of divorce in Ireland meant an inability to secure autonomy from the marital union for both spouses. Friedman notes that 'A marriage, if it cannot be dissolved, can become a trap, a slavery, a burden; such a marriage interferes with

⁵³⁸ Aspasia Tsaoussi, 'Divorce and separation' in David Clark (ed), *Encyclopedia of Law and Society: American and Global Perspectives* (Sage Publications 2007).

individual growth and development; it stifles the unfolding of the self.’⁵³⁹ Further, Schneider notes the centrality of divorce from an autonomous perspective in that ‘Two core ideas about marriage follow from the primacy of autonomy. First, people should be able to choose the kind of marital relationship they prefer. Second, people should not be trapped within a marriage they would rather leave.’⁵⁴⁰ More recently, Almog and Herbst-Debby describe the increasing prevalence of women initiating divorce proceedings as them ‘breaking through marital barriers to gain autonomy and control over their lives.’⁵⁴¹ In the absence of divorce, the contract of marriage therefore operates as a barrier for many in securing individual autonomy. As a consequence of the constitutional ban on divorce, introducing legislation that would dissolve a marriage necessitated a referendum which was recommended by the *Report of the Joint Committee on Marriage Breakdown*, given what was regarded as the inadequacy of the existing legal regime in 1985.⁵⁴² Subsequent to a failed referendum in 1986, the electorate voted in favour of amending Article 41.3.2 in 1995 to enable the establishment of divorce. The governing legislation for divorce, the Family Law (Divorce) Act, 1996 was commenced on the 27th of February 1997. The 1996 Act facilitated individual choice, exercised through the deliberate omission of the traditional obstacle of fault, quickly identifying Ireland’s divorce regime as one that facilitates unilateral repudiation of the marital bond. Premised on the right to exit, this approach is far from trivial as Herring outlines that ‘Many of the arguments in favour of no-fault or liberalised divorce were based on autonomy or self-determination.’⁵⁴³ Further support for this stance is evidenced by Crowley who notes that ‘Undoubtedly the evolution of no-fault divorce brings with it an implied recognition of the entitlement of each spouse to eventually exit the marriage and all associated responsibilities.’⁵⁴⁴ While the introduction of no-fault divorce indicated a growing appreciation for individual autonomy, a deeper appreciation of the regime’s intricacies

⁵³⁹ Lawrence Friedman, *The Republic of Choice: Law, Authority, and Culture* (Harvard University Press, 1990) at page 176-177.

⁵⁴⁰ Carl Schneider, ‘Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse Symposium: Twenty-Five Years of Divorce Revolution’ (1994) 1994(2) Utah Law Review 503 at page 527.

⁵⁴¹ Ephrat Almog and Anat Herbst-Debby, ‘Women who initiate divorce embrace autonomy’ (2025) 87(4) Journal of Marriage and Family 1664 at page 1664.

⁵⁴² Joint Committee on Marriage Breakdown (n 532) at paragraph 7.8.29.

⁵⁴³ Jonathan Herring, *Relational Autonomy and Family Law* (Springer 2014) at page 5.

⁵⁴⁴ Louise Crowley, ‘Equal versus Equitable Division of Marital Assets—What can be learned from the experiences of other jurisdictions? Part II’ (2007) 10(2) Irish Journal of Family Law 12.

suggests that it is premised on relational autonomy (as will be discussed later in this chapter), albeit achieved through the retention of familial responsibilities.

As noted in Chapter 1, a significant feature of the Irish approach, is the constitutional and legislative prerequisite that ‘proper provision’ must be secured for both spouses and any dependent children, prior to the granting of a decree of divorce.⁵⁴⁵ Crowley notes that ‘The need to appease those who feared significant societal impact resulted in a divorce regime that now incorporates a capacity (if not expectation) that financial ties remain post-divorce in order to protect the “vulnerable” Irish homemaker’,⁵⁴⁶ with the ‘protection of the homemaker [as] a key social priority.’⁵⁴⁷ This enduring relationship is personified in the statutory capacity to seek orders under the 1996 Act ‘On granting a decree of divorce or at any time thereafter...’⁵⁴⁸ Crowley further notes that although:

facilitating the remedy of divorce, the state has retained this protectionist approach and has enacted a statutory framework which normalises life-long interdependence, placing such financial obligations on the breadwinner (former) spouse, making it impermissible to seek or secure individual financial freedom.⁵⁴⁹

Whilst these financial ties operate as a direct impediment to individual autonomy, access to adequate resources is fundamental to enable an individual to operate in an autonomous fashion.⁵⁵⁰

While it is likely that parties and their representatives will be aware of the criteria for the making of financial provision for both parties on granting a judicial separation or divorce, the ultimate determination as to whether proper provision has been

⁵⁴⁵ Article 41.3 of the 1937 Constitution of Ireland. This provision almost mirrors that which had been included in s. 3 of the 1989 Act (as enacted) in which the court was required to determine ‘such provision...as is proper’.

⁵⁴⁶ Crowley (n 518) at page 284.

⁵⁴⁷ *ibid* at page 285.

⁵⁴⁸ Family Law (Divorce) Act, 1996.

⁵⁴⁹ Crowley (n 518) at page 272.

⁵⁵⁰ Moore (n 531).

established rests with the court.⁵⁵¹ Solicitor 2 in expressing their preference for this position noted that:

there always has to be flexibility, like a judge always has to have the capacity to make decisions based upon what they're seeing in front of them...if they hear evidence, and they decide something, the judge has to have discretion.

Adopting this individualised approach contrasts with many other civil law jurisdictions which operate matrimonial property regimes, thereby stipulating the qualifying assets for division, thus stifling the necessity for excessive judicial discretion to be exercised.⁵⁵² As a consequence of the judicial discretion afforded by way of the undefined requirement of proper provision, and the statutory and Constitutional requirement that the divorce decree only be granted upon the Court being satisfied that proper provision has in fact been achieved, the capacity of the parties to absolutely self-determine is inhibited, thus rejecting their individual autonomy. While it was expected that clarity would be brought to this matter by the LRC when it identified 'Proper Provision and Clean Break on Divorce' as an area for consideration and reform in its 5th Programme of Law Reform, regrettably it has yet to be considered.⁵⁵³ Thus, the Irish approach has been characterised by its imposition

⁵⁵¹ *DT v CT* [2002] 3 IR 334. In this ample resource case, the Supreme Court was tasked with the determining whether the payment of a lump sum constituted proper provision. Such was the size of the lump sum that it was intended to establish a clean break. Keane CJ in delivering the judgment noted the importance of judicial discretion specifying that 'While s.20(2) lists in detail the factors to which the court is required to have regard in making the various financial orders provided for in part III of the Act, it is obvious that the circumstances of individual cases will vary so widely that ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what he or she considers a just resolution in all the circumstances.'

⁵⁵² Kathryn O'Sullivan, 'The "Dejudicialisation" of Family Law in Europe: Where does Ireland Stand?' (2024) 27(1) *Irish Journal of Family Law* 3. While O'Sullivan partially suggests that the Family Courts Bill 2022 evidences the unwillingness to depart from judicial involvement as is increasingly been done in other jurisdictions, she does foresee the *Review of the Enforcement of Child Maintenance Orders* as a willingness of the State to reform in an alternative direction through the provision of guidance. See also: Louise Crowley, 'Dividing the spoils on divorce: rule-based regulation versus discretionary-based decision' (2012) *International Family Law* 388; Department of Social Protection, *Report of the Child Maintenance Review Group* (DSP 2022).

⁵⁵³ Law Reform Commission, *Report Fifth Programme of Law Reform* (LRC 120 – 2019). In noting the rational for this discontinuation, it was specified that 'Given the Commission's current resourcing constraints, priorities, and existing commitments, focus will instead be given to the aspect of the project relating to recognition of foreign divorce.' See also: Law Reform Commission, 'Rationalisation of Fifth Programme of Law Reform' (LRC 28 September 2023) <<https://www.lawreform.ie/news/rationalisation-of-fifth-programme-of-law-reform.1122.html>> accessed 18 August 2024.

of on-going financial ties, often deemed necessary by the courts to achieve proper provision, resulting in an absence of predictability and a lack of individual autonomy.⁵⁵⁴ Unsurprisingly therefore, O'Shea in her empirical study of judicial separation and divorce in the Circuit Court notes 'a significant variation in the approach of judges to the statutory and constitutional requirements on divorce.'⁵⁵⁵ This variability is problematic, as it limits individual autonomy by increasing the likelihood that self-determined outcomes will be overruled or altered. While individual autonomy appears statutorily inhibited, the next section will demonstrate a growing appreciation and a recognition of the value of self-determination by the Irish judiciary.

4.6.4 A 'Clean Break'

It is arguable that individual autonomy following divorce can be achieved by securing immediate proper provision for the parties in light of their circumstances. A clean break 'assumes that spouses should be capable of attaining economic self-sufficiency upon divorce, enabling financial obligations between them to be terminated.'⁵⁵⁶ Support for this interpretation is offered by Eekelaar who notes that the concept of a 'clean break' constitutes three elements: (i) self-determination; (ii) self-sufficiency; and (iii) finality.⁵⁵⁷ A clean break therefore establishes the parties as autonomous from one another and seeks to avoid them remaining financially connected.

Given the courts' capacity to impose on-going financial ties, a clean break with adequate financial provision for both spouses and consequentially individual autonomy appears incompatible with the Irish regulatory framework.⁵⁵⁸ Despite the

⁵⁵⁴ Crowley (n 536).

⁵⁵⁵ Roisin O'Shea, *Judicial Separation and Divorce in the Circuit Court* (PhD thesis, Waterford Institute of Technology 2014) at page 92. See also: Crowley (n 544).

⁵⁵⁶ Ellen Gordon-Bouvier, 'The Open Future: Analysing the Temporality of Autonomy in Family Law' (2020) 32(1) *Child and Family Law Quarterly* 75 at page 75. In Ireland, this self-sufficiency would be achieved through satisfying the proper provision requirement through inter spousal distribution of wealth.

⁵⁵⁷ Frank Martin, 'From Prohibition To Approval: The Limitations Of The "No Clean Break" Divorce Regime In The Republic of Ireland' (2002) 16(1) *International Journal of Law, Policy and the Family* 223 citing John Eekelaar, 'Post-Divorce Financial Obligations' in Sanford Katz, John Eekelaar and Mavis Maclean (eds), *Cross Currents: Family Law and Policy in the US and England* (Oxford University Press 2000) at page 411.

⁵⁵⁸ *JD v DD* [1997] 3 IR 64 at page 89. Noted by McGuinness J is that 'the Oireachtas has made it clear that a "clean break" situation is not to be sought and that, if anything, financial finality is virtually to be prevented. Under both the Act of 1995 and the Act of 1996...there appears to be no limit on the number

reluctance of the judiciary to facilitate a clean break upon divorce for many years, contemporary caselaw suggests that (at the very least) it is a legitimate aspiration. Demonstrating the evolving nature of family law, the concept of finality was a central issue in the judgments delivered in the Supreme Court in *DT v CT*, with Keane CJ noting that:

Irish law should be capable of accommodating those aspects of the “clean break” approach which are clearly beneficial...I do not believe that the Oireachtas, in declining to adopt the “clean break” approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality...⁵⁵⁹

This sentiment was shared by Murray J:

I also agree that when making proper provision for the spouses, a court may, in the appropriate circumstances, seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. This is not to say that legal finality can be achieved in all cases...However, the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit.⁵⁶⁰

Keane CJ, in upholding the High Court's ruling, attempted to regard it as effecting a clean break. In arriving at this decision, he emphasised that a lump sum could not be varied under s. 22(1)(d) of the 1996 Act because this only applies where a financial payment order is payable in instalments. Given that the High Court had ordered a lump sum payment, no future application for variation could be made by the respondent, which Keane CJ suggested gave rise effectively to a clean break in the circumstances.

of occasions on which a property adjustment order may be sought and granted. The court, in making virtually any order in regard to finance and property on the breakdown of a marriage, is faced with the situation where finality is not and never can be achieved...The statutory policy is, therefore, totally opposed to the concept of the “clean break”.’

⁵⁵⁹ *DT v CT* [2002] 3 IR 334 at page 365.

⁵⁶⁰ *ibid* at page 411.

Additionally, since no order other than a pension adjustment order had been made, a later variation would be impermissible, as such a variation requires an initial order. However, Crowley argues that Keane CJ overlooked the possibility of further ancillary orders, such as a lump sum order under s. 13 of the 1996 Act, which may be made '[o]n granting a decree of divorce or at any time thereafter.'⁵⁶¹ This, Crowley contends, undermines Keane CJ's reasoning that a clean break has 'effectively' been achieved. While Crowley acknowledges the value of achieving a clean break, she maintains that it must be introduced in a more appropriate legal framework. Although the availability of ample resources may more easily facilitate the perceived achievement of proper provision by way of lump sum, so long as the capacity for either 'spouse' to seek relevant orders at 'any time thereafter' remains, along with the right to apply for a variation under s. 22 of the 1996 Act, there will be no statutory basis for finality in Irish marital law, thereby operating as a direct impediment to individual autonomy.⁵⁶²

While finality was identified as a legitimate aspiration in *DT v CT*, it has not been accepted as a right under Irish law, further perpetuating an inconsistency in approach. Adopting a highly restrictive view as regards the right to re-apply, in 2005 Hardiman J refused to award additional financial relief in *WA v MA* according 'very significant weight' to an agreement intended to be full and final settlement, regarding 'proper provision' as meaning 'fit, apt or suitable', and he was of the view that it would not be apt to overturn the longstanding settlement.⁵⁶³ Notwithstanding Hardiman J's views, the following year in *SMcM v MMcM* additional relief was awarded to the applicant despite the parties previously entering into a separation agreement intended to be a full and final settlement, with Abbott J clearly distinguishing the ruling of Hardiman J, noting how 'the settlement is of long years standing and does not represent a sharing of assets and business opportunities between husband and wife such as occurred in *W. A. v M. A.*'⁵⁶⁴ These contrasting approaches underscore the discretionary nature of

⁵⁶¹ Louise Crowley, 'Divorce Law in Ireland - Facilitating or Frustrating the Resolution Process' (2004) 16(1) Child and Family Law Quarterly 49.

⁵⁶² *ibid* at page 53. Despite favouring the aspects afforded by a clean break, Crowley critiques 'the assertion by Keane CJ. that a clean break can be imposed on the basis of the inability to vary lump sum orders payable by instalments [as it] appears to ignore the statutory entitlements of every party to return to court for further relief.'

⁵⁶³ *WA v MA* [2005] 1 IR 1 at page 20. In this case both the applicant and respondent had executed and acted upon a separation agreement. Contained within the agreement was the assertion that neither party was permitted to seek a judicial separation or ancillary relief.

⁵⁶⁴ *SMcM v MMcM* [2006] IEHC 451 per Abbott J. In this case the applicant wife issued proceedings against her respondent husband seeking a divorce and ancillary relief. Despite the parties having

judicial interpretation in post-separation relief, revealing a lack of coherent guiding principles. As a result, predictability in outcomes remains elusive, potentially undermining confidence in the finality of marital settlements.

A legitimate criticism of the 1996 Act is the lack of an explicit statement of principles or underlying policy aims guiding its application. While s. 20 provides criteria for ensuring proper provision between spouses, it does not convey a broader vision of what the law permitting the granting of divorce seeks to achieve. What is absent is a consideration of the underlying policy aims, that might otherwise provide useful instruction to parties as they aspire to self-determine their dispute. Crowley opines that the lack of substantive pre-enactment debate on the broader purpose of the 1996 Act and the associated financial matters further contributed to these interpretative gaps, leaving the judiciary to fill a vacuum that arguably should have been addressed by the legislature.⁵⁶⁵ While this lacuna still persists, the case of *YG v NG* can be commended for providing some clarity on the matter.⁵⁶⁶ Following an appeal from the High Court, Denham CJ provided a considered approach to the weighting to be given to an existing separation agreement while endeavouring to secure proper provision. Denham CJ declared that the agreement ‘should be given significant weight’ as it was ‘entered into with consent by both parties’, according value to their autonomous decision making.⁵⁶⁷ In determining the weight to be given to a separation agreement, Denham CJ outlined a number of welcome general principles which are detailed, cogent, holistic and accessible.⁵⁶⁸ While an array of considerations were identified, in relation to finality it

previously entered into a separation agreement that was deemed reasonable, further relief was awarded so as facilitate the wife to catch up with modern prosperity on the basis of the respondents successful career.

⁵⁶⁵ Crowley (n 536).

⁵⁶⁶ *YG v NG* [2011] 3 IR 717. Pertaining to the capacity of parties to secure a clean break, this case both demonstrates and examines the limits/aspirations of autonomy in Irish divorce law. The spouses involved had previously entered into a separation agreement which included a full and final settlement clause. While the courts are to ‘have regard’ to separation agreements they must be considered in light of the requirement of proper provision.

⁵⁶⁷ *ibid* per Denham CJ at paragraph 22(i).

⁵⁶⁸ *ibid* per Denham CJ at paragraph 22. ‘In light of the law and the Constitution, there are a few general principles which may be applied where there has been a prior separation agreement followed by a subsequent application by a party to court. These principles are drawn up in light of the circumstances of this case, but they are general principles:-(i) A separation agreement is an extant legal document, entered into with consent by both parties, and it should be given significant weight. This is so especially if the separation agreement, as here, provides that it was agreed between the parties that the agreement was intended to be a full and final settlement of all matters arising between the parties; and, in the event of either party being granted a court decree, the terms of the agreement should be incorporated into the court order.(ii) Irish law does not establish a right to a "clean break". However, it is a legitimate aspiration... (iii) The constitutional and legislative scheme gives to the court a specific jurisdiction and

was specified that a 'deed of separation stated to be in full and final settlement is a significant factor' further evidencing a respect or recognition of party autonomy, albeit not absolute.⁵⁶⁹ However, in the case under consideration, since the signing of the agreement, the homemaker spouse had suffered from an illness 'such as to enable a court to increase her maintenance so that she has proper provision' thus the 'statutory duty prevails' requiring Denham CJ on the facts to depart from the terms of the agreement.⁵⁷⁰ Notwithstanding the decision not to uphold a clean break, this case is laudable in identifying a clear desire and respect for finality and autonomy, despite such factors being overridden in the circumstances. Denham CJ sought to mitigate certain inadequacies under the divorce legislation by identifying key principles to

duty under the Act of 1996.(iv) Under s. 20(1) of the Act of 1996, "the court shall ensure that such provision as the court considers proper having regard to the circumstances exists" will be made for the spouses and any dependent children. Thus this duty requires the court to make proper provision, having regard to all the circumstances. A deed of separation stated to be in full and final settlement is a significant factor.(v) If the circumstances are the same as when the separation agreement was signed then prima facie the provision made by the court would be the same, as long as it was considered to be proper provision.(vi) If the circumstances of the spouses, one or both, have changed significantly then the court is required to consider all the circumstances carefully. However, the requirement is to make proper provision and it is not a requirement for the redistribution of wealth.(vii) Relevant changed circumstances may include the changed needs of a spouse. If there is a new or different need, that may be a relevant factor. Such a need may be an illness.(viii) The changed circumstances which may be relevant include the bursting of a property bubble which has altered the value of the assets so as to render an earlier provision unjust. These are two example illustrations and are not intended to be a conclusive list of relevant changed circumstances.(ix) If a spouse acquires wealth after a separation, and the wealth is unconnected to any joint project by spouses during their married life, then that is not a factor of itself to vest in the other spouse a right to further monies or assets.(x) If, in the period subsequent to the conclusion of a separation agreement, one spouse becomes very wealthy, there is no right to an automatic increase in money or other assets for the other spouse.(xi) If a party seeks additional funds, the court has to look at all the circumstances and its duty is to make proper provision, not to enter into a redistribution of wealth.(xii) The facts and circumstances to be considered will include the length of time since the separation agreement was entered into. The greater the length of time which has passed, barring catastrophic circumstances, the less likely a court will be to alter arrangements.(xiii) The standard of living of a dependent spouse should be commensurate with that enjoyed when the marriage ended. The Act of 1996 specifically refers to matters to which the court shall have regard and these include the standard of living enjoyed by the family before the proceedings were instituted or before the spouses commenced to live apart, as the case may be. (xiv) However, if a party has new needs, for example a debilitating illness, that will be a factor to be considered by a court in all the circumstances of the case.(xv) Assets which are inherited will not be treated as assets obtained by both parties in a marriage. The distinction in the event of separation or divorce will all depend on the circumstances. In one case, where a couple had worked a farm together, which the husband had inherited, the wife on separation sought 50%, however, the order given by a court was 75% to the husband and 25% to the wife. This is a precedent to illustrate an approach, but the circumstances of each case should be considered specifically.(xvi) A party should not be compensated for their own incompetence or indiscretions to the detriment of the other party.(xvii) If there has been an exceptional change in the value of assets, which was unforeseen at the time of the judicial separation or High Court hearing, it is a relevant factor, as not to take account of such a factor would result in an injustice.'

⁵⁶⁹ *ibid* at paragraph 22.

⁵⁷⁰ *ibid* at paragraph 25.

support future judicial determinations of individual autonomy as appropriate.⁵⁷¹ While availing of the discretion afforded to her, it was exercised in a manner that addressed the substantive issue in contention, a welcome approach to the restrictive governing provisions. Although primarily concerned with the enforceability of an existing separation agreement, Denham J in her discussion includes observations on broader issues of autonomy. Her comments touch on the right of individuals to move on from past relationships and highlight the limited, if any, claim a former spouse may have on the future wealth of the other. The impact of these general principles is now illustrated through a consideration of contemporary case law evaluating the weight to be given to pre-existing arrangements between parties.

Drawing on the guiding principles articulated by Denham CJ, the terms of an existing separation agreement were altered by Abbot J in *T v L* when awarding a decree of divorce.⁵⁷² Following an appeal on the basis that significant weight had not been given to the separation agreement, which was intended to be a full and final settlement, the ruling of Abbot J was upheld. The judiciary noted that:

It is clear that the High Court judge was bound to attach substantial weight to any such agreement, as was advised by the Supreme Court in *Y.G. v N.G.* However, in order to attach that type of weight to the agreement, the court had to be satisfied that, at the time it was made, the agreement made proper provision for the parties.⁵⁷³

As the Court of Appeal determined that proper provision had not been adequately established by the separation agreement, it upheld the decision of the High Court to alter its terms. The Court of Appeal did nonetheless expressly value the aspiration of finality and specified that ‘if the judge is satisfied that proper provision was made in the agreement then he should not make further financial provision, subject to maintenance which always remains a reviewable factor.’⁵⁷⁴ Clearly, while the

⁵⁷¹ The impact and influence of *YG v NG* is observable through the consideration of and application of these general principles in subsequent Court of Appeal cases: *CC v NC* [2016] IECA 410 and *QR v ST* [2016] IECA 421.

⁵⁷² *T v L* [2015] IECA 363.

⁵⁷³ *ibid* at paragraph 78.

⁵⁷⁴ *ibid* at paragraph 79.

necessity to establish proper provision remains, it is apparent that significant weight is now attached to a pre-existing arrangement, and there now exists a high bar for interfering with a pre-existing arrangement. This position is illustrated in *KC v TC* where the parties entered into a separation agreement intended to be a full and final settlement. Accounted for in the agreement were monies pertaining to the sale of a family home. However, as the home did not achieve its expected price, the applicant did not receive what was anticipated as part of her settlement on separation. Highlighting the high bar for interference, Binchy J noted ‘There is a significant difference between a change of circumstances and a shortfall in hopes or expectations, even though the financial impact upon a person may be just the same.’⁵⁷⁵ In refusing to alter the terms agreed, Binchy J relied upon the ruling of Abbot J in *AK v JK* where it was stated that what must be proven is that the change in circumstances are of ‘such a fundamental nature that it would be unfair and unjust to ignore such change or changes.’⁵⁷⁶

Despite an embedded capacity to intervene, there is evidence of a developing judicial preference for a shift away from ongoing financial ties towards supporting independence and party autonomy where possible. However, achieving such autonomy through judicial policymaking is not necessarily a sound approach. Where it does occur, it remains subject to judicial discretion, resulting in inconsistency and a broader lack of predictability.

4.6.5 Separation Agreements

Further to those remedies previously discussed, separation agreements have long been used to agree the terms of resolution of marital disputes in Ireland.⁵⁷⁷ While facilitating the exercise of the individual autonomy of both parties (albeit not extending to their marital status), this method of resolution is of course subject to the legal stipulations

⁵⁷⁵ *KC v TC* (n 511) at paragraph 23.

⁵⁷⁶ *AK v JK* [2009] 1 IR 814 at paragraph 14, as cited by Binchy J in *KC v TC* (n 511) at paragraph 27.

⁵⁷⁷ Maria Luddy and Mary O’Dowd, *Marriage in Ireland 1660 – 1925* (Cambridge University Press 2020) at part IV.

of contract law.⁵⁷⁸ Within a family law context, Diduck notes how a ‘contract is the perfect expression of legal autonomy’ as it is removed from the imposition of terms by a presiding judge.⁵⁷⁹ Parties therefore determine the terms of their agreement facilitating individual autonomy in the absence of judicial interference.⁵⁸⁰ Mediator 8 in advocating for private ordering amongst parties opines that:

if clients have the capacity...and it is a document they are going to work on, which they will adhere to, that is the ideal outcome. Why should you be forcing them into a court process if they don’t want to be part of it?

This view underscores the recognition that parties to the relationship are generally best equipped to determine the outcome of their own disputes, highlighting the importance of a client-centred approach. Further to facilitating party autonomy, separation agreements are perceived as: (i) reducing hostility between the parties;⁵⁸¹ (ii) facilitating individuals to identify what works best given their personal circumstances;⁵⁸² and (iii) provides a heightened flexibility to respond to evolving circumstances whether through built-in review mechanisms, mutual renegotiation, or, where necessary, judicial intervention.⁵⁸³ In facilitating individual autonomy in this way, such agreements may also reflect a broader commitment to family autonomy.

Notwithstanding this promotion of party autonomy, arguably the veracity of these agreements has weakened since the introduction of the legislative regime regulating Irish family law disputes in 1964 and the identification of individual spousal statutory

⁵⁷⁸ *LM v M* [1994] 2 Fam LJ 60 (SC). In this case a husband, was unsuccessful in seeking to demonstrate that he had entered into the agreement under duress. A friend of both the husband and wife who was a solicitor aided in the drafting of the agreement.

⁵⁷⁹ Diduck (n 458) at page 101.

⁵⁸⁰ Brian Bix, ‘Private Ordering and Family Law’ (2010) 23(1) *Journal of the American Academy of Matrimonial Law* 249. See also: Stephen Cretney, ‘Private Ordering and Divorce – How far can we go?’ (2003) 33(6) *Family Law* 399; Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Socio-legal Studies 2017).

⁵⁸¹ Barlow, Hunter, Smithson and Ewing (n 580). See also: Ministry of Justice, Department for Education and the Welsh Government, *Family Justice Review Final Report* (FJR 2011); Felicity Kaganas, ‘Justifying the LASPO Act: authenticity, necessity, suitability, responsibility and autonomy’ (2017) 39(2) *Journal of Social Welfare and Family Law* 168.

⁵⁸² Bix (n 580). See also: Cretney (n 580).

⁵⁸³ Barlow, Hunter, Smithson and Ewing (n 580). See also: Kaganas (n 581).

rights. Following the enactment of the Guardianship of Infants Act, 1964 (hereafter the ‘1964 Act’) the enforceability of a separation agreement concerning a child, was determined by the courts with reference to the welfare principle.⁵⁸⁴ More recently, tenets of this principle have been given a constitutional basis following the successful passing of the Children’s Rights Referendum in November of 2012 which resulted in the enactment of the Thirty-first Amendment of the Constitution (Children) Act 2012 in 2015. This Act which inserted Article 42A in the Irish Constitution, provides for express rights of the child and identifies the associated responsibilities of the State. Through the implementation of the ‘best interests’ principle, which is afforded an increased scope to the welfare principle, there is an interference with the otherwise autonomous rights of parents when separating by way of agreement. The freedom to negotiate and enforce the terms of their separation is potentially limited, as the child’s best interests become the paramount consideration. In a comparable fashion, albeit not in relation to children, the degree to which separation agreements could facilitate party autonomy in an Irish context was altered following the enactment of the 1976 Act. Prior to the enactment of the 1976 Act, Shatter notes that it was not uncommon that an agreement which provided for the payment of maintenance or a lump sum intended to be a final settlement, would include a stipulation whereby the wife would covenant not to seek a further maintenance order.⁵⁸⁵ Following the enactment of the 1976 Act, s. 5 introduced the right to seek maintenance where the award of such maintenance was determined by the court as ‘proper in the circumstances’. Evidence of how the newly implemented statutory right to apply precluded party autonomy is discernible in *H’D v P’D* where a husband sought to neglect his duties to support his spouse by way of alimony on the basis of an agreement that they had entered into.⁵⁸⁶ In consideration of the agreement, Walsh J stated that ‘The consent which was entered into in the present case was in effect a separation agreement though not in the ordinary form of a separation agreement.’⁵⁸⁷ Despite both parties freely entering into the

⁵⁸⁴ Section 3 of the 1964 Act (as enacted). Section 3 specified that ‘Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.’

⁵⁸⁵ Alan Shatter, *Family Law in the Republic of Ireland* (4th edn, Butterworths 1997) at page 307.

⁵⁸⁶ *H’D v P’D* [1978] WJSC-SC 1144 (unreported). The agreement in question had been signed by both the husband and wife along with their solicitors. This case established a common law obligation to support the dependent spouse with the payer spouse unable contract out of.

⁵⁸⁷ *ibid* at page 5.

agreement, Walsh J regarded himself as required to override its finality.⁵⁸⁸ Given the existing legal landscape, it was asserted that ‘a provision in any such agreement for periodical maintenance payment is not final and there is nothing to prevent the spouse receiving the payments from subsequently applying for a maintenance order if the circumstances have changed.’⁵⁸⁹ Curiously Walsh J failed to cite s. 27 of the 1976 Act which had already established the position adopted in *H’D v P’D*, providing that ‘An agreement shall be void in so far as it would have the effect of excluding or limiting the operation of any provision of this Act.’ It is evident that the position adopted by Walsh J coupled with s. 5 and 27 of the 1976 Act serve to inhibit party autonomy, given the inability to now preclude the ongoing spousal right to seek maintenance, a very significant impact of this statutory enactment.

While introducing an important spousal protective measure, at the expensive of individual autonomy, a legitimate criticism of the 1976 Act was its failure to provide guidance on the amount payable, specifying that ‘in determining the amount of any payment, shall have regard to all the circumstances of the case.’⁵⁹⁰ This discretionary approach which may be seen to encourage interspousal bargaining is retained to the present day, despite numerous calls for reform, most recently with the *Report of the Child Maintenance Review Group*.⁵⁹¹ Rogerson opines that ‘child support policies have increasingly emphasized standardization and transparency, including the development of formulas and guidelines for determining the amount of child support.’⁵⁹² In light of the problems associated with discerning the amount payable on

⁵⁸⁸ *ibid* at page 7. Walsh J in referencing the 1976 Act outlined that ‘the operation of the Act cannot be affected by a separation agreement...It is clear from the whole structure of the Act that its purpose is to deal with the situation of the parties at the time the proceedings were brought under the Act...The basic question to be decided is whether at any given time there is a failure by one spouse to provide reasonable maintenance for the support of the other spouse and for any dependent children of the family of the spouses. In my view it is not possible to contract out of the Act by an agreement made after the Act came into force or by an agreement entered into before the legislation was enacted.’

⁵⁸⁹ *ibid* at page 7-8.

⁵⁹⁰ Section 5(4) of the 1976 Act.

⁵⁹¹ Department of Social Protection, *Report of the Child Maintenance Review Group* (DSP 2022) at page 129. The Review Group advocates for the introduction of guidelines that ‘are intended to describe a formula system but with inbuilt flexibility and discretion in their interpretation.’

⁵⁹² Carol Rogerson, ‘Child Support, Spousal Support and the Turn to Guidelines’ in John Eekelaar and Rob George (eds), *Routledge Handbook of Family Law and Policy* (1st edn, Routledge 2014) at page 154.

a discretionary basis, O’Sullivan notes that the majority of common law countries have converted to a more defined and guided system.⁵⁹³

While the capacity of separation agreements to facilitate party autonomy has been depleted, so too has their utility in family law generally. As noted in Chapter 3, following the implementation of the 2019 reforms, which altered the required periods of living apart, clients primarily seek divorce as a sole marital remedy. This is supported by the qualitative data in this research, as the majority of solicitors interviewed highlighted how they rarely execute separation agreements. Solicitor 5 noted:

I cannot remember the last time I completed a separation agreement. If there are no issues that need to be addressed, the parties can be advised to wait until such time as they qualify for a divorce if this is their intended outcome. If particular issues arise such as maintenance, then these are usually dealt with on a stand-alone basis either through correspondence or a court application.

Further illustrating the decline in separation agreements sought by clients, Solicitor 1 noted how they have:

not applied to make a separation agreement a rule of court in a long time, the fact that now one can get a divorce after 2 years apart may have something to do with that.

While the incentive to executing a separation agreement has diminished, parties are still encouraged to negotiate a settlement in order to form the basis of a decree of divorce ruled on consent. In describing the advantages of this approach, Solicitor 5 specified how:

⁵⁹³ Kathryn O’Sullivan, ‘Child Maintenance Review Group Report: A Critique and Call for Reform’ (2023) 26(2) Irish Journal of Family Law 37.

if we all try and reach a settlement now that you can live with, at least you know what it is. You know what the outcome is going to be. So, it's their choice at the end of the day.

In order to streamline the system to account for these consent divorces, Solicitor 7 noted that:

they [the courts] do separate the consent matters and the hearings, the full on fights.

Where the divorce is sought on the basis of consent, Solicitor 7 proceeded to outline how it is a faster process, noting that in order to:

get your consent divorce ruled, it's going to take fifteen minutes, maybe. And they squeeze as many in as they can.

While acknowledging the benefits for parties in negotiating a settlement the views of Solicitor 5 above regarding party autonomy are somewhat misleading. Whatever is agreed by the parties, the judiciary retains the capacity to alter the terms where of the view that proper provision has not been made. Regardless, it is desirable that parties negotiate a settlement on the terms of their dispute, thus enhancing the potential for a self-determined outcome. While similar, it must be noted that the context and style in which this process of negotiation takes place differs to the mediation process, as is discussed in the next chapter on service synergy.

This section demonstrates that although there is an increasing appreciation for familial autonomy in the resolution of marital disputes, it does not supersede the necessity to establish proper provision. Crowley notes that 'the state's capacity to retain ultimate control over the resolution of family disputes...conflicts with the notion and practice of private contract law and the capacity of individuals to freely and voluntarily enter into a binding contract...' with such limitations to party autonomy predominantly

stemming from the public policy issues that arise.⁵⁹⁴ Central in this regard is support for family obligations which prevents individual members from becoming dependent on the State.⁵⁹⁵ However, the State's lawmakers, both legislative and judicial, continue to struggle to strike a balance between respecting individual autonomy and reinforcing family responsibilities, resulting in a regime that is often inconsistent and unpredictable. Drawing on the preceding analysis, proposed reforms to enhance the independence and self-determination of spouses while fostering a supportive and equitable environment for all will now be considered.

4.7 Enhancing Autonomy Through Reform

Regulation is commonly perceived as the antithesis to autonomy. Woolf opines that:

The defining mark of the state is authority, the right to rule. The primary obligation of man is autonomy, the refusal to be ruled. It would seem, then, that there can be no resolution of the conflict between the autonomy of the individual and the putative authority of the state...it would seem that anarchism is the only political doctrine consistent with the virtue of autonomy.⁵⁹⁶

While cogent, this assertion by Woolf is perhaps overstated, as regulation is recognised as a fundamental requisite of a functioning society and as will be argued, can promote the attainment of individual autonomy.⁵⁹⁷ Expressing an alternative view to Woolf, May opines that 'the regularity and stability provided by the authoritative rules of society seem necessary for any meaningful sense of self-determination.'⁵⁹⁸ Central to

⁵⁹⁴ Louise Crowley and Maebh Harding, 'Contractualisation of Family Law in Ireland' in Frederik Swennen (ed), *Contractualisation of Family Law – Global Perspectives* (Springer 2015) at page 237.

⁵⁹⁵ Patricia Frericks and Martin Gurin, 'Family as a redistributive principle of welfare states: An international comparison' (2023) 33(1) *Journal of European Social Policy* 52.

⁵⁹⁶ Woolf (n 457) at page 18.

⁵⁹⁷ David Aberle, Albert Cohen, Arthur Davis, Marion Levy, and Francis Sutton, 'The functional prerequisites of a society' (1950) 60(2) *Ethics* 100.

⁵⁹⁸ Thomas May, 'The Concept of Autonomy' (1994) 31(2) *American Philosophical Quarterly* 133 at page 133.

this premise is the importance of predictable legal regimes, a view which Hayek shares in specifying that:

the rationale of securing to each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge, especially of his concrete and often unique knowledge of the particular circumstances of time and place. The law tells him what facts he may count on and thereby extends the range within which he can predict the consequences of his actions...the law thus serves to enable the individual to act effectively on his own knowledge.⁵⁹⁹

Hayek suggests that not only is the ability to self-determine important but so too are the conditions upon which the decision is being made. The critical importance of information provision in guiding well informed decision making applies in all aspects of law. When drawing on the views of May and Hayek it is argued that regulation has the capacity to facilitate or bolster autonomy where advantageously applied. This is because predictable legal regimes have a vital role in enabling individuals to make informed and independent choices. This however contrasts with the current Irish marital breakdown regime due to its lack of predictability, as previously noted.⁶⁰⁰

The majority of solicitors and mediators interviewed noted their desire for a more predictable and defined regime. Highlighting the challenging nature of marital disputes, Solicitor 2 referred to ‘the lack of predictability’ and how this impacts on the negotiation process in specifying that:

My experience is not that there are legal practitioners saying
get more and more and more. My experience is that it is clients

⁵⁹⁹ Friedrich Hayek, *The Constitution of Liberty* (Routledge 1999) at page 156 – 157.

⁶⁰⁰ Crowley (n 552); O’Shea (n 555). See also: Katharine Baker, ‘Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family’ (2012) 2012(2) University of Illinois Law Review 319 at page 359. Albeit not in an Irish context, Baker opines that ‘Without sufficient guidance on what an award might be, many women-even those in fairly long-term marriages-forego even attempting to secure alimony because bargaining for it is too difficult.’

who feel that they're entitled to more...You know it's about clients' expectations and clients' beliefs.

In considering how such misconceptions could be curtailed, Solicitor 2 suggested that clients be given:

an idea of a Ball Park that they're working within, of what's reasonably expected under normal circumstances.

It is through the use of guidelines, principles, and formulas (where appropriate) that this 'ball park' could be established in a framework to provide resolution to marital disputes.⁶⁰¹ In stark contrast, the approach in Ireland has arguably established a vacuum of information/direction that could otherwise perform a vital role in guiding and informing client expectations. The findings of this research suggest that individual's uninformed, and subjective beliefs can negatively impede the resolution of marital disputes as is now discussed.

This gap between client expectations and the operation of the law can be even more challenging for mediators, given their facilitative role. Describing the mediation landscape and its associated difficulties, Mediator 7 specified that:

however they [the clients] want to finalise that agreement, either as lay litigants or with solicitors, they're part of the legal process, so therefore the agreements have to fit into a legal framework and mediators have to have that knowledge without being able to give advice. They have to have that knowledge of what's likely to succeed in the Court and to be able to help clients to identify that. And that's difficult because we don't have enough family law that's distinctive and written down

⁶⁰¹ O'Sullivan (n 516); Government of Canada, *Spousal Support Advisory Guidelines* (DoJ Canada 2024). Though introduced on a non-legislative basis, following an extended period of research, Canada published its Spousal Support Guidelines. O'Sullivan notes that these guidelines, which are widely accepted amongst lawyers and judges: (i) account for the parties individual circumstances; (ii) provide parties with a range of what could reasonably be expected; (iii) more easily identify outliers which are then afforded increased attention and scrutiny; and (iv) have resulted in increased consistency in outcome.

clearly, you know, it's very vague. It's very much down to individual judge's interpretation... You know there needs to be more consistency in the judiciary, as to what kind of agreements are acceptable.

Similarly, Mediator 5 noted that:

oftentimes you almost get asked directly in mediation, you know, what's the going rate for maintenance?

Having highlighted their inability to provide legal advice, Mediator 5 asserted that:

if there was a range of figures that they [the client] could just think about, that could again help inform their own decisions. I think that would be really helpful. So that's certainly something I would like to see improved.

Were such guidance to be provided, Mediator 5 was of the belief that it would:

make a better experience for the clients.

While posing a challenge to service providers (particularly mediators) in how they support their clients, this absence of information could place certain individuals at risk in the negotiation process. In their seminal article *Bargaining in the Shadow of the Law: The Case of Divorce* Mnookin and Kornhauser identify the practical implications of how the particulars of a divorce regime can impact the negotiation process. They specify how 'custody, alimony, child support, and marital property are all striking for their lack of precision and thus provide a bargaining backdrop clouded by uncertainty.'⁶⁰² Given this uncertainty inherent in family law disputes, the 'risk preferences' of parties involved will have implications on their capacity to negotiate effectively.⁶⁰³ This influence is unfortunate as it is arguable that those who are

⁶⁰² Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution' (1978) 88(5) Yale Law Journal 950 at page 969.

⁶⁰³ *ibid* at page 970.

financially vulnerable are more commonly risk averse and can therefore be at a disadvantage or prone to exploitation.⁶⁰⁴ It is contended that this impact inhibits autonomy, as included within the ‘conditions of autonomy’ as identified by Raz, is the ability to make choices ‘free from coercion and manipulation by others, he must be independent.’⁶⁰⁵ Accordingly, it is necessary that attempts are made to mitigate this factor through the establishment of a more considered, guided, and defined regulatory process. In support of this stance, Jules and Nicola note how ‘more case law, more precedent...offer a more predictive quality to negotiations’ for in the absence of such, one may accurately ‘describe family law negotiations as bargaining in the shadow of the unpredictable Wild, Wild West.’⁶⁰⁶ On this basis it could be inferred that a more predictable regime would lend itself towards a more balanced bargaining process with a greater respect for individual autonomy.⁶⁰⁷ Support for this stance is offered by Crowley who asserts that ‘In practice, predictable laws, and thus identifiable outcomes, should lessen the scope for protracted disputes and ultimately facilitate private bargaining.’⁶⁰⁸ While aiding parties in the self-determination of their dispute, Crowley further asserts how this approach could curtail the capacity of the judiciary to excessively limit party autonomy, noting:

The articulation of policy aims in this context would diminish the significance of the judicial discretion currently embedded in the Irish divorce process, given that where clear principles and policies are articulated, these aims provide guidance to the judiciary and reduce the likelihood of unintended outcomes. Such structure and direction would also create identifiable boundaries for the parties to the divorce process, facilitating

⁶⁰⁴ Diduck (n 458) at page 104. Diduck notes the impact of care responsibilities as she outlines how they ‘can have a significant impact upon ones financial security and prospects, one’s bargaining power and freedom to make choices about how to arrange one’s life.’

⁶⁰⁵ Raz (n 463) at page 373. At page 378, Raz notes how ‘Coercion and manipulation subject the will of one person to that of another. That violates his independence and is inconsistent with his autonomy.’

⁶⁰⁶ Adrienne Jules and Fernanda Nicola, ‘The Contractualization of Family Law in the United States’ in Frederik Swennen (ed), *Contractualisation of Family Law – Global Perspectives* (Springer 2015) at page 348.

⁶⁰⁷ John Eekelaar, ‘Financial and property settlement, A standard deal’ (2010) 40(1) Family Law 359 at page 359. Eekelaar opines that ‘it seems essential to responsible negotiation for both sides to know how far they are accepting a deviation from the default outcome.’

⁶⁰⁸ Crowley (n 552) at page 11.

the securing of the identified aims through either court order of private ordering.⁶⁰⁹

While Crowley recognises the drawbacks of a discretionary regime, she does not advocate for its removal. Rather, she proposes that the present regime be refined such that the discretion once exercised, is not unbounded. In providing the relevant guidance, it is foreseen that private ordering would more appropriately align with expectations of what could reasonably be expected (once articulated). This position is also adopted by O'Sullivan, who in drawing on the work of Crowley, suggests that the 'adoption of a more rule-oriented approach to ancillary relief, on the other hand, could potentially ensure more fundamental protection, particularly to vulnerable, financially weaker spouses' and that the 'rule-oriented scheme would also promote greater judicial consistency and better facilitate the majority of divorcing spouses engaged in private bargaining.'⁶¹⁰ While a more rule-oriented approach may arguably enhance the potential for private ordering and, by extension, individual autonomy, it would nonetheless require the introduction of additional constraints into the current regime, a development that aligns with Hayek's perspective. It would therefore be necessary to limit the autonomy perceived to heighten the autonomy achieved.

With this desire to develop a more defined and structured regime, the next question must be how such an approach can be achieved? The views expressed amongst some research participants indicate that it is both feasible and attainable. Describing the nature of relationship breakdown disputes, Solicitor 2 noted how:

it's the same stuff over and over again, right? People need to agree to the family home. They need to agree on access for the children, maintenance, a lump sum. They need to agree their pension adjustment orders. So, you can make scenarios using those. While it's complex, it's also fairly straight forward like.

⁶⁰⁹ Crowley (n 536) at page 236.

⁶¹⁰ O'Sullivan (n 516) at page 118. In making this assertion O'Sullivan partially relies on the work of Scherpe who explores a variety of jurisdictions approach to private ordering and the safeguards incorporated into the various regimes. For further reading see: Jens Scherpe, *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford: Hart Publishing, 2012).

In identifying the matters common to relationship disputes, there is a potential to develop targeted areas of guidance which individuals may draw upon as relevant to their circumstances. Expanding on how this informed guidance could be both developed and utilised, Mediator 5 noted:

I'm sure that information is out there. So again, there must be volumes of judicial decisions around maintenance orders perhaps. And it's not that anybody has to stick to those, it's just so that people have a starting point in terms of their conversations, a point of reference really. And then you know, it's up to themselves individually and how much or not they utilise that information and you know build it into their own financial circumstances.

Drawing on the findings of the qualitative data, there is a basis to contend that certain valuable information could be recorded by the Court Service (if this is not already happening), which would provide useful insights for interested parties into the courts application of the governing laws. Such a development would have the potential to provide novel guidance for separating parties involved in lower value cases currently determined in the Circuit Family Court, insights that are long overdue given the paucity of reported judgments at that level.⁶¹¹ When asked whether the quantity of resources impacts the complexity of disputes, Solicitor 4 emphatically responded:

‘Oh God yes!’

They elaborated further:

it's not like one of these High Court cases where you're dividing up assets and shares and paintings and you know jewellery and all that...in a lot of our cases both parties are on

⁶¹¹ Aisling Parkes, Simone McCaughren, and Kenneth Burns, *The Operation of the In Camera Rule in Family Law Proceedings* (DoJ 2025).

social welfare. So really, it's just a question of um. Navigating a fairly, you know simple formula for separation or divorce where they just literally, you know, become legally divorced the same way as they got legally married. You know it's the same, without the meal.

This perspective underscores the relative simplicity of many LAB cases and highlights the potential benefit of recording how the courts determine such disputes. A consideration of this position suggests that this reform could be of particular use to LAB clients, given the necessity for them to satisfy a means test.⁶¹² Ultimately, it is contended that if agreements formed through private ordering more closely reflected the shared objectives of lawmakers, the legislature, and the judiciary (once identified and agreed), the agreements would be more widely valued. Based on the evidence gathered, it is therefore suggested that a more predictable and structured regime could enhance party autonomy. Furthermore, such party autonomy could be exercised in a manner that is less prone to exploitation, as individuals have a greater awareness of what is commonly obtained in their circumstances.

While an increase in guidance and certainty could provide for a more balanced negotiation process, the importance of judicial discretion and supervision must not be forgotten. In light of the existing discretion-based approach in Ireland, potential reforms should seek to increase the instruction and predictability of the Irish divorce regime while simultaneously retaining the prerequisite of proper provision. For over a decade Crowley has advocated for such an approach through the establishment of policy aims and guidelines noting that:

Adjudicating on the basis of fairness therefore demands an awareness of the social policy aims of the jurisdiction which, in order to satisfy the criterion of democracy, should ideally be articulated in the governing laws. Where direction is provided

⁶¹² O'Sullivan (n 516); Government of Canada (n 601). While calculating spousal support may be more straightforward in cases involving modest assets, it is by no means limited to them. The successful application of Canada's Spousal Support Advisory Guidelines across a wide range of cases, along with the experience of jurisdictions that follow community property regimes, provides a strong foundation for the proposed reforms aimed at resolving all aspects of marital disputes.

as to the aims and priorities of a distribution regime, this can allow the legislature, supported by the judiciary, to identify what fairness demands and thus add predictability and consistency to its system of regulation.⁶¹³

Consideration of this proposition presents an opportunity to reform the Irish divorce regime to good effect. Through the articulation and acceptance of guidelines and underlying aims, the current lack of predictability could be mitigated.⁶¹⁴ Such mitigation may consequentially enhance private autonomy through an increased acceptance of private contracts, while simultaneously retaining the protection currently afforded through achieving a baseline of ‘proper provision’. Having identified how potential reforms could more appropriately structure a framework with the aim of facilitating/enhancing party autonomy, the suitability of dispute resolution mechanisms that provide for this aspiration will now be assessed.

Part 2

4.8 Autonomy in Mediation

When compared to court-based litigation, mediation is recognised by many as promoting higher levels of party autonomy.⁶¹⁵ Singer outlines how ‘proponents view mediation as superior to adjudication precisely because mediation is designed to return decisional autonomy to the divorcing parties.’⁶¹⁶ Such is the extent of this position that Roberts and Moscati outline how mediation’s ‘core values embody an ethic of respect

⁶¹³ Crowley (n 536) at page 238.

⁶¹⁴ O’Sullivan (n 516). O’Sullivan discusses in detail how the State could adopt a rule-based approach while simultaneously retaining judicial discretion. See also: Kathryn O’Sullivan, ‘Ancillary Relief & Private Ordering: The Vulnerability of Financially Weaker Spouses’ (2016) 19(1) *Irish Journal of Family Law* 3.

⁶¹⁵ Hazel Genn, ‘What is Civil Justice For – Reform, ADR, and Access to Justice’ (2012) 24(1) *Yale Journal of Law & the Humanities* 397. See also: Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* (LRC CP 50 – 2008); Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98 – 2010); Natia Chitashvili, ‘Safeguarding Self-Determination in Family Mediation: Ethical Challenges of Power Imbalance and Violence’ (2025) *Journal of Law* 46. Although noting higher levels of self-determination, Chitashvili stresses the necessity for appropriate safeguards to support this autonomy.

⁶¹⁶ Jana Singer, ‘The Privatization of Family Law’ (1992) 1992(5) *Wisconsin Law Review* 1443 at page 1513. See also: Alison Diduck, ‘Autonomy and Family Justice’ (2016) 28(2) *Child and Family Law Quarterly* 133.

– in particular, for the parties’ own decision-making authority.’⁶¹⁷ Sharing in this view, Client 4 noted that:

‘the aim of it [mediation] is to try and ensure that there is more autonomy, more insight, more interaction with people who are looking to separate.’

Such is the centrality of autonomy in mediation, that Diduck has suggested that the ‘A’ in ADR has come to mean ‘autonomous’.⁶¹⁸ Though this interpretation has not been widely adopted, the importance of autonomy in this context is not disputed. In Ireland, statutory recognition for autonomy can be seen in s. 6(9) of the 2017 Act which describes the mediation process and in doing so specifies that it ‘is for the parties to determine the outcome of the mediation.’⁶¹⁹

As was briefly noted in Chapter 3, the association of autonomy as a cornerstone of the mediation process is premised/dependent on the mediator’s facilitative role.⁶²⁰ Rasnic outlines how the:

role of the mediator is not judgmental, nor does he/she take a position on behalf of one party or the other. The underlying principle is to permit the parties themselves to make the ultimate determination resolving the issue, with the mediator’s conciliatory assistance. His role, then, is to facilitate, rather than to impose, a settlement.⁶²¹

Similarly, Blakey highlights how:

⁶¹⁷ Marian Roberts and Maria Moscati, ‘Introduction’ in Marian Roberts and Maria Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020).

⁶¹⁸ Diduck (n 616). See also: Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* (LRC CP 50 – 2008) at 2.07. The LRC notes that there is an absence of a universal consensus as to what the ‘A’ in ADR constitutes as others have referred to it as constituting: appropriate; additional; amicable; accelerated.

⁶¹⁹ Section 6(9) of the 2017 Act.

⁶²⁰ Carol Rasnic, ‘Alternative Dispute Resolution Rather Than Litigation? A Look at Current Irish and American Laws’ (2004) 4(2) *Judicial Studies Institute Journal* 182.

⁶²¹ *ibid* at page 183.

A facilitative mediator...has a limited, strictly defined role because it is believed that the parties are best placed to produce a viable settlement that reflects their personal circumstances. This framework intends to provide parties with a greater sense of autonomy and control over their dispute.⁶²²

Beyond the theoretical discussions, the majority of those interviewed directly associated the facilitative approach with the FMS model. In giving an overview of their role, Mediator 7 asserted that:

what we do is we offer a safe space to look at options and the key to mediation is facilitating that kind of option development.

Recognising the value in self-determination in these disputes, Solicitor 5 observed:

it's in everybody's best interest to come up with something that you [the client] agree with, you take responsibility for, because then it's more likely to actually last as opposed to having an order imposed on you that one or both of you are not happy with and you're stuck with it to a large extent and therefore you may not want to, you know, kind of comply with it to a large extent.

It is seemingly apparent that given the mediator's role does not include determining the outcome, clients assume more responsibility and thus attain a greater degree of autonomy. This feature of the process contrasts directly with court-based litigation where decisions are imposed by a third party. Recognising its value, the Irish State has formally endorsed the facilitative approach, with the 2017 Act defining the process as 'confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve

⁶²² Rachael Blakey, 'Cracking the code: the role of mediators and flexibility post-LASPO' (2020) 32(1) *Child and Family Law Quarterly* 53 at page 56.

the dispute.’⁶²³ However, a further provision of the 2017 Act enables some deviation. Under s. 8(4) of the 2017 Act, it is noted that ‘The mediator may, at the request of all the parties, make proposals to resolve the dispute, but it shall be for the parties to determine whether to accept such proposals.’ Thus, despite describing mediation as facilitative, the 2017 Act also enables an evaluative approach. McRedmond observes that the inclusion of this provision acknowledges the widespread practice among lawyer-mediators of offering evaluative input.⁶²⁴ While the 2017 Act provides for an evaluative approach, it is dependent on the parties expressing their desire for the mediator to be evaluative, theoretically providing the parties with autonomy over the processes model.⁶²⁵ Parties are therefore in control of the process and can disengage at their choosing, thereby attaining autonomy over both the outcome and their participation.

Although the 2017 Act makes provision for an evaluative approach, the qualitative data, in aligning with the LAB/FMS description of mediators,⁶²⁶ suggests that FMS mediators are strictly facilitative as Mediator 2 noted that:

obviously mediation is talking about giving the power back into clients’ hands, we don't tell a client what to do. We don't give them any advice. We don't give them any kind of opinion if you like in terms of what they should or shouldn't do in their circumstances. What we do is we lead them through a process which allows them to investigate those things themselves.

However, a more nuanced understanding suggests that the distinction between facilitative and evaluative mediation is not as clear-cut as often presented.⁶²⁷ Blakey

⁶²³ Section 2 of the 2017 Act.

⁶²⁴ Penelope McRedmond, *Mediation Law* (Bloomsbury 2018) at paragraph 3.17.

⁶²⁵ Effectively endorsing this capacity would likely require parties to have a comprehensive understanding of the mediation process, underscoring the importance of legal literacy, a matter discussed on an ongoing basis in this thesis.

⁶²⁶ Legal Aid Board, *Family Mediation Procedures Handbook* (LAB 3rd edn 2023) at page 1-9. Noted in the handbook is that ‘Mediators are highly skilled professionals facilitating the couple in their negotiations; they do not take sides and are neutral as to the outcome of the process.’ As the handbook contains no reference to an evaluative approach, it suggests that the facilitative model is fully endorsed amongst its service providers.

⁶²⁷ Leonard Riskin, ‘Decision-making in Mediation: The New Old Grid and the New New Grid System’ (2003) 79(1) *Notre Dame Law Review* 1. See also: Alyson Carrel, ‘Dismantling the “Facilitative”

defines the process of reality-testing as assessing ‘whether a proposal is a workable and viable solution for both participants’,⁶²⁸ and argues that where employed it may constitute ‘evaluation by facilitative proxy’,⁶²⁹ situating this model in a more central position on Riskin’s continuum as noted in Chapter 3. In conducting the qualitative interviews, several mediators referenced the frequent use of reality testing. For instance, Mediator 3 remarked:

‘we're testing all the time. From the minute they come in, we're testing, testing, testing, testing until the very day when they leave.’

Similarly, Mediator 4 noted that:

‘what I tend to do, is I tend to talk through the scenario [of their agreement]... And I'm clarifying that I don't provide options and that I'm stubbornly obstinate when they ask me for solutions.’

While conducting reality testing, Mediator 4 views their approach as still facilitative, emphasising scenario-based discussions while maintaining neutrality by refraining from offering solutions. A central tool for such reality testing is budgeting, with Client 4 noting that their mediator required them to work through the financial implications of their agreement:

literally euro by euro.

While these examples may indicate the presence of evaluative elements, they may also reflect practices considered compatible with facilitative mediation. Chang observes that it is the manner in which reality testing is conducted, rather than its mere presence,

“Evaluative” Dichotomy: Reflecting on Riskin’s Grid and Predicting the Future’ in Art Hinshaw, Andrea Schneider, and Sarah Cole (eds), *Discussions in Dispute Resolution: The Foundational Articles* (Oxford University Press 2021).

⁶²⁸ Rachael Blakey, *The Conceptualisation of Family Mediation: Access to Justice after LASPO* (PhD thesis, Cardiff University 2021) at page 138.

⁶²⁹ *ibid* at page 138.

that determines whether it leans toward a facilitative or evaluative approach.⁶³⁰ In the context of autonomy however, the findings suggest that reality testing, as described by participants, may actually support party autonomy by promoting informed decision-making and enabling parties to critically assess the viability of their own proposals. Nonetheless, this raises a broader concern about whether such practices could gradually shift mediation as offered by the FMS into the evaluative sphere. An overreliance on reality testing, particularly if directive in tone or outcome, may risk subtly influencing party decisions and diminish their ownership over the process. That said, the available data is limited and does not support firm conclusions. Rather, it indicates that while FMS mediators predominantly adhere to a facilitative model, there exists a degree of practical fluidity. This nuance warrants further exploration, especially as the next section considers whether a uniform commitment to party autonomy is advisable in all contexts, particularly where power imbalances or participant vulnerability may compromise the fairness or effectiveness of the mediation process.

4.9 The Threat of Autonomy

Whilst this chapter has advocated for increased levels of autonomy, it also suggests that it is unwise to wholly abandon the capacity for the judicial oversight and discretion as embedded in the marital breakdown regime. In support of this position, this section will consider the potential concerns of promoting unfettered autonomy in this context. Due to the intensely personal negotiations that typically take place in relationship mediation, it is important to also recognise the threat of power imbalances and coercive control which often form the basis of the feminist critique and limitations of the process,⁶³¹ and the need for an inherent/embedded capacity to protect vulnerable parties where there is an unequal bargaining position.⁶³² Equally, it may be that parties

⁶³⁰ Tae Joon Chang, 'Risk Analysis, Reality Testing and Mediation' (2021) 14(1) American Journal of Mediation 43.

⁶³¹ Martha Shaffer, 'Divorce Mediation: A Feminist Perspective' (1988) 46(1) University of Toronto Faculty of Law Review 162. See also: Amy Sixsmith and Rachael Blakey, 'Family mediation and domestic abuse: lessons from Australia' (2025) 47(2-3) Journal of Social Welfare and Family Law 213. Sixsmith and Blakey discuss how family mediation is not a panacea and can be particularly dangerous where domestic violence is present.

⁶³² Women's Aid, *Submission Regarding the Mediation Bill 2017* (Women's Aid 2017). See also: Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010).

to the dispute are not similarly effective in the process of negotiation and therefore not on an equal footing in terms of bargaining skills/power.⁶³³ The potential for such imbalance is concerning, Wallbank notes how:

Mediation is founded on the idea that both parents are of equal standing, with equal bargaining power. The fear is that parties who are already vulnerable could be “supported” into “agreeing” to decisions they would object to if they had that freedom.⁶³⁴

Recognising this limitation, Mediator 7 articulated their ever-present concern as to whether:

the client is agreeing in the room, but really they're not agreeing, you know? And so then when they are in a one on one situation again, [the client will specify] “well, I don't think that's fair but I felt like I had to agree to it” so it's difficult.

This suggests that despite the party agreeing to the outcome in mediation, they may have been absent of the ‘capacity for autonomy’ as identified by Raz.⁶³⁵ In order to possess the ‘capacity for autonomy’ the decision being made must come from a position of independence from others, thus absent of coercion.⁶³⁶ While there are an array of circumstances that can contribute to an imbalanced negotiation process, of particular relevance to the current context is the role of caregiver.⁶³⁷ In discussing its impact, Diduck identifies how it:

⁶³³ Julie Wallbank, ‘Universal norms, individualisation and the need for recognition: the failure(s) of the self-managed post-separation family’ in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014) at page 84. As previously discussed in this chapter, an imbalance of power may arise for various additional reasons, for example, when one spouse is less financially secure or lacks sufficient information about likely outcomes, placing them at a bargaining disadvantage and limiting their autonomy.

⁶³⁴ *ibid* at page 84.

⁶³⁵ Raz (n 463) at page 372.

⁶³⁶ *ibid*.

⁶³⁷ Bill Hughes, Linda McKie, Debra Hopkins and Nick Watson, ‘Love’s Labour’s Lost? Feminism, the Disabled People’s Movement and an Ethic of Care’ (2005) 39(2) *Sociology* 259 at page 264.

can have a significant impact upon one's financial security and prospects, one's bargaining power and freedom to make choices about how to arrange one's life. And apart from these crude classifications, neither the domestic violence victim nor the carer is either exclusively autonomous or vulnerable.⁶³⁸

Providing empirical support for Diduck's position, Client 2 highlighted how their professional development was stifled as a consequence of their care giving role. Expressing dismay at their current situation, Client 2 noted how they are:

stuck in a situation where I am working locally in the job that I got while we were married and I'm actually finding it very hard to get a better and higher paying job because I started at a very low level and did it very late after raising the children.

The systemic imbalance that can arise from the act of caregiving has potential consequences for the financially dependent and more vulnerable spouse, particularly within a discretionary-based regime. Parkinson highlights how such a system invites litigation from risk-takers and tends to be weighted against those who are risk-averse or cannot afford to litigate.⁶³⁹ These individuals are at the mercy of the low 'take-it-or-leave-it' offer,⁶⁴⁰ notwithstanding the underpinning legislation which favours the vulnerable party. This dynamic is especially pronounced in facilitative mediation, where, despite the existence of supportive legislation, vulnerable parties may feel compelled to accept significantly less than they are entitled to, due to power imbalances and a desire to avoid conflict or further legal costs. While the requirement of proper provision is intended to support the dependent party, O'Sullivan queries the compliance with this requirement in practice, providing a basis for the continued relevancy of this concern.⁶⁴¹

⁶³⁸ Diduck (n 458) at page 104.

⁶³⁹ Patrick Parkinson, 'Reforming the Law of Family Property' (1999) 13(2) Australian Journal of Family Law 117. See also: Kathryn O'Sullivan, 'Ancillary Relief & Private Ordering: The Vulnerability of Financially Weaker Spouses' (2016) 1(1) Irish Journal of Family Law 1.

⁶⁴⁰ Parkinson (n 639).

⁶⁴¹ O'Sullivan (n 516).

Participant solicitors also identified domestic violence as a common occurrence amongst their client base. Solicitor 6 estimated that in:

about 70% of my cases there's going to be domestic violence.

Proceeding to detail how evidence arises in the absence of direct disclosure, Solicitor 6 noted how:

it might be something like oh no, I just want this to go away.
Oh he can have the house. He can have everything. And then
you're explaining it to them. Well, you know, you are entitled
to that.

It is evident that in such instances the client is significantly impeded in their ability to negotiate in their best interests. While a solicitor can advise their client on how best to proceed, the mediator is more restricted in their facilitative role. In the absence of legal advice, which many in mediation forego or do not have access to,⁶⁴² the process of mediation can prove an inappropriate forum for some. This limitation to the process was not lost on mediators who participated in this study, rather Mediator 3 noted that in the case of:

domestic abuse, you would certainly be saying, well, look, you
know, there's safety orders here, there's barring orders. You
know, each of you are saying that it's impossible to have a
conversation together. So, mediation isn't appropriate in this
circumstance.

The threat of power imbalances and coercive control featured prominently in the Oireachtas debates leading to the enactment of the 2017 Act. Seeking to confine the scope of the Bill, numerous contributions were made regarding its unsuitability in such instances. For example, Senator Lynn Ruane highlighted that:

⁶⁴² See Table 1 & Figure 1 on page 92.

When two parties are in a room trying to find some reconciliation, the mediator holds the balance of power. We can never really understand the balance of power that exists between those two parties outside that room...It is sometimes difficult to realise that for reasons of manipulation, coercion and risk to personal safety, one party in the room is under the complete power of the other party.⁶⁴³

Seeking to implement safeguards to address this concern, it was proposed that the Bill be amended ‘to prevent it from applying to proceedings where there are allegations of domestic violence or assault between parties or where the safety of one of the parties is at risk.’⁶⁴⁴ Amending the Bill in this fashion would have removed the statutes applicability where there were allegations of domestic violence. This more protective stance was not adopted, rather in enacting the statute, the 2017 Act excludes from its scope cases where there is or has been proceedings issued under the Domestic Violence Act 2018.⁶⁴⁵ While recognising that certain types of disputes are ill-suited to mediation, the result of this amendment is that it is only where domestic violence proceedings have been issued that the 2017 Act will not be applicable. Although mediation is a voluntary process, this outcome is concerning due to the acknowledged under reporting of domestic violence, and the distinct possibility given the nature of such relationships that a party could be coerced into mediation.⁶⁴⁶ Further, there is a notable omission from the statutorily prescribed role of the mediator in s. 8 of the 2017 Act, this being the necessity to screen the parties suitability for the process. Although not acted upon, Woman’s Aid directly highlighted this omission and in its submission at Committee stage, suggested that the Bill be amended to place a responsibility on

⁶⁴³ Seanad Debate 19 July 2017, Vol. 253 No. 3.

⁶⁴⁴ Dáil Debate 11 July 2017, Vol 957 No. 3. See also: Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98 – 2010) at paragraph 6.56. This stance whereby the Mediation Act 2017 would be unapplicable where there were allegations of domestic violence had also been outlined by the LRC whereby it was noted that ‘The Commission expressed the view in its Consultation Paper that mediation is inappropriate for resolving family disputes where domestic violence is alleged, where there are allegations of child sexual or physical abuse, where one of the parties suffers from alcohol or drug dependency, or where power imbalances exist between the parties.’

⁶⁴⁵ Section 3(1)(h) of the 2017 Act as amended by the Domestic Violence Act 2018.

⁶⁴⁶ Dáil Debate 11 July 2017, Vol. 957 No. 3. Outlined by Deputy Aengus Ó Snodaigh is that ‘Often what we find in domestic violence cases is that the allegation is made, but because of the fear and the dominance of one of the parties, one party will not initiate proceedings. However, sometimes the visible effects can be seen.’

mediators to screen their clients.⁶⁴⁷ Though arguably constituting a lacuna in the legislation, the majority of mediator participants in the qualitative phase noted that screening clients for domestic abuse is firmly entrenched within the FMS model. Mediator 3 observed that in the first session:

we start screening for domestic abuse...we talk to them separately and we've a really clear format for assessing for domestic abuse at that stage.

In such instances therefore, where the parties' circumstances raise concern, FMS mediators will discontinue the process. In other instances, where the root source of an imbalance is not identifiable, the incorporation of legal advice may present an alternative option and allow for mediation continuation. Given the utility of legal advice as a protective measure, its current and potentially enhanced role within the mediation process will now be ascertained.

4.10 Legal Advice in Mediation

In outlining the various aspects of the mediation process, s. 6(4)(c) of the 2017 Act specifies that a 'party may obtain independent legal advice at any time during the mediation.' Furthermore, the mediation agreement which is to be signed by the parties prior to engaging in the process, provides that there must be information on 'the right of each of the parties to seek legal advice.'⁶⁴⁸ This inclusion is imperative, as the LRC identified legal advice as a core mechanism to ensure fairness in the process.⁶⁴⁹ The importance of including these legislative safeguards in the mediation process, is emphasised by McRedmond who states that 'It is not for the mediator to proffer legal

⁶⁴⁷ Women's Aid, *Mediation Bill Submission* (Women's Aid 2017) at page 10.

⁶⁴⁸ Section 7(e) of the 2017 Act.

⁶⁴⁹ Law Reform Commission, *Consultation Paper on Family Courts* (LRC CP 1994) at page 146. Specified in the Consultation Paper is that it is 'usual practice, mediated agreements, before being set in binding legal form, to be reviewed by the parties' respective legal advisers. The role played by the legal adviser is a subtle one. On the one hand he or she must advise the client thoroughly on the legal implications, long and short term, of the various terms of the agreement, and give warning where it appears that the client is waiving or prejudicing his or her legal rights.' This point was reaffirmed in the subsequent: Law Reform Commission, *Report on Family Courts* (LRC 52 – 1996); Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* (LRC CP 50 – 2008); Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98 – 2010).

advice, as this would impair their role as an impartial and neutral facilitator of the mediation process.’⁶⁵⁰ Aligning with this position, Mediator 4 noted that:

if I start to present a solution, first of all, I'm disempowering them from owning the outcome. Secondly, if I suggest something, invariably someone is likely to feel that suits the other person's agenda slightly better than mine. So [the client is thinking] is the mediator hearing the other person better than me? Is the whole process being skewed in that other person's direction? So hence when they ask me for what I think they should do, I'm unhelpful. And so then I say, however, it's your job to obtain the information if there's a vacuum of information for you as to what to do, you should have a legal advisor helping you.

While Mediator 4 makes reference to information, this likely means legal advice, given the subsequent mention of a legal advisor. Through a requirement for an express right to secure legal advice, it is evident that the legislature was acutely aware of the need to create a context to best secure substantive fairness in mediation. Further to its statutory basis,⁶⁵¹ legal advice was nonetheless perceived by both solicitors and mediators throughout the qualitative element of the study as a fundamental safeguard. For mediators, legal advice is seen as a means to ensure parties are aware of their legal rights, in addition to mitigating the potential limitations of the facilitative approach (e.g. power imbalances). In describing one client who sought to sign an agreement that was heavily imbalanced and not in their favour, Mediator 1 noted that:

at a particular point in the process I said “look, I really think it would be important to get legal advice on this because it will become a legal document. You’re looking for a divorce, so it’s going to court”...I was looking for them (the legal advisor) to say to their client, which is what they would say anyway, “I

⁶⁵⁰ McRedmond (n 624).

⁶⁵¹ Section 6(4)(c) and 7(e) of the 2017 Act.

wouldn't be agreeing to all that." And then the client came back in and said, "actually darling, I'd love to give you the shirt off my back but my solicitor is not really going to let me go down that road."

Despite the mediator being acutely aware that the agreement was not in the interests of one of the parties to the dispute, it was outside their remit to suggest that they ought not enter into it. Although the facilitative role confines FMS mediators in this respect, it is arguable that the provision of legal advice by a third party is preferable and can run parallel with the ongoing facilitated mediation process. Not only does it operate as a safeguard and assist the parties in the dispute resolution process, it can also serve as a safeguard for the mediators. Regarding legal advice, Mediator 4 reported a practice of informing their clients that:

it's an unburdening of the potential responsibility on the part of the mediator if I know that both of you have advice going through this and you know the parameters within which you're negotiating and you're making your own choices then within that. It muddies the waters of my role if I'm kind of helping you and telling you what might or might not be given in a courtroom. So, if you have your independent advisor doing that, it's very useful. So, I do encourage it in my process. But it's your own choice. That's my usual conversation with the client at the outset.

Mediator 1 noted how legal advice is also a means to protect solicitors given their mandate to advise clients on the potential utility of mediation.⁶⁵² Mediator 1 observed that:

If family solicitors don't feel that family mediation is somewhere where they can let their clients be well served, they won't refer them. So, they're mandated to talk about family

⁶⁵² Part 3 of the 2017 Act. See also: s. 6 of the 1996 Act and s. 5 of the 1989 Act (as amended).

mediation but the number one thing for a solicitor is to meet the needs of the clients. And I know this for a fact, I absolutely know that there's some concern amongst family solicitors that if they were to refer Johnny and Mary to a family mediator, who then mediates a legal document with no recourse to legal advice, then they can't in all consciousness as a solicitor recommend that Mary goes into that process or Johnny goes into that process.

Despite the apparent safeguards afforded by contemporaneous legal advice, there is no mandate that parties receive it. This position is somewhat concerning given that the 2017 Act states that it is up to the parties to determine 'whether the mediation settlement is to be enforceable between them.'⁶⁵³ This provision of the 2017 Act therefore acknowledges the potential enforceable nature of a mediation agreement in the absence of appropriate safeguards. However, as will be discussed in full in the next section, the FMS does not adopt this stance as it expressly states that FMS agreements are not legally binding in the absence of additional legal services. Criticisms of a similar approach, to that accounted for in the 2017 Act, adopted in England and Wales, noted that this:

"it is up to you" idea of justice is devoid of a theory of power and uses the sophisticated and seductive language of autonomy to return family living and therefore family justice to the private sphere where the risks and often realities of structural and individual inequality are not the law's concern. It dramatically reduces the role of the court from protector of basic principles of fairness, to protector only of a gendered form of autonomy.⁶⁵⁴

It appears that whilst the Irish legislature noted the importance of substantive fairness in the mediation process, the 2017 Act places more emphasis on a liberalist view of

⁶⁵³ Section 11(1)(b) of the 2017 Act.

⁶⁵⁴ Diduck (n 616) at page 148.

autonomy, potentially at the cost of vulnerable parties. Whilst seemingly affording parties the unbounded capacity to self-determine, it will be seen however, that the 2017 Act introduces a broad scoping safety net through the introduction of a caveat to the enforceability of all mediation settlements.

4.11 The Enforceability of Mediation Settlements

The enforceability of mediation agreements is highly pertinent to discussions on autonomy as the LRC ‘considers that the enforceability of agreements reached through mediation or conciliation [a]s intrinsically linked to the principle of self-determination.’⁶⁵⁵ While s. 11 of the 2017 Act now provides a statutory basis for such enforceability outside of court proceedings, this was not always the case. Senator Lynn Ruane, reflecting on her own experience prior to the implementation of the 2017 Act, observed that:

‘the part that always stood out to me [with regards to mediation]...was that there was no enforcement of agreements. Women would enter into negotiations, often around access to their children and maintenance, but there was no way to enforce agreements. It can be a tiring and disheartening process to go through, to have to come back and then end up in the court system.’⁶⁵⁶

This shortcoming has long been recognised with the LRC noting, prior to the enactment of the 2017 Act, that ‘currently in Ireland (with some exceptions) no formal means exist by which mediated settlement agreements are enforceable, except those concluded during court proceedings, such as family proceedings, which may be ruled by the court.’⁶⁵⁷ Section 11 of the 2017 Act now addresses this lacuna and, as Conneely et al. note, enhances self-determination by enabling parties to choose whether their agreements should be enforceable, thereby strengthening their autonomy in the

⁶⁵⁵ Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98—2010) at page 87.

⁶⁵⁶ Seanad Debate 18 July 2017, Vol. 253 No. 1.

⁶⁵⁷ LRC (n 655) at page 63.

mediation process.⁶⁵⁸ This elevated capacity for autonomy under the 2017 Act is to be welcomed, however, whether there are any caveats to its endorsement must now be considered.

The enforceability of mediation settlements and thus the facilitation of party autonomy provided for under s.11 is arguably significantly limited by s.11(3) given that it provides that a:

court may, on the application of one or more parties to a mediation settlement, enforce its terms except where the court is satisfied that—(a) the mediation settlement—(i) does not adequately protect the rights and entitlements of the parties and their dependents (if any), (ii) is not based on full and mutual disclosure of assets, or (iii) is otherwise contrary to public policy, or (b) a party to the mediation settlement has been overborne or unduly influenced by any other party in reaching the mediation settlement.⁶⁵⁹

Although it is desirable that a settlement is not enforced in such instances, it is problematic that s. 11(3) refers to how the court ‘may’ enforce a mediation settlement, thereby suggesting that the agreement between the parties, if challenged, remains subject to the approval of the court. McRedmond notes that the ‘court therefore has a general discretion in deciding whether or not to enforce a mediation settlement even where none of the exceptions in s 3(a) are proved.’⁶⁶⁰ This provision illustrates the manner in which judicial discretion is in fact powerfully charged with determining whether individual autonomy is to be recognised. It is conceivable therefore that akin to the way the judiciary retains ultimate control in approving orders for judicial separation and divorce, the judiciary also appears to now retain control in determining the validity of a

⁶⁵⁸ Sinéad Conneely, Shane Dempsey, Róisín O'Shea, “‘On Such a Full Sea Are We Now Afloat’: Family Mediation in Practice in the Wake of the Mediation Act 2017” (2020) 23(3) Irish Journal of Family Law 73.

⁶⁵⁹ Section 11(3) of the 2017 Act.

⁶⁶⁰ McRedmond (n 624) at paragraph 8.44.

mediated agreement. McRedmond suggests that s. 11 potentially ‘introduces the concept of fairness into mediation by the back door.’⁶⁶¹ It could therefore be contended that adopting this right of subjective determination by the courts effectively acts as a rejection of the concept of self-determination, notwithstanding it being identified as a fundamental principle of mediation. Seemingly, the 2017 Act undermines the capacity of parties to definitively self-determine, however, it will now be seen that the model endorsed by the FMS adopts a similar stance but in a more concrete and direct fashion.

While it seems that the enforceability of mediation agreements is somewhat of a grey area in the 2017 Act, the FMS has adopted a more definitive position. Contained within the agreement to mediate, to be signed by the clients, is a clause which expressly provides that an agreement reached between the parties with the FMS will not be considered legally binding. Mediator 5 noted that the intent of this clause is to ensure clients:

are signing the agreement [to mediate] in the knowledge it [the subsequent mediation settlement] gives no legal effect.

In rationalising the approach adopted by the FMS in this respect, Mediator 1 noted how:

we [the FMS] decided that we would err on the side of caution until the Act settled down because it was far worse to put somebody into a legal agreement that was unsound, then it was to not offer that [the choice to determine whether or not the agreement is enforceable].

Whilst arguably incorporated as a safeguard, from a client’s perspective, Client 3 identified the absence of enforceability as a drawback to the process, noting:

⁶⁶¹ *ibid* at paragraph 3.94.

The only downside I suppose is ideally speaking, you would want it to, the mediated agreement, you would love that to be legally binding and to be able to wrap it up...For people who are in agreement on almost everything...it's a shame that you still have to go through, like there is no, you can't just kind of streamline that and make it fast and get it done, you have to go through a lot of legal stuff and you probably have to pay a lot of money still.

Additionally, Mediator 6 described how when they inform clients of this standing, they:

just put their eyes up to heaven and go, seriously?

Despite the discontent expressed amongst participants, it remains the case that within the context of judicial separation and divorce, it is arguable that the enforceability of mediation settlements is a moot point given the over-arching requirement that the State is to be satisfied that proper provision has been secured.

4.12 Constitutionally Mandated Judicial Oversight - The Core Barrier to Autonomy in Family law Disputes

Regardless of whether parties avail of legal advice, should they desire a decree of judicial separation or divorce, any agreement concluded through mediation (or litigation or separation agreement) will nonetheless be subject to the statutory and constitutional requirement of proper provision for both spouses and any dependent children where implementation is sought.⁶⁶² Thus, despite parties consciously choosing to mediate, the State in its protectionist role will ultimately determine whether the terms of this agreement satisfy the court, allowing the remedy sought to

⁶⁶² Article 41.3.2 of the 1937 Constitution of Ireland. It is specified that a Court will only grant the dissolution of a marriage where it is satisfied that 'such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law.'

be granted. Given the State's capacity to disregard some or all of the terms of the parties' agreement, it is arguable that such an intervention constitutes a paternalistic approach.⁶⁶³ Expressing their surprise at the necessity for this judicial oversight, Client 2 noted that:

we did understand that we can't do it in mediation for divorce, that we have to present it to a judge in a Circuit Court. So, we said look, when we present it to the judge will he give us the divorce straightaway, is that how it works? And that's when she said well, no, because the judge is actually going to review everything...and could rule in a different way or could change some conditions and we weren't really 100% aware of that because like in fairness we both did work out something that was quite fair I think.

Despite operating as a core impediment to the exercise of party autonomy, the degree to which judicial oversight and scrutiny is actually observed in practice is questionable.⁶⁶⁴ For example, Solicitor 7 stated that once handed the agreement, it is a common response of the judge to the parties, to enquire:

okay do you agree with this? Do you agree with this? Great you both agree, let's just run with it.

Similarly, Client 5 specified how:

he [the judge] asked little bits about it. I can't remember what, but it was mainly regarding the house, were we happy?

⁶⁶³ Dworkin (n 455) at page 124. Dworkin opines that soft paternalism is sometimes justified on the basis that the individual in respect of whom the paternalism is exercised is lacking in competency. In contrast, hard paternalism occurs in instances where there is no such evidence of the lack of competency. See also: Joel Feinberg, 'Legal Paternalism' (1971) 1(1) Canadian Journal of Philosophy 105.

⁶⁶⁴ O'Sullivan (n 516).

In light of this thesis having advocated in Chapter 3 for the retention of judicial oversight, it is worth querying how it may be more appropriately applied, particular in light of the previously discussed proposal advocating for increased statutory guidance.

Marital disputes feature prominently in the Irish Courts, as demonstrated in Chapter 3.⁶⁶⁵ As a consequence, the judiciary is under great pressure to manage an expansive caseload, resulting in the time afforded to these cases being constrained.⁶⁶⁶ In consideration of this challenge, it is contended that were increased guidance on the resolution of marital disputes introduced, it would more easily facilitate the identification of disputes that deviate from the norm. Routine disputes (those that fit within the accepted framework) could then be streamlined under the new guidance, freeing up judicial time for those that genuinely require closer scrutiny. This chapter has consistently advocated for such guidance, yet it also recognises the need to preserve a measured degree of judicial discretion. The following section therefore examines whether a revised conceptualisation of party autonomy can achieve this balance, offering practical support without unduly constraining the court's authority.

4.13 The Endorsement of Relational Autonomy

Given the familial context of the dispute, it is worth considering whether a relational approach to autonomy more closely aligns with the Constitutional obligation to protect the family unit and all its members. Where autonomy premised on individualism or liberalism meets criticism is the inability to guarantee an equitable negotiation process. Thus, the potential for an unequal bargaining position in the family context limits the capacity for mediation to be utilised in a fair and balanced manner. Diduck expresses significant concern in this regard, noting that the liberalist view of autonomy is:

premised on the myth of a pre-existing equal playing field on
which each individual has equal freedom, power and capacity

⁶⁶⁵ See Figure 3 on page 100.

⁶⁶⁶ O'Shea (n 555). In her empirical study of separation and divorce in the Circuit Court, O'Shea identified that the average duration in a consent divorce was 5.3 minutes and 7.5 minutes in a consent separation case. In contrast, a contested divorce case lasted on average 20.57 minutes and a contested judicial separation case lasted on average 16.79 minutes.

to express it...This autonomy is not necessarily impervious to dependency or structural and social conditions but when these are not rendered irrelevant in its mythical ideal expression they are taken to revoke, or at least to damage, the subject's autonomy.⁶⁶⁷

The liberalist understanding of autonomy therefore assumes that individuals are unattached and free of obligations, failing to consider the very real implications that third parties such as children or any other dependents will have on the negotiation process, as previously discussed.⁶⁶⁸ Briggs also critiques the liberalistic approach on the questionable presumption that legal subjects act in a rational, individualistic, and self-sufficient manner.⁶⁶⁹ To that end, while liberalistic autonomy is attractive in terms of securing self-determination, however, in practice this approach may be unrealistic and in fact may cause concern. In adopting an alternative premise, Nedelsky argues that 'the objective is not to achieve a mythic independence, but to structure relations so that they foster autonomy.'⁶⁷⁰ This perspective directly contrasts with the liberalist foundation and aligns with the relational approach to autonomy, defined by MacKenzie and Stoljar as:

an umbrella term, designating a range of related perspectives...premised on a shared conviction that persons are socially embedded, that agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.⁶⁷¹

Expanding on this social premise, Diduck notes how the 'idea of autonomy, often called "relational autonomy", takes the individual to be first and foremost a social

⁶⁶⁷ Diduck (n 458).

⁶⁶⁸ *ibid* at page 101. See also: Nedelsky (n 459) at page 120. In relation to liberalistic autonomy, Nedelsky notes that 'traditional liberalism took atomistic individuals as the basic units of political and legal theory and thus failed to recognize the inherently social nature of human beings.'

⁶⁶⁹ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008).

⁶⁷⁰ Nedelsky (n 459) at page 118.

⁶⁷¹ Catriona MacKenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press 2000) at page 4.

being with an important network of people with whom she/he has a close relationship, forming part of his/her identity.’⁶⁷² Central to this view is a rejection of autonomy based on individualism, and an appreciation that relationships are central to the formation of the self and are consequentially inescapable.⁶⁷³ A comprehensive and practical understanding of autonomy, particularly in the family law context, should recognise that family life is not about separation and individualism. Rather, it is about the collaboration of one another to the benefit of the family partnership, which extends beyond divorce to ensure a workable resolution for all.⁶⁷⁴

From an individualistic understanding of autonomy, the role of the law is to ‘enable people to be free from outside interference, to only be subject to those obligations they have chosen to undertake.’⁶⁷⁵ In contrast, when adopting an understanding premised on relational autonomy, the role of the law is ‘to uphold and maintain relationships and protect people from the abuses that can occur within them’ while simultaneously providing respect for parties’ choice and determination.⁶⁷⁶ A cornerstone of relational autonomy is therefore an emphasis on the ‘importance of relational obligations, as well as autonomy rights.’⁶⁷⁷ As such, of great relevance to relational autonomy is an understanding that how family decisions are regulated has implications for society as a whole.⁶⁷⁸ Devising regulations in this context is exceedingly challenging due to the inherent contradiction that exists between relational and individual notions. In navigating these competing interests, the primary question is not ‘is there a good reason to restrict my freedom’, but rather ‘is it possible to have some freedom, given

⁶⁷² Diduck (n 458) at page 108. See also: Roy Gilbar, ‘Family Involvement, Independence and Patient Autonomy in Practice’ (2011) 19(2) Medical Law Review 192.

⁶⁷³ Susan Carle, ‘Theorizing Agency’ (2005) 55(1) American University Law Review 307. Carle presents a theory of agency premised on classical pragmatism. In doing so she discusses the pivotal relationship between the self and the social environment in which they act. See also: Nedelsky (n 459).

⁶⁷⁴ Mary Glendon, *The Transformation of Family Law* (University of Chicago Press 1989) at page 297. In relation to the US family law system, it has been noted that ‘The legal imagery of separateness and independence contrasts everywhere with the way most functioning families operate and with the circumstances of mothers and young children in both intact and broken homes. Yet the law holds self-sufficiency up as an ideal, suggesting that dependency is somehow degrading, and implicitly denying the importance of human inter-subjectivity.’

⁶⁷⁵ Johnathon Herring, *Relational Autonomy and Family Law* (Springer 2014) at page 13.

⁶⁷⁶ *ibid* at page 13.

⁶⁷⁷ *ibid* at page 16.

⁶⁷⁸ Karen Bogenschneider, ‘Making a Global Case for Family Policy’ in Angela Abela and Janet Walker (eds), *Contemporary Issues in Family Studies: Global Perspectives on Partnerships, Parenting and Support in a Changing World* (Wiley Blackwell 2013).

the responsibilities of those I am connected to.’⁶⁷⁹ This stance is reflected in those cases previously discussed which identified a qualified judicial respect for parties self-determined arrangements, as their enforceability depended on whether proper provision had been established for the parties to the dispute.

Consideration of the Irish divorce regime would suggest that it is established upon relational autonomy, evidenced through the unequivocal judicial endorsement of marriage as a partnership. In *DT v CT Murray* J asserted that ‘Proper provision should seek to reflect the equal partnership of the spouses.’⁶⁸⁰ Accounting for the various roles and sacrifices within the relationship along with how these do not cease following relationship breakdown is the establishment of on-going financial ties, providing a statutory safety net for the homemaker and dependents.⁶⁸¹ Expanding beyond relationship breakdown, it is further contended that Article 41 embodies the essence of relational autonomy through supporting the unit rather than the individual members, a central notion to the relational approach.⁶⁸²

Whilst the relational approach is firmly entrenched within the statutory regime, its philosophy was further endorsed and appreciated by certain participants in this research study, particularly where there are children involved. Amongst the views expressed by the majority of LAB/FMS clients was a recognition that despite the marriage coming to an end, this by no means concluded the parties’ relationship, given the need to account for its impact through appropriate provision. Noting the importance of navigating their marital breakdown in a manner that was suitable to their children, and to themselves, on an on-going basis, Client 5 reported that:

⁶⁷⁹ Jonathan Herring, ‘Forging a relational approach: Best interests or human rights?’ (2013) 13(1) *Medical Law International* 32 at page 37.

⁶⁸⁰ *DT v CT* (n 559) at page 408. See also: *Murray and Murray v Ireland* [1985] IR 532 at page 535-536. In *Murray and Murray v Ireland* Costello J noted how ‘the Constitution makes clear that the concept and nature of marriage which it enshrines are derived from the Christian notion of a partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special life-long relationship.’ The case of *Murray and Murray v Ireland* involved an imprisoned married couple seeking to assert their right to procreate under Article 40 and 41 of the Constitution. Their application was unsuccessful in both the High Court and Supreme Court.

⁶⁸¹ See previous discussion on the ‘Threat of Autonomy’ where the necessity to account for the vulnerable parties to a relationship is highlighted.

⁶⁸² Herring (n 675) at page 11.

even though we didn't want to be married anymore we still got on... We just weren't wanting to be together. So, I think our key thing was, his parents split up just before we got married and it has been hell ever since. Every family gathering there is murder a month beforehand. So, we are very conscious that we do not want that for our kids, like that is just not what we want. We want to be able to sit in a room, enjoy all those celebrations that should be enjoyed and not give them any grief about it, you know?

It is evident that the primary goal of Client 5 was to separate from their partner but to do so in a manner that would enable them to continue to have an amicable relationship for the benefit of their children. Comparably, in highlighting the enduring nature of these relationships, Client 3 noted that despite the marriage coming to an end, parties:

will continue to have a relationship, a different type of relationship.

It is clear from the views expressed that often, in dissolving the marital bond, the relationship is not severed, rather it is altered. It is desirable therefore that parties seek to reconsider and reconfigure their relationship accounting for their needs and the needs of any other relevant parties. Supporting this aspiration, Mediator 6 poses questions to their clients pertinent to this end goal:

What's important for you about where you live? What's important for you about what money you need in order to pay for your life? What's important to you about your relationship with your children? What's important for you about how you provide for yourself and your children in the future?

These questions force clients to consider the need for the relationship with their former spouse to be restructured in such a manner as to enable all parties to continue to be provided for, thereby demonstrating the core aspiration of relational autonomy. It is clear that the Irish marital breakdown regime is concerned with the attainment of

substantive justice, which upon consideration aligns with the aims of relational autonomy. This equitable approach to dispute resolution is therefore to be commended as it arguably creates a platform (akin to the Rawls difference principle) to mitigate the power imbalances that can present in relationships. While presenting numerous advantages to the family unit and society as a whole, the present regime is not without flaw, namely an absence of a capacity for individual autonomy to be exercised where appropriate.

4.14 Conclusion

This chapter has sought to provide both a theoretical and rights-based investigation of autonomy, drawing on the qualitative data secured. The primary focus was the manner and extent to which autonomy is both interpreted and achieved within marital disputes. This contextual exploration has demonstrated a growing appreciation for party autonomy within the legal sphere. Such party autonomy is however undermined by an inherent paternalism on a constitutional and legislative level. Through the discretionary determination of ‘proper provision’ it is argued that the State has endorsed a relational rather than liberalistic understanding of autonomy. While the basis for the relational approach is commendable and one which the State should continue to uphold, there is potential to incorporate individual autonomy where appropriate. Interestingly, judicial activism over the last two decades seems to signify an expanding appreciation for this integration. In exploring autonomy’s complex nature through the unique lens acquired in this study, it is suggested that liberalistic autonomy could be fostered within the protectionist framework were additional guidance and support provided to parties in the resolution of their marital dispute. Through the articulation and endorsement of policy aims, guidelines and formulas (where appropriate), it is contended that Ireland could more effectively create a regulatory framework that would better support the exercise of individual and relational autonomy through the determination of agreements within a more predictable and consistent regime. Should the State effect such reforms, it may alleviate the current burden on the Irish judicial system through the enhanced utility of private ordering in solicitor negotiation, mediation or other such dispute resolution process. Furthermore, they could also incorporate additional protection to those who

may be at a disadvantage in the negotiation process. While the provision of structured and effective guidance would likely better realise these goals, of further importance is a holistic approach to dispute resolution. Central in this regard is the comprehensive integration of dispute resolution services, as will be discussed in the next chapter.

Chapter 5: Bridging the Gap: Enhancing Collaboration Between the Irish Legal Aid Board and Family Mediation Services in Judicial Separation and Divorce

5. Introduction

Having critically explored clients' lived experience of access to justice and autonomy, this chapter will discuss the final key theme identified in the empirical analysis - the need to enhance the synergy between LAB and FMS services. The chapter commences with a discussion of the dispute resolution landscape highlighting the desire of the State to integrate these services. With the requirement that a judicial separation/divorce be ordered by a court, the necessity for cohesion between these services will be demonstrated. Owing to the unique structure of the LAB, the potential for service synergy will then be explored. While there already exists a foundation for enhanced synergy, this chapter will argue that advancements in service delivery are required to positively augment the client experience in this context. Following this, empirical data will be utilised to explore various potential initiatives to achieve effective service synergy, whilst acknowledging the primary barriers inhibiting this goal, namely: (i) differences in service accessibility and (ii) challenges of accessibility within a timely fashion. On the basis of these empirical findings a number of evidence-based reforms are suggested, namely: (i) additional resources; (ii) the introduction of legislative guidelines and underlying principles; (iii) a public legal education campaign; (iv) improved service provider training; (v) advancements in case management and IT; and (vi) the development of a pilot providing legal advice to those who draft a mediation settlement intended to be made an order of court.

5.1 The Desire to Integrate

In 'occupying the same territory of practice', Maclean and Eekelaar note that 'family mediation appears to becoming increasingly integrated into legal practice.'⁶⁸³ Having previously operated under the Family Support Agency, responsibility for the FMS was

⁶⁸³ Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016) at page 121-122.

transferred to the LAB following the amendment of the Civil Legal Aid Act, 1995 by the Civil Law (Miscellaneous Provisions) Act, 2011.⁶⁸⁴ At the time of this transition, Alan Shatter, the then Minister for Justice, Equality and Defence discussed the appropriateness of this re-structuring given the overlapping caseload yet shared objective of resolving family disputes, and the consequential importance of cohesion and synergy between these agencies to achieve a more holistic service.⁶⁸⁵ In support of his argument, Shatter referenced the Dolphin House Pilot (housing legal, mediation and court services under the one roof) which he regarded as a success, making it ‘apparent that the Family Mediation Service could operate more efficiently and effectively if it is integrated with the Legal Aid Board.’⁶⁸⁶ Shatter foresaw that this relationship would be symbiotic, noting that the:

Legal Aid Board would also benefit from the exercise because it would be in a position to steer the mediation service in a way that would increase the numbers using it, reduce demand for legal aid and court time, better establish the status of legal agreements and provide economies in the use of premises through collocation with law centres or courts, where possible.⁶⁸⁷

While articulated as a goal at the time of this transition, the statutory obligation on solicitors to discuss the option of mediation with their client prior to instituting proceedings for a decree of judicial separation or divorce predates this structural reform.⁶⁸⁸ In light of this recognition of these co-existing and complementary means of resolving family law disputes, numerous reforms (e.g. the co-location model and priority waiting list) have been implemented to enhance the synergy between these services.

⁶⁸⁴ The Civil Legal Aid Act, 1995 as amended by the Civil Law (Miscellaneous Provisions) Act, 2011. Section 50 of the Civil Law (Miscellaneous Provisions) Act 2011 states that ‘On the coming into operation of this section the functions of the Agency relating to family mediation services shall be transferred to and be a function of the Board.’

⁶⁸⁵ Dáil Debate 21 July 2011, Vol. 739 No. 4.

⁶⁸⁶ *ibid.* See also Carol Coulter, ‘Family Mediation Service and Legal Aid Board to be integrated’ *The Irish Times* (3 November 2011) <<https://www.irishtimes.com/news/family-mediation-service-and-legal-aid-board-to-be-integrated-1.6626>> accessed 21 March 2025.

⁶⁸⁷ *ibid.*

⁶⁸⁸ Section 5(1)(b) of the 1989 Act (as enacted); Section 6(1)(b) of the 1996 Act (as enacted).

5.2 The Need to Integrate

While this chapter advocates for the increased integration of mediation and legal services, it does not contend that they serve as replacements for one another within a marital breakdown context. Blakey notes that ‘Family mediation was not designed to replace legal advice but work alongside it, rendering the solicitor integral to mediation’s success.’⁶⁸⁹ Adopting a similar position, Hitching and Miles outline their view that ‘the roles of lawyer and mediator in such [divorce] cases are complementary.’⁶⁹⁰ This stance is not novel, rather within the context of marital breakdown, parties seeking to resolve their dispute via mediation with further support of legal advice has been described as the ‘optimum process’.⁶⁹¹ Recognising their disparities and the necessity for both to be respected, Mediator 1 noted that:

As a mediator, as a solicitor we do very different jobs.

In describing how these alternative roles were explained to them, Client 4 specified how:

the lawyer will be fighting for one of you over the other, you know if it’s my lawyer they will be fighting for me, if it’s my husband’s lawyer they will be fighting for him. But in mediation we are just putting the two of you opposite each other and having that discussion so it’s not, you know we’re trying to be equal and even.

McGowan identifies the difference between these services and the unique contribution each has to offer as a basis to advocate for increased collaboration.⁶⁹² She concludes

⁶⁸⁹ Rachael Blakey, *The Conceptualisation of Family Mediation: Access to Justice after LASPO* (PhD thesis, Cardiff University 2021) at page 51.

⁶⁹⁰ Emma Hitchings and Joanna Miles, ‘Mediation, Financial Remedies, Information Provision and Legal Advice: The Post-LASPO Conundrum’ (2016) 38(2) *Journal of Social Welfare and Family Law* 175 at page 175.

⁶⁹¹ Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Socio-legal Studies 2017) at page 133.

⁶⁹² Deirdre McGowan, ‘Reframing the Mediation Debate in Irish All-Issues Divorce Disputes: From Mediation vs. Litigation to Mediation and Litigation’ (2018) 40(2) *Journal of Social Welfare and Family*

her argument in specifying that mediation is to be viewed as an ‘additional’ dispute resolution process in this context rather than an ‘alternative’ as mediation cannot replace litigation when securing a judicial separation or divorce decree.⁶⁹³ Having highlighted the view that many perceive service integration as advantageous, each process will now be considered with regards to its contribution to establishing a holistic dispute resolution process.

5.2.1 Legal Processes: A Contribution to Integrated Conflict Resolution

Within a discretionary based divorce regime, Batagol and Brown underscore the importance of independent legal advice in family mediation, for in its absence there is a very real threat of exploitation.⁶⁹⁴ Central to minimising this concern is the capacity of legal advice to ‘provide a “legal benchmark” against which the client can evaluate offers on the table.’⁶⁹⁵ This is not the sole advantage of legal support in the mediation process, rather Hitchings and Miles perceive it as beneficial from the perspective of:

remedying imbalance in the relationship caused by having one party legally represented and the other not having any legal support; reassuring clients that they are going about settlement in the right way; encouraging the clients to be more flexible; [and] preventing a final panic where the client thinks they have been “stitched up”...⁶⁹⁶

In providing crucial support, Hitching and Miles utilise empirical data from their previous qualitative study conducted with Woodward regarding the approach of mediators to the provision of legal information.⁶⁹⁷ They highlight how mediators ‘reported that it was harder to mediate in a case where only one or neither party has

Law 181. In her considered article, McGowan directly discusses the collaboration of mediation and legal services in Ireland.

⁶⁹³ *ibid* at page 192.

⁶⁹⁴ Becky Batagol and Thea Brown, *Bargaining in the Shadow of the Law: the Case of Family Mediation* (Themis Press 2011).

⁶⁹⁵ Hitchings and Miles (n 690) at page 181.

⁶⁹⁶ *ibid* at page 182.

⁶⁹⁷ Emma Hitchings, Joanna Miles and Hilary Woodward, ‘Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce’ (2014) 44(1) Family Law 309.

solicitor advice in the background.’⁶⁹⁸ Similarly in the Irish context, Solicitor 3 described the impact of legal advice on the mediation process, noting how:

at the moment it tends to be sort of a separate process, so like if people go off to mediation we don’t tend to have much to do with them...it might help more if people get a consultation to get some advice on sort of like, what they might expect an outcome to be...So I think it would help if people got some advice about that [matters pertaining to the sale of the home etc.] before they go into mediation, so they kind of know the things they need to think about really, you know? And like, I did have a client recently who was in the mediation process, and I did have quite a few discussions with him about, sort of what to do about the house. And I think he was a bit resistant about getting things like valuations. But I think having access to kind of some legal advice just helped move the process along a little bit, you know?

If this position is adopted, it suggests that the integration of services is advantageous to both the service provider and their client. At the foundation of this premise is that clients are making more informed decisions, previously discussed as a protective mechanism. Service providers may also benefit as the negotiation process is aided with there being an increased likelihood of logical decision-making which accounts for legal norms.

While solicitors have the capacity to provide tailored legal advice, litigation also provides procedural protection given the capacity to compel individuals to act in accordance with orders made, such as orders for discovery. In a marital breakdown context these functions are vital, to ensure mutual knowledge of each party's financial circumstances, and the courts ability to be satisfied that the Constitutional requirement of proper provision is achieved.⁶⁹⁹ Highlighting the necessity for this capacity, Solicitor 2 noted that:

⁶⁹⁸ Hitchings and Miles (n 690) at page 181.

⁶⁹⁹ Article 41.3 of the Irish Constitution (as amended).

People don't want to give their vouching documentation... You have to drag it out of them, like that's the bottom line... So that's why the, I suppose the adversarial system or whatever you want to call it like is useful sometimes. Because you can get an order against someone for noncompliance, and you can drag it out of them. Like some people are highly resistant to engaging.

As the intentions of those who engage dispute resolution services can differ substantially, it is important to have multiple routes to a resolution. It is therefore just as necessary to have an avenue that enables parties to retain their decision-making autonomy, as it is to have a route that compels parties to act in a certain manner, thus necessitating the 'menu of choices'.⁷⁰⁰ Ultimately then, it is the parties' individual circumstances and attitudes that will determine the appropriate mechanism(s) to be used.

The fundamental role of legal advice in the mediation process has previously been noted.⁷⁰¹ Its utility, which is statutorily recognised,⁷⁰² operates as a fundamental safeguard in ensuring that parties are fully informed.⁷⁰³ As McGowan notes, in the absence of legal advice, individuals can 'never be entirely sure what precise rights and obligations apply to their relationship.'⁷⁰⁴ Recognising the necessity for legal advice in the mediation process but equally noting how its provision is outside the remit of mediators, is a clear demonstration of the importance of FMS integration and/or collaboration with the LAB which has this capacity. If informed decision making is valued and recognised, the capacity for effective and meaningful collaboration between the FMS and the LAB merits serious attention. Having considered legal advice and associated litigation, the role of mediation in this context is now discussed.

⁷⁰⁰ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* (LRC CP 50 – 2008) at paragraph 1.12.

⁷⁰¹ See Chapter 4 for a full discussion on the vital role performed by legal advice in the mediation process where a judicial separation or divorce is sought.

⁷⁰² Section 6(4)(c) of the 2017 Act.

⁷⁰³ The provision of legal advice was discussed previously in the Chapter 4 as a central means to mitigate the limitations of the facilitative mediation model.

⁷⁰⁴ McGowan (n 692) at page 188.

5.2.2 Mediation Process: A Contribution to Integrated Conflict Resolution

Marital breakdown disputes are complex in nature. Not only do they involve difficult decisions around finances, but they can also be highly emotive, often not aided by the adversarial process of litigation. The LRC in its consideration of the adversarial approach to resolving family disputes notes that ‘Where human relationships are strained, the adversarial approach may actually increase rather than reduce conflict.’⁷⁰⁵ Furthermore, Kelly notes the risks of the adversarial model to child development and argues that:

The basic nature of the adversarial process pits parents against each other, encourages polarized and positional thinking about each other's deficiencies, and discourages parental communication, cooperation, and more mature thinking about children's needs at a critical time of change and upheaval.⁷⁰⁶

Kelly, drawing on an array of empirical studies (predominantly conducted in America) which focus on the responses of children to familial conflict, notes that:

Between parents in an adversarial divorce process and those in mediation, the parents participating in mediation reported less conflict between them during and after the divorce, more cooperation and child-focused communications, and more frequent offers of support to each other after the divorce.⁷⁰⁷

This discrepancy between the legal and mediation processes was not lost on LAB/FMS service providers, rather the majority of those interviewed were acutely aware that the service they deliver is not suitable for all facets of a family dispute. Throughout the qualitative interviews, it was frequently recognised that mediation is a more suitable

⁷⁰⁵ LRC (n 700) at page 175.

⁷⁰⁶ Joan B Kelly, ‘Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice’ (2002) 10(1) Virginia Journal of Social Policy & the Law 129 at page 131.

⁷⁰⁷ *ibid* at page 139.

forum for dealing with matters pertaining to children, whereas the legal process is more suited to financial matters. In drawing this distinction, Solicitor 2 observed:

I don't think our side of the system is at all well suited to dealing with the family dynamics, that's where we fall down...but you know, it's useful the adversarial system, to get people to disclose their assets and to then hopefully come up with an equitable distribution of the assets. That's what our system is better at. I don't think we're good at dealing with children and with access and that kind of stuff.

Reinforcing this position, Solicitor 2 proceeded to note:

we're good at sorting out the house and all that stuff. You know, the mortgage, the pensions. That's what I see our role as being really like. You know, as being like our most useful role, I should say.

Expressing their view that family matters should be dealt with in a less adversarial environment, Solicitor 7 opined that:

I would rather they [clients] sort out the things they were emotional about and upset about and angry about in a safe place where they are both heard and that is facilitated, than me having to try and deal with that through snotty correspondence. I think that is really not beneficial at all. If I think it is something that would benefit the parties sending them to mediation and if they were open to it, absolutely. Go sort that out, come back to me when it's done.

Recognising the strengths of the mediation process in this regard, Solicitor 3 was of the belief that:

mediation could be really useful to sort out things like kind of access arrangements you know? We spend a lot of time negotiating access agreements, which is, you know, drop off and collection times and which weekends...and where are they going to take them on holiday, and that's where mediation could really help if they, if people could get quick access to a mediator...because they've got more time as well than to kind of sit down and actually really think about what the arrangement should be. And our role really, we can be sorting out all the financial side, you know?'

This stance was not uncommon, rather the majority of those solicitors interviewed expressed the opinion that mediation could be better utilised if it were issue focused (as will be discussed more fully later in this chapter).

As previously noted, research studies have identified that clients can progress through mediation more efficiently and effectively where they have access to legal support.⁷⁰⁸ In a likewise fashion, this study provides empirical support for the contribution of mediation towards an efficient and effective legal process. Solicitor 7's experience was that:

it's easier to deal with them [clients who participated in mediation] [be]cause their head is clearer. It is focused on what they need to focus on as part of dissolving this relationship. Rather than you know, having all the emotional side to deal with as well because that is a massive factor for people. It does make it harder for them to go through the process and it makes it harder for me to help them through it.

The preceding information illustrates that best practice involves parties having access to both mediation and legal services. While there is ample support to suggest that

⁷⁰⁸ Hitchings and Miles (n 690) at page 181.

clients having access to both mediation and legal services as required in their circumstances is advantageous, it is necessary to consider the feasibility of this goal.

5.3 A Novel Platform for Service Synergy

Having discussed both the desire and rationale for integrating these services, this section will consider the feasibility of further integration. Within private practice it has been argued that mediation and legal services can present a threat to one another as they pull from the same client base. Clark has explored this issue and while noting ‘the well-worn idea that lawyers resist mediation because they fear it may not be in their financial interests’ he suggests that this relationship is more complex.⁷⁰⁹ Within a Scottish context, Clark investigates commercial lawyers resistance to mediation and identifies three potential barriers: (i) financial barriers; (ii) legitimate/practical barriers; (iii) and cultural barriers.⁷¹⁰ Though Clark, drawing on his empirical research with Dawson,⁷¹¹ discounts the financial incentive argument suggesting instead that mediation is often viewed as unnecessary/unsuitable due to the availability of other mechanisms like solicitor negotiation (thus constituting legitimate resistance),⁷¹² qualitative data from this study indicates that the means of remuneration can affect service delivery. Mediator 1, reflecting on the potential impact of financial incentives, noted that:

private solicitors, they don't want to be alleviated from their money.

⁷⁰⁹ Bryan Clark, ‘Views from the coal face: the development of international commercial mediation’ (2024) 75(1) Northern Ireland Legal Quarterly 74 at page 85. See also Bryan Clark, ‘Mediation and Scottish Lawyers: Past, Present and Future’ (2009) 13(2) Edinburgh University Press 252. For additional reading see: Roselle Wissler, ‘Barriers to Attorneys’ Discussion and Use of ADR’ (2004) 19(2) Ohio State Journal on Dispute Resolution 459.

⁷¹⁰ Bryan Clark, ‘Mediation and Scottish Lawyers: Past, Present and Future’ (2009) 13(2) Edinburgh University Press 252.

⁷¹¹ Bryan Clark and Charles Dawson, ‘ADR and Scottish commercial litigators: a study of attitudes and experience’ (2007) 26(1) Civil Justice Quarterly 228 at page 240. In response to the assertion that, ‘lawyers will lose money if ADR becomes popular’ there was a: complete absence of those who ‘strongly’ agreed; 15.6% ‘somewhat’ agreed; 37.8% ‘somewhat’ disagreed; 26.7% ‘strongly’ disagreed. See also: Clark (n 710).

⁷¹² *ibid.*

In demonstrating a more considered view, which accounts for service provider variability, Mediator 8 noted that:

‘there are seasoned practitioners who have established family law practices and realise that the [FMS] system, they can use to their advantage. There is, however, you know another whole coterie of lawyers who have, I suppose, a very genuine fear of it [losing their caseload].’

Whilst a detailed discussion of lawyer resistance to mediation is outside the scope of the current discussion, it is useful to note that in the context of the LAB and FMS, such ‘competition’ between services doesn’t exist and as such, a unique platform for service synergy presents itself.

Paid on a fixed annual salary, irrespective of workload or outcomes, empirical data suggests that the motives of LAB & FMS directly employed service providers (to the exclusion of those who act under the private practitioner panel),⁷¹³ differ from private practitioners who predominantly operate and earn fees, on a case by case basis.⁷¹⁴ Noting the impact of this salary structure, Solicitor 5 specified how:

We've a fixed wage so whether we spend, you know, 30 hours on a file or whether something is very easy, whatever it is, that has no impact on us like fees or all. That's something that's not our motivation at all. Our motivation is getting the job done and managing your client as best as you can through that process.

⁷¹³ Legal Aid Board, *Family Mediation Procedures Handbook* (3rd edn, 2023) at page 7-2. In describing this private practitioner panel, it is noted that ‘In certain cases, legal aid may be provided by solicitors in private practice who are contracted by the Board and placed on a panel for this purpose.’ See also Legal Aid Board, ‘Family Mediation Panel’ <<https://www.legalaidboard.ie/en/our-services/family-mediation/family%20mediation%20panel/>> accessed 6th January 2025.

⁷¹⁴ Iain Campbell and Sara Charlesworth, ‘Salaried Lawyers and Billable Hours: A New Perspective from the Sociology of Work’ (2012) 19(1) *International Journal of the Legal Profession* 89. This system of billable hours is common in law firms across common law jurisdictions. See also: Alice Woolley, ‘Evaluating Value: A Historical Case Study of the Capacity of Alternative Billing Methods to Reform Unethical Hourly Billing’ (2005) 12(3) *International Journal of the Legal Profession* 339.

Recognising how this system of remuneration lends itself to service integration, Mediator 7 specified the majority view that:

we're [LAB solicitors and FMS mediators] all on the same side here...what you want to do is to get this family through this trauma in as fair a way as possible, and to ensure that children continue to have a relationship with both parents because that's really what's important.

The findings of this research suggest that there does exist an attitude and environment which is conducive to further integration of the LAB and FMS. In light of this platform, the next section will draw on the empirical data to demonstrate that the integration that was envisaged has not occurred to a desirable level in practice. In doing so it will be contended that the qualification criteria required of clients to access the services is the key factor that is inhibiting such integration.

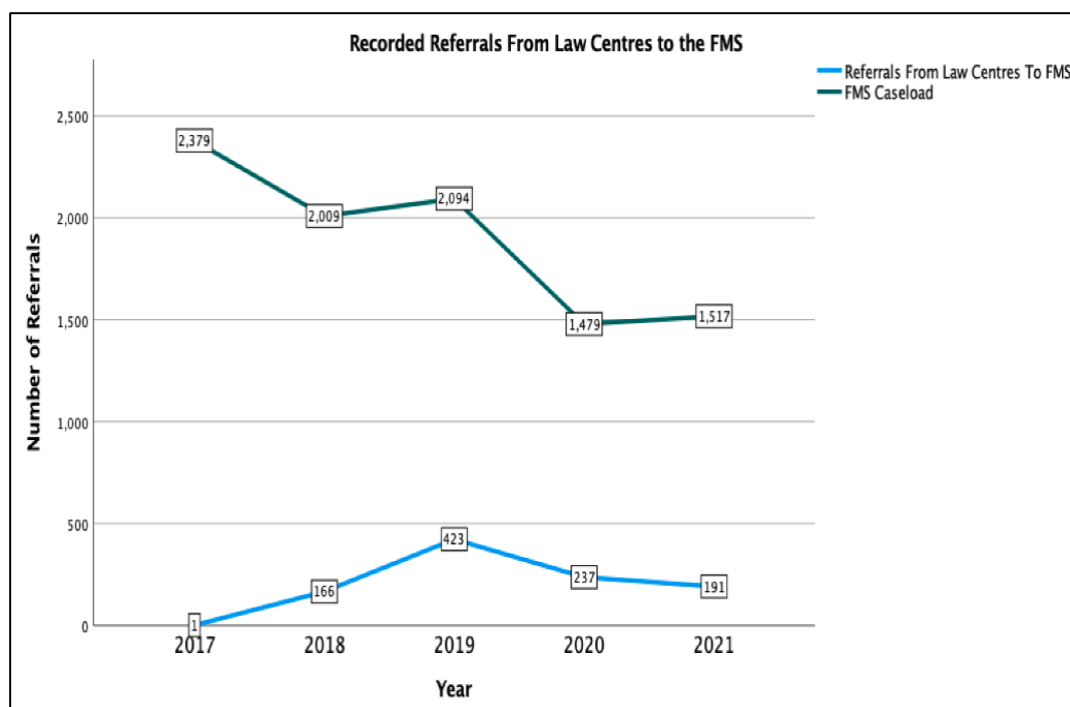
5.4 An Absence of Integration

Having considered the rationale for the integration of the LAB and FMS services, this section of the chapter will discuss the progress that has been made in seeking to achieve this aim. Though the FMS has remained under the remit of the LAB for over a decade, the empirical data collected and analysed in this thesis indicates that the synergy that was foreseen by Deputy Alan Shatter (as he was then), has not been achieved in practice. This is despite the implementation of a number of reforms by the LAB with the intent of supporting enhanced service synergy, such as the priority waiting lists and the co-location model, both of which are discussed below.

A central means of investigating the integration that has taken place between the LAB and the FMS is to consider the number of inter-service referrals. Rates of referrals provide a vital insight into the level of synergy occurring in practice, given the statutory mandate on barristers and solicitors to share information regarding mediation services with their clients and to present a statutory declaration demonstrating the

fulfilment of this obligation.⁷¹⁵ Notwithstanding this obligation, the data demonstrates that the number of cases referred from law centres to the FMS is minimal and in recent years has even experienced a decline (see Figure 12 below). This decline further compounds the necessity to explore barriers perceived as inhibiting service synergy.

Figure 12: The Number of Referrals from Law Centres to the FMS on an Annual Basis



In discussing the limited number of referrals, Mediator 8 noted that:

those issues shouldn't exist in a situation...where mediators and solicitors, let's say under the umbrella of the Legal Aid Board, are both guaranteed an income...The process [of integration] isn't operating as seamlessly as it should and it behoves us to ask why...These two stakeholders within the one organisation, where both are being paid and both have really nothing to fear, what is it that is preventing the system not working quite as well as it should?

⁷¹⁵ Part 3 of the 2017 Act. See also: s. 5 of the 1989 Act (as amended by the 2017 Act) and s. 6 of the 1996 Act (as amended by the 2017 Act).

Having identified both the desire and platform for service synergy, the next section of this chapter will investigate reforms implemented with the intent of supporting this aspiration.

5.5 Evaluating Service Integration Initiatives

In seeking to enhance integration between these services, the most notable reform implemented by the LAB was the establishment of the co-location model in 2016 which positions FMS offices and LAB centres in the same building.⁷¹⁶ At the time of its establishment, former CEO of the LAB John McDaid explained that their introduction was done ‘with a view to trying to change the dynamic for many of those seeking to resolve a family problem. The “synergising” of the two services holds considerable potential and I firmly believe it can work to benefit the client.’⁷¹⁷ The intent behind the co-located model is clear, it seeks to enhance service synergy. In seeking to evaluate the contribution of the co-location model to service synergy, the quantitative empirical data collected was assessed to determine whether there was a statistically significant difference in the number of cases referred to the FMS in co-located centres as distinct from the more traditional non co-located services. The test utilised to evaluate this relationship is known as an independent samples T – Test.⁷¹⁸ In running this test, it was found that the significance value of $p=.904$ was above the required level of significance of $p<.05$ (see Appendix E).⁷¹⁹ This result does not reach the threshold for statistical significance, indicating that there is no meaningful difference in the number of referrals made between co-located centres and those that are not. The absence of a statistically significant effect suggests that the co-location model did not lead to a measurable increase in referrals, and therefore its effectiveness

⁷¹⁶ Legal Aid Board, *Annual Report* (LAB 2019) at page 17. The objective of this model which houses both services under the one roof, is to ‘encourage more persons seeking legal services in relation to a family dispute to seek to resolve the dispute with the assistance of a mediator rather than through a court process.’

⁷¹⁷ Legal Aid Board, *Annual Report* (LAB 2015) at page 13.

⁷¹⁸ The independent samples T-Test compares the mean score with regards to a continuous variable (in this instance the number of referrals) pertaining to two different groups (whether the office is co-located or not). The test was run on data pertaining to 2019. This data was purposefully selected as it was the most up-to-date while not having been distorted by the Covid-19 pandemic.

⁷¹⁹ As the significance value is $p>.05$, the null hypothesis suggesting there is no statistically significant difference is retained. Had the level of significance been $p<.05$ the alternative hypothesis would have been accepted, suggesting that there is in fact a statistically significant difference between the number of referrals made between co-located centres and those which are not.

in this regard is not supported by the data. Due to this result, any observed difference between the two models is likely due to random variation rather than a genuine effect of the co-location model. The absence of a significant difference raises questions about whether co-location as a structural change is impacting service synergy as intended. The output of this quantitative analysis is further supported by the qualitative findings of this research. For example, Mediator 2 noted that:

we are supposed to be creating a pathway for clients to move smoothly between the mediation offices and the law centres, okay? But this is not happening...The Mediation Service has been part of the Legal Aid Board since 2011. Since 2011, there has been, in my view, no progress, significant progress from a client's perspective of smoothing out that pathway. We've got what we call a co-location blueprint where there's a movement towards bringing the mediation offices and the law centres actually physically together...But in reality, in my opinion that has made minimal material difference to the users of the Legal Aid Board.

While the co-location model is intended to encourage appropriate referrals, the empirical data suggests this is not occurring in practice. Nonetheless, the model plays a pivotal role in increasing exposure to dispute resolution options. Its potential as a reformative mechanism will be further examined in the sections that follow.

Service integration also requires consideration of those cases moving from the FMS to the LAB in order to obtain a separation or divorce decree with state support. As noted in Chapter 3, the majority of FMS clients do not proceed to law centres. Rather, the data presented in Table 1 & Figure 1 (on page 92) illustrates that the vast proportion of FMS clients proceed as lay litigants. The majority of solicitors also spoke to their experience of the limited number of mediation agreements in which they are involved with. For example, Solicitor 3 noted:

To be honest, I haven't seen that many mediated agreements come into this office in recent years at all.

Similarly, Solicitor 5 observed:

I haven't seen an actual, fully completed, mediation agreement for quite some time.

While there is likely to be a variety of factors contributing to the lack of mediation agreements LAB solicitors are presented with, such as the perceived decline in the utility of separation agreements (of which mediation agreements can support the construction of) as noted in Chapter 4, the next section will pay particular attention to the influence of the different entry requirements for the LAB and FMS. Upon identifying those actual and potential barriers, this chapter will proceed to propose reform measures that may enhance service synergy.

5.6 Barriers to the Attainment of Service Synergy

Having highlighted the unique platform for collaboration between the LAB & FMS, along with the attempt to integrate these services through the introduction of the co-location model and the priority waiting list (as yet to be discussed), the factors hindering better integration will now be explored. Whilst the integration of these services requires nuanced consideration, where party participation is not an issue, two core barriers have been identified based on the empirical data obtained, these are: (i) the differences in service accessibility and (ii) the necessity for services to be available/accessible within a timely fashion. The existence and impact of these barriers will be considered in turn, followed by a discussion of potential reforms to increase service synergy in an optimum manner, or at the very least, give rise to changes in practice to mitigate the impact of the barriers identified.

5.6.1 Differences in Service Accessibility

The intricacies of service accessibility can significantly impact process uptake. England and Wales had previously operated one of the most expensive legal aid systems in the world, however, it was noted by the Ministry of Justice that to continue

in such a manner was not maintainable.⁷²⁰ In need of reform, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter the ‘LASPO Act 2012’) was implemented in 2013 and had the effect of removing legal aid funding for the majority of private family law issues while support for family mediation was retained.⁷²¹ In light of its availability, it was foreseen that there would be an increased participation in mediation, however, in the year following the Act’s implementation, the opposite occurred as there was a significant fall in publicly-funded mediation participation.⁷²² This outcome was later attributed in part to the failure to adequately account for the vital role performed by solicitors in informing and directing clients towards mediation.⁷²³ Though Ireland continues to offer both state-funded mediation and legal aid, the experience of the LASPO Act 2012 serves to highlight the impact of accessibility routes on service uptake, which is now considered in light of the empirical findings of this research.

In Ireland, the FMS offers free mediation significantly limiting barriers to entry. In its review of various jurisdictions offering mediation (Ireland included), the Scottish government noted how low-fee or free mediation may encourage uptake.⁷²⁴ While mediation is accessible to all in an Irish context, legal aid is not, thus the accessibility differs. Considering the synergy between the LAB and FMS, McGowan notes how:

the mediation service provided by the state does not facilitate contemporaneous publicly funded legal support...Some participants do obtain legal advice during state-funded mediation, but for those relying on legal aid it is unlikely to be available. Although the Family Mediation Service and the Legal Aid Board are part of the same organisation, their services are not integrated.⁷²⁵

⁷²⁰ Ministry of Justice, *Consultation Paper on Proposals for the reform of Legal Aid in England and Wales* (Ministry of Justice CP 2010).

⁷²¹ Legal Aid, Sentencing and Punishment of Offenders Act 2012.

⁷²² Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader, and Julia Pearce, *Litigants in person in private family law cases* (London: Ministry of Justice 2014).

⁷²³ *ibid.*

⁷²⁴ Scottish Government, *An International Evidence Review of Mediation in Civil Justice* (Scottish Government 2019).

⁷²⁵ McGowan (n 692) at page 189.

McGowan opines that many of those who utilise the FMS will not obtain legal aid, noting the impact of wait times and a lack of coordination between the services.⁷²⁶ While the empirical data collected in this study provides corresponding support for the impact of wait times, it also highlights the influence of the stringent means test (which could arguably fall within the remit of a lack of coordination as identified by McGowan). Through a combination of qualitative data, and quantitative data regarding referrals and the manner in which mediation cases proceed, differing entry routes to the FMS and LAB were identified as a barrier in this regard.

Insights into the impact of service accessibility are gained when considering the manner in which mediation cases proceed as depicted in Table 1 & Figure 1 (on page 92). The data highlights that the majority of those who participate in mediation, ultimately proceed as lay litigants or alternatively to private practitioners. While the quantitative data collected does not permit an objective identification of causality (with regards to the impact of accessibility and the manner in which mediation cases proceed),⁷²⁷ the qualitative data indicates that it is a contributing factor. From the semi-structured interviews conducted with mediators, it was repeatedly noted that the application of the means test establishes a different client base to the FMS which contains no such barriers to entry. Describing this impact, Mediator 3 noted how:

we [the FMS & LAB] don't have a huge overlap of clients at all. So, you are talking about a different client base.

Providing additional support but in a manner that identifies the direct impediment to service synergy, Mediator 2 noted how:

Anybody going to law centres is means tested. So, you're either eligible for legal aid or you're not eligible for legal aid, okay?...So they're [mediation clients] never even getting the, you know, they're never getting any contact with the law

⁷²⁶ *ibid.*

⁷²⁷ To demonstrate causality it would be necessary to run a controlled study which is beyond the remit of this research.

centre. So, in that situation, our procedural processes are left standing alone...We're not having an opportunity for looking for any synergy, you know, across to the law centres because the law centres won't deal with them. Now, in my view, that's short sighted.

Though clarification was not obtained on what Mediator 2 was explicitly referring to by 'short sighted', based on the information provided, it is confidentially assumed that they were referring to the service falling short of its intended potential as a comprehensive dispute resolution organisation. If mediation is to be established as a viable alternative for resolving these disputes, it needs to have capacity to do so in a holistic manner, so the agreement reached leaves no unanswered issues. For example, Mediator 6 opined that:

it would be fantastic if we could, you know, bearing in mind Chinese walls and everything, just send these people down to lawyers. It's just cutting right to the chase and say right listen, we've a mediated agreement here, it's all done and dusted. This client here he's an accountant in Grant Thornton he needs a bit of legal advice. Can you give it?

It is suggested that were this achieved, the services would have the capacity to vastly improve the client experience and the attainment of justice. While one means to progress towards this goal would be to alter the qualification requirements for legal aid as is currently under review,⁷²⁸ a further means is to pilot the provision of legal advice for clients who have drafted a mediation agreement and intend to use it as a basis for their subsequent court order (as will be considered under the section on proposed reforms). Having discussed the impact of accessibility, of further relevance to service synergy is access to services within a timely fashion.

⁷²⁸ Chief Justice's Working Group on Access to Justice, *Access to Justice Conference: Civil Legal Aid Review: An Opportunity with a view to developing a model system in Ireland* (Office of the Chief Justice 2023) at page 8.

5.6.2 Access to Services Within a Timely Fashion

While a well-constructed route enabling clients to move between mediation and legal services is necessary to enhance cohesiveness, of equal importance is the speed at which access to these services occurs.⁷²⁹ In her qualitative study of separated/divorced parents, Elena Moore noted the uncertainties arising upon marital breakdown and how their continuation can impact the negotiation process with such ambiguities heightening the emotional intensity of the living environment.⁷³⁰ Furthermore, where there are children to the relationship, the conflict following marital breakdown has consistently been identified as negatively impacting children.⁷³¹ Hetherington and Kelly note that many children display signs of depression and anxiety during the divorce process but that two years after the process, 75% of these children show reduced symptoms.⁷³² Unsurprisingly, Kohn values an expedient resolution as a means of harm reduction, specifying that ‘In high conflict divorces, where children may be at the epicenter of the conflict, a speedy resolution may well be necessary to protect the health and wellbeing of children.’⁷³³ Although divorce is likely to present ongoing challenges, Kohn identifies the separation period as the ‘most emotionally taxing time frame in the divorce process’, as it is marked by significant uncertainty and the need to adjust to a new way of life.⁷³⁴ With such a strenuous impact on parties and their families, it is desirable that marital disputes are resolved expeditiously through reducing wait times to access services and the overall case duration. Although the LAB has made progress in reducing the wait times to access their services, further improvements would help both access to justice concerns, facilitate better synergy between the services, and enhance the overall client experience.⁷³⁵ In pursuing advancements in this aspect of service delivery, the LAB/FMS has explored alternative

⁷²⁹ Discussed at length in Chapter 3 is the potential for prolonged wait times to operate as an access to justice barrier.

⁷³⁰ Elena Moore, ‘Delaying Divorce: Pitfalls of Restrictive Divorce Requirements’ (2016) 37(16) *Journal of Family Issues* 2265.

⁷³¹ William Fabricius and Linda Luecken, ‘Postdivorce Living Arrangements, Parental Conflict, and Long-Term Physical Health Correlates for Children of Divorce’ (2007) 21(2) *Journal of Family Psychology* 195.

⁷³² Mavis Hetherington and Joan Kelly, *For better or for worse: Divorce reconsidered* (Norton & Company 2002).

⁷³³ Laurie Kohn, ‘Justice Delayed by Design: The Harms of Our Protracted Divorce System’ (2025) 70(1) *Villanova Law Review* 179 at page 180.

⁷³⁴ *ibid* at page 181.

⁷³⁵ Legal Aid Board, *Administrative Procedures Handbook* (13th edn, LAB).

means of limiting wait times. With the aim of improving synergy, the LAB/FMS has a policy that those cases referred between services are to be given priority on waiting lists.⁷³⁶ Such strategies may improve case duration periods which is to be welcomed, in light of the challenges stemming from prolonged wait times for the parties involved, and the suggestion that they inhibit referrals as is now discussed.

5.6.2.1 Prompt Access to Legal Advice:

The role of legal advice in the mediation process has been previously discussed. While its importance is recognised, both those solicitors and mediators interviewed highlighted the challenging nature of its provision to clients also engaged with the FMS in a timely fashion. This identification has unfortunate consequences for service synergy as undue delays have been identified as potentially increasing animosity between parties and creating a situation where it is more difficult to reach an amicable resolution.⁷³⁷ Stemming from their substantial workload, the majority of LAB solicitors noted how their schedule does not allow them to provide clients with ad hoc legal advice when it is required. Describing a hypothetical scenario, Solicitor 1 explained:

somebody might contact you to say this issue has come up in mediation and we are going back tomorrow say to discuss...you know the mortgage. Something like that or issues around the children...Before there is a proposal, I want to see what you have to think. And yes, it can be quite difficult because I might say I'm not here today, I'm in court, and tomorrow I am in court as well. Or you haven't given me enough notice. And from the client's point of view obviously then, they want to go away feeling that back up of the solicitor advising them or listening to the issue and saying well that's fine, that is quite in order.

⁷³⁶ *ibid.*

⁷³⁷ Chapter 3 provides an empirical based discussion of this topic. See also: Daniel Olivas, 'Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to Be Ignored Comment' (2003) 71(4) *Tennessee Law Review* 769; Moore (n 730).

From the views expressed by Solicitor 1, it is clear that not only is the provision of legal advice important but it also needs to be timely if it is to benefit the client and in turn support the mediation process. Unfortunately, due to the wait lists to receive a consultation with a LAB solicitor,⁷³⁸ some mediators noted how they find themselves directing their clients towards private practitioners to avert these delays. Describing this situation, Mediator 8 noted how:

The difficulty is in terms of them getting legal advice from the Legal Aid Board solicitors is that an awful lot of the time there are very significant waiting lists. So, if you have a situation where for instance you have a custody, access and guardianship dispute and there is some feature of that which is urgent, okay, and it has to be dealt with ASAP, ask yourself how realistic it is to ask somebody to wait a couple of weeks or months to actually get into the Legal Aid Board solicitor? So, for the most part in that situation, what I find myself saying to the clients is look, you know what I would suggest is that you ring around a couple of private solicitors, suggest that you would like a once off consultation and ask them what fee they're quoting for that...And that is a situation that often presents. So again, the ideal would be that maybe, you know out there somewhere or someplace there would be a solicitor to which one would have immediate access or relatively immediate access.

This situation draws attention to the effectiveness of the priority wait list system for those cases being referred from one service to the other.⁷³⁹ While identified by a sole participant, and thus constituting an outlier in the data set, Mediator 2 noted that if clients are:

⁷³⁸ See Figure 8 & Table 3 on pages 113 and 100, respectively.

⁷³⁹ LAB (n 735).

referred over to us from the law centre, we will offer them an appointment within a month. We will make sure we prioritise those appointments that come over and I believe that's happening for all of our offices. Now the reason that we can do that is because there's not that many coming across.

However, Mediator 2 felt that this agreement wasn't reciprocal, specifying that:

It is supposed to be reciprocated. It's not happening. It's supposed to be when somebody is in mediation, we've actually got a standard letter that says, you know, about a priority appointment. But we've had, I've had clients of mine telling us that the law centre staff has said it doesn't matter what letter you have. Our waiting list is four to six months.

As the court is to be satisfied that proper provision has been achieved in granting a decree of judicial separation or divorce, the importance of tailored legal advice for those in mediation cannot be overstated. In recognition of its importance, the findings of this research suggest that there is a gap in the synergy between the services offered as timely access is unlikely outside of the private sphere. This is problematic as it increases the likelihood that where parties forego legal advice, the agreement drafted in mediation may not satisfy the requirements for the remedy sought. Alternatively, should the parties have waited to receive legal advice, their conflict may have exacerbated and potentially undermined a pre-existing mediation agreement (or agreement to mediate). Whilst further research in this area may provide additional insights into the depth and scale of this problem, it is suggested that timely access to legal advice for those in mediation would be beneficial to enhance the integration of these services, thus the current operation of the priority system warrants increased attention. Having considered legal advice, the next section will investigate the importance of mediation being readily accessible to legal aid clients.

5.6.2.2 Prompt Access to Issue-Specific Mediation:

The unfortunate consequences of the divorce process for adults and children is well established.⁷⁴⁰ With a heightened concern for wellbeing, it is important that all possible means to mitigate potential harms are pursued wherever possible. One means of supporting this aspiration is by parties having access to the most suitable dispute resolution mechanism for the area of contention, as is now considered. In evaluating the role of mediation within the legal process for separation and divorce, solicitors within the LAB noted how they find it difficult to refer clients to mediation, as Solicitor 4 highlighted that:

Generally in my experience, I find it hard to navigate Legal Aid Board clients in the direction of mediation.

Providing a rationale for this difficulty, Solicitor 4 identified how clients who qualify for legal aid favour the additional legal support, noting how they:

prefer to deal with their solicitors. If there's to be a settlement meeting, they much prefer to have their solicitor and if necessary their barrister, paid for by the Legal Aid Board, facilitating that process for them rather than going to mediation themselves. And I'd say that's universal.

Solicitor 4 was not alone in the majority view that there can be a difficulty referring LAB clients who are seeking a judicial separation or divorce to the FMS. Sharing in this view but offering a different rationale for the occurrence, Solicitor 3 noted that:

everyone's given the details of the Mediation Service, but I think it's something to do with the fact that by the time people

⁷⁴⁰ Paul Amato, 'The consequences of divorce for adult and children' (2000) 62(4) *Journal of Marriage and Family* 1269. See also: I-Fen Lin, Susan Brown and Kagan Mellencamp, 'Gray divorce and parent-child disconnectedness: Implications for depressive symptoms' (2024) 86(1) *Journal of Marriage and Family* 95; Lisa Strohscchein, Peggy McDonough, Georges Monette and Qing Shao, 'Marital transitions and mental health: Are there gender differences in the short-term effects of marital status change?' (2005) 61(11) *Social Science & Medicine* 2293; Richard Lucas, 'Time Does Not Heal All Wounds. A Longitudinal Study of Reaction and Adaptation to Divorce' (2005) 16(12) *Psychological Science* 945.

come in here anyway, they're looking to get a divorce... You know, their focus is on actually just getting the legal process underway.

The views of Solicitor 3 and 4 above arguably support Clark's assertion that lawyers resist mediation on the basis of it being unsuited to the particulars of the case, or an alternative mechanism such as solicitor negotiation being better placed to resolve the dispute.⁷⁴¹ Additionally, the value of mediation may not be readily apparent to clients upon realising that even where mediation is successful a court decree is still required, as has been discussed at length in Chapter 3. While the necessity to secure a court order was identified as a barrier to engagement in mediation for judicial separation and divorce disputes, many of those solicitors interviewed did still see value in the mediation process, just not as a standalone mechanism for resolving separation disputes.

As illustrated in Chapter 2, the predominant model of mediation delivered by the FMS is known as the 'all-issues' model of mediation. In describing this model, the FMS notes that the issues negotiated are couple specific but often similar in nature. What is commonly included in a final mediated 'all-issues' agreement are 'finances, maintenance, family home, other property, insurances, pensions, succession, parenting arrangements, and guardianship.'⁷⁴² However, it is for the parties to the dispute to identify the issues that need to be addressed. With the desire to resolve disputes holistically, it is logical that the FMS offer this model, but it may not always be a prompt process as the findings in Chapter 3 suggest. In discussing the utility of mediation within the legal process, certain solicitors interviewed expressed a view that on occasion, the FMS be purposefully constrained in their scope and simply deal with targeted issues. In evaluating the utility of mediation, Solicitor 5 opined that:

the Mediation Service is a limited service, but it can be very good if it is focused on certain areas [such as childcare arrangements] where they really add value to the overall

⁷⁴¹ Clark (n 710).

⁷⁴² Legal Aid Board, *Family Mediation Procedures Handbook* (3rd edn, LAB 2023) at page 1-7.

process. Otherwise, they can think that they're doing great work...and then when they're coming to us, we just start from scratch in terms of affidavit of means or whatever.

Similarly, Solicitor 3 expressed a preference for a:

bit more coordination in terms of access to the services and even, if like mediation were willing to deal with like kind of 1 off issues. So that you know, you could kind of say, look, there's a fight about a holiday brewing, get them into mediation and sort of, you know, things like that might be a help, might help just kind of get everything running a bit more smoothly.

While all of those solicitors interviewed were in support of mediation, the majority articulated its suitability to certain types of disputes. Adopting this approach would however require the construction of an alternative model to that of 'all-issues' where mediators are more confined in their scope. Furthermore, mediators would likely need to be more directive ensuring that parties remain on focus. In approaching mediation in this manner, the mediator would deviate from their largely facilitative position on the spectrum towards somewhat more of an evaluative role, as previously discussed in Chapter 4. While the nuances of this potential model would require comprehensive consideration, its delivery would need to be readily accessible in the same manner as legal services, to prevent the conflict from escalating. Were these services accessible in a prompt manner, this would contribute to meaningful service synergy which in turn would enhance the client experience.

While the capacity to refer for specific issues may improve the synergy between these services, it raises a fundamental question. Is mediation a tool to be used by the legal profession or is it a dispute resolution mechanism in its own right, which needs to be viewed as a resolution process on par with traditional legal services? Interestingly, addressing this question might not be as divisive as may be expected.⁷⁴³ As has been

⁷⁴³ Maclean and Eekelaar (n 683); Rachael Blakey, 'Mediators mediating themselves': tensions within the family mediator profession' (2023) 43(1) Cambridge University Press 139.

advocated throughout this thesis, it is the clients' individual needs that should guide the dispute resolution process. Therefore, an optimal system would have the capacity to provide legal advice in a prompt fashion once a mediation settlement is reached and additionally, it would ensure mediator availability to address targeted issues as necessary. Parties could therefore confine themselves to one process or draw from each as is necessary to their circumstances. Whilst the findings of this research suggest that this would improve the existing system, the next section will consider its feasibility in practice.

5.7 Increasing Integration

5.7.1 Additional Resources

Like many publicly funded organisations, the LAB reports resource shortages with the system previously being described as 'chronically underfunded'.⁷⁴⁴ Despite an increase in funding in recent years, as discussed and will further be noted, from the very onset of the LAB review, concern was expressed over the availability of adequate resources to implement the reforms yet to be identified. Speaking on behalf of the Minister for Justice, TD Hildegard Naughton frequently caveated the necessity to reform the legal aid system with reference to the availability of 'the finite resources available'.⁷⁴⁵ Despite the review having yet to formally commence, Naughton noted that such reforms are to be conducted with 'resources that must of necessity be constrained'.⁷⁴⁶ While discouraging, this issue is by no means confined to the LAB, rather the Former Chief Justice Francis Clarke specified how 'It must also be acknowledged that, as in all areas of public expenditure, there will never be sufficient resources to deliver the perfect system.'⁷⁴⁷ Although resources in this context are not infinite, this section will suggest how some modest reforms could better facilitate the integration of the LAB/FMS and may reduce public expenditure in the long term.

⁷⁴⁴ Joint Committee on Justice Equality Debate 20 February 2019.

⁷⁴⁵ Seanad Debate 17 February 2022, Vol 282 No.14.

⁷⁴⁶ *ibid.*

⁷⁴⁷ Office of the Chief Justice (n 728) at page 34.

Legal aid schemes operating on the basis of restricted resources is an issue not confined to Ireland. Denvir et al. in their study of the legal aid landscape in England and Wales noted how legal aid solicitors are frequently absent of ‘adequate time to complete the work required to give a good level of service.’⁷⁴⁸ Their study identified that:

Remuneration is a significant concern for practitioners, with the majority indicating that their salary and working arrangements for their role are unfair, that they frequently need to work beyond set hours to meet demands and that they often struggle to fit work around their family life and personal commitments.⁷⁴⁹

Comparably, in discussing the client experience with participants in the current study, both solicitors and mediators spoke to the substantial workload pressure on LAB solicitors and how they struggle to manage their caseloads.⁷⁵⁰ Further to those assertions regarding caseload discussed in Chapter 3, Mediator 3 identified how:

the Law Centre’s are completely overrun like, I mean, they are really under resourced and overrun and, you know, put to the pin of their collar.

In addition to significant workloads, the limited resources available negatively impacts wait times and inhibits service delivery, as discussed in full in Chapter 3.⁷⁵¹ While this view demonstrates that additional resources may contribute to a higher standard of service, the LAB could also enhance synergy through services being more readily accessible were additional service providers employed alleviating the current caseload. Additionally, the resultant greater capacity could support the establishment

⁷⁴⁸ Catrina Denvir, Jacqueline Kinghan, Jesscia Mant, and Daniel Newman, *Legal Aid and the Future of Access to Justice* (Bloomsbury 2023) at page 229.

⁷⁴⁹ *ibid* at page 229.

⁷⁵⁰ See Chapter 3 for empirical-based discussion on service provider caseload.

⁷⁵¹ To observe the direct impact of resources on wait times, see Chapter 3 where the re-introduction of the private practitioner scheme had the immediate effect of reducing wait times.

of pilot projects specifically targeting this aspect of service delivery, as will be discussed later in this section. Given the undoubted multi-layered benefits of such developments, it seems imperative that the Government recognise the need to fully commit to the legal aid review to deliver meaningful change and provide the necessary level of support. While securing the necessary funding is likely to be difficult, there is a growing body of evidence suggesting that a conservative approach to the provision of additional resources by the State is short sighted within this context.

Contemporary research indicates that investing in legal aid can be profitable.⁷⁵² With reference to the speech delivered by Ms Eilis Barry the Chief Executive of FLAC at a 2023 Access to Justice Conference, it was noted that ‘There are many natural concerns about resources for legal assistance...’ but that ‘There is a growing body of research to the effect that access to justice is an economic investment and, in fact, saves the State money.’⁷⁵³ Though Eilis Barry made reference to research conducted by Moore and Farrow, this is not the sole basis for this argument.⁷⁵⁴ Albeit its claims are more conservative, the Boston Bar Association asserts that ‘For every dollar invested in civil legal aid, the return to the state and its residents is as much as \$2 to \$5 dollars.’⁷⁵⁵ While research would be required to investigate these claims in an Irish context, given its potential to alter how State investment is viewed, it is an aspect of service delivery that warrants increased attention. If validated, there is scope to improve the client experience in a manner that could be considered an investment rather than an additional drain on public expenditure. The validation of this claim in an Irish context could prove very beneficial as in the sections which follow, the reforms discussed are likely to require some element of additional resources and thus serve to highlight the importance of the current proposal.

⁷⁵² Lisa Moore and Trevor Farrow, *Investing in Justice: A Literature Review in Support for the Case for Improved Access* (CFCJ 2019).

⁷⁵³ Office of the Chief Justice (n 728) at page 74. The research in question: Moore and Farrow (n 752). The study claims that for every dollar spent, the state can potentially recoup between 9 and 15 dollars, further to those benefits that do not lend themselves to such measurement i.e. fulfilling an unmet legal need.

⁷⁵⁴ Moore and Farrow (n 752).

⁷⁵⁵ Boston Bar Association, *Investing in Justice: A Roadmap to Cost-Effective Funding of Civil Legal Aid in Massachusetts* (Boston Bar Association 2014) at page 3. The findings of this study predominantly pertain to domestic violence and homelessness.

5.7.2 Introduction of Guidelines and Underlying Principles

The role and impact of mediation agreements is significant when considering the synergy between the LAB & FMS. Constituting the essential output of mediation and the basis for subsequent legal procedures, mediation agreements necessitate a collaboration of these two services (where intending to secure a judicial separation or divorce). Noting the inability to circumvent the requirement to engage with the court processes, Mediator 7 noted that:

however they [the client] want to finalise that agreement, either as lay litigants or with solicitors, they're part of the legal process so therefore the agreements have to fit into a legal framework.

While Chapter 4 provides support for this requirement, much concern was expressed (amongst all cohorts interviewed) over the handling of mediation agreements where legal advice/representation is sought. To the exclusion of matters pertaining to children (such as a parenting plan), the research findings identified that mediation agreements are somewhat disregarded and that solicitors tend to start from scratch upon their receipt. While a central rationale for their disregard is that these agreements are not typically constructed on the basis of verifiable information and/or full disclosure by one or both of the parties, an additional factor noted by Solicitor 2 is that:

they're of varying quality.

Proceeding to discuss the implications for service synergy, Solicitor 2 opined that:

some mediated agreements, they're poor [in accounting for legal norms]...the Mediation Service and the Legal Aid Board are supposed to be as one. It's a huge problem, that they don't work together.

Solicitor 2 ultimately drew a direct connection between the inadequate standard of mediation agreements and the lack of cohesion between these services. In such instances where solicitors advise clients not to proceed on the basis of the terms of the mediation agreement, it essentially concludes the mediation process and commences the legal process, as opposed to these services supporting or collaborating with one another. Thus, it is argued that were the quality of mediation agreements more in line with the regulatory requirements, supported through mediators having an enhanced awareness of legal standards, there would be an increased potential for their transition into the legal framework. While improving service provider training will be discussed as a means to support this aspiration, a further approach is the introduction of guidelines, principles, and formulas where appropriate.

As noted in Chapter 4, the findings of the research highlight the importance of legal advice, specifically relating to the rights and responsibilities of the parties. While the introduction of guidelines, principles, and formulas is intended to aid clients in negotiating the outcome of their dispute, so that they are better informed as to what could reasonably be regarded as proper provision in their circumstances, it would further enhance the synergy between these services through a greater respect for mediation agreements. This assertion is grounded on the acceptance that legal knowledge positively influences the quality of mediation and its outputs.⁷⁵⁶ Through increasing the awareness of the standards required and probable outcomes to be achieved from a rights perspective, it is likely that mediation agreements could more readily be drafted in a manner that meets the necessary legal requirements, and therefore more easily transition to the legal process.⁷⁵⁷

5.7.3 The Introduction of a Public Legal Education Campaign

The outcome of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, as previously discussed, demonstrates that information and awareness has a pivotal role in service uptake. Hunter highlights how England and Wales ‘had simply failed to see

⁷⁵⁶ Marian Roberts, *Mediation in Family Disputes Principles of Practice* (3rd edn, Routledge 2017).

⁷⁵⁷ See Chapter 4 for an empirically grounded in depth discussion on this topic.

that solicitors were a crucial source of information about and referrals to mediation.’⁷⁵⁸ Within an Irish context, the importance of conveying information regarding mediation has long been noted. In the 1994 LRC *Consultation Paper on Family Courts* it is outlined that where proceedings for judicial separation have been instituted, the parties should be required to attend a family court centre to receive information and advice regarding the availability and purpose of mediation.⁷⁵⁹ In March 1996, the LRC published a *Report on Family Courts*.⁷⁶⁰ Section 7.08 of the Report outlines that the response to the proposals made in the 1994 Consultation Paper were ‘positive’ with regards to the development of information centres to carry out information sessions.⁷⁶¹ It is suggested therefore, that from the earliest stages of law reform, the LRC identified the potential benefit of informing individuals about the advantages and key aspects of mediation. Following the 1994 Consultation Paper and 1996 Report, it appeared as if a scheme would be established for the development of information sessions, however, in the years that followed, little if any progress was made regarding their establishment.⁷⁶² While the establishment of information sessions is one means to convey information regarding mediation, this section will discuss the need to convey information prior to a dispute arising.

As argued previously, the client’s individual circumstances will predominantly determine the means of dispute resolution. It is therefore desirable that parties have a sufficient prior understanding of each process, aiding them in their selection. Unfortunately, the qualitative data collected indicates that general awareness of these processes is lacking amongst those seeking services, with regards to both their

⁷⁵⁸ Rosemary Hunter, ‘Inducing demand for family mediation – before and after LASPO’ (2017) 39(2) *Journal of Social Welfare and Family Law* 189 at page 193.

⁷⁵⁹ Law Reform Commission, *Consultation Paper on Family Courts* (LRC 1994) at paragraph 7.37. Outlined in this Consultation Paper was that ‘Where proceedings for judicial separation have been instituted, the parties should be required within two weeks to attend a family court centre (which should be attached to each regional family court), if they have not already done so, to receive information as appropriate concerning the various family support services available, including welfare services; to receive information and advice concerning the availability and purpose of mediation. This information and advice should be given by an official who has appropriate knowledge and counselling skills and who would act under the auspices of the court. It might be augmented by an appropriate video, and by the provision of a full information pack. There should be emphasis throughout on the need to give priority to the interests of any dependent children and on the importance of avoiding any damage or distress to them.’

⁷⁶⁰ Law Reform Commission, *Report on the Family Courts* (LRC 52 1996).

⁷⁶¹ *ibid* at paragraph 7.07.

⁷⁶² Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98 2010) at paragraph 6.12. See also: McGowan (n 692).

availability and what they entail. Solicitor 7 in highlighting this majority view, described how:

for the most part clients have absolutely no idea of any of the processes available, court procedures or mediation...Some people, clients I've found, they don't understand the point of mediation. They think, oh like is it just counselling, is it just to get back together, is it, like what is the point of it? Like can I not just go to court and get my divorce now?

The findings highlight the importance of enhancing citizens legal literacy, for example, by way of a PLE campaign. In this way, this gap could be ameliorated through the provision of information on the role and availability of mediation, as suggested by Mediator 5 in specifying how:

there's a lack I suppose of general awareness out there maybe in terms of what mediation is. Certainly, from a general public, broad sweeping awareness point of view, there's certainly a bit of work that could happen there to make the general public more aware of mediation. I don't think, you know, people even realise it's there in many cases, either through ourselves, or through another provider.

If parties are unaware of the strengths of mediation or even its availability, it will likely not be regarded as a viable approach, meaning the willingness to attempt mediation diminishes substantially and this can operate as a barrier to service synergy. This issue has been previously recognised by the LAB/FMS who trialled mandatory individual information sessions as part of a pilot project in Cork from 2014-2017, which were ultimately described by Carney as 'successful on many different levels'.⁷⁶³ The pilot involved individuals completing a one-hour information session prior to receipt of the legal aid certificate, qualifying them to receive legal advice and/or representation.

⁷⁶³ Marie Carney, 'Project Review: Introduction to Individual Information Sessions: Cork Pilot Project 2014-2017' (2018) 4(1) Legal Ease 3 at page 4.

Central from the perspective of service synergy is that those who attended were ‘40% more open to using ADR as a method of resolving their dispute after having attended the information session.’⁷⁶⁴ Interestingly, a lack of trust over the process was one of the issues identified for non-attendance, which could be attributed in part to an absence of awareness.⁷⁶⁵ Despite the success of the pilot, its sustainability was impacted through the availability of resources.⁷⁶⁶

In recognition of the vital role of information and early intervention, the Australian government has established Family Relationship Centres which ‘provide information, advice, referral and mediation.’⁷⁶⁷ The Centres have been identified as having a positive impact on the dispute resolution landscape with it being noted that during the first five years of their operation:

overall applications to the courts in parenting cases dropped dramatically (approximately 32%). Simultaneously, public use of mediation and counselling services increased. The FRCs also seem to be a good investment of comparatively limited public funds...The FRCs provide significant help to a large number of people who do not qualify for legal aid and would not go to court, but still need help navigating the difficult transitions of separation and divorce for them and their children.⁷⁶⁸

Although innovative approaches such as Family Relationship Centres and the pilot information sessions in Cork demonstrate positive results in encouraging mediation

⁷⁶⁴ *ibid* at page 4.

⁷⁶⁵ *ibid*.

⁷⁶⁶ *ibid*.

⁷⁶⁷ Patrick Parkinson, ‘The Idea of Family Relationship Centres in Australia’ (2013) 51(2) Family Court Review 195 at page 195. See also: Leanne Smith, ‘Family Law for Family Life: Rethinking the Boundaries of Family Law’ (2025) 78(1) Current Legal Problems 271. Smith contends that family law should move towards a preventative and user-centred model, supporting individuals and families earlier in the lifecycle of disputes through early intervention, accessible information and non-adversarial processes. It is her belief that this would lead to an improve long-term wellbeing of the family even where family breakdown occurs.

⁷⁶⁸ Andrew Schepard and Robert Emery, ‘The Australian Family Relationship Centres and the Future of Services for Separating and Divorcing Families’ (2013) 51(2) Family Court Review 179 at page 181-182.

uptake, it would be of further benefit to convey relevant information to the public prior to a dispute arising. Considering the various intricacies of a general public information campaign, Mediator 7 described the reforms they would like to see in this regard, noting that:

I do think from a societal perspective it's a really unique thing that we offer [free mediation services] and we can be doing more with it...I think we should be going out as a service to promote it in terms of information sessions to people, in terms of going into schools to say, do you know what mediation is and this is how it works for family separation and all kinds of groups...But behind that you then have to have the resources to do it because if you're facing into a 6 or a 10 month waiting list then that takes all the energy out of it. But you know I've never seen a stronger movement for mediation as I feel there is at the moment, so I'm hoping we might be hitting a tipping point.

While Mediator 7 clearly identified the need for a public legal education (PLE) campaign to improve awareness and engagement, they also emphasised that such an initiative would require appropriate resources to be effective. This concern aligns with issues previously discussed in this chapter regarding the importance of sustained investment and strategic planning in the development of accessible and effective service provision.

The perceived lack of awareness of both mediation and court processes is a barrier, which impedes service synergy. In highlighting how some legal literacy enhances service synergy, Mediator 8 noted that:

the clever persons are those that are able to use both systems and marry, excuse the pun, and marry and take from each system what it is they require...you know, often people say...look I've come here because I don't want to go next or near solicitors. I don't want to have anything to do with the

legal process. And the first thing I say to them is look, what you've got to understand is if you like, how the clever person should play this system and the clever person should play this system by using the best of both processes, okay? And there is good in both processes and there are weaknesses in both processes. And if you realise that from the outset and recognise what the weaknesses and the strengths are of each process, if you like, and marry the strengths as best you can and use those to your advantage, well then that's the clever person.

Enhanced legal literacy is therefore beneficial from the perspective of enabling clients: (i) to have a better awareness of what each process entails; (ii) to have an increased awareness of the availability of each process; (iii) to select the most appropriate dispute resolution mechanism in their particular circumstances; (iv) and to have a better understanding of the dispute resolution process as a whole. Additionally, based on the experience of Family Relationship Centres in Australia, there is a basis to contend that increasing awareness and understanding amongst the public can contribute to a reduce public expenditure in the long term. Further to those matters discussed, increasing awareness would have the capacity to reduce the barriers to entry and may aid in expediting the resolution of these disputes, which will now be discussed.

The majority of solicitors interviewed noted that by the time clients arrive at a LAB consultation they are simply looking to secure a decree of separation or divorce. At this stage, the solicitors' experiences were that it is challenging to refer clients in the direction of mediation once they realise that they will ultimately require a court order, through the services of the LAB. Despite this observation, some practitioners did note the positive aspects resulting from initial engagement with mediation prior to legal services, as previously outlined. Central to this benefit is the opportunity afforded to work through the emotional aspects of the dispute and those matters relevant to parenting. Beyond emotional readiness, empirical support was provided by Mediator 2 as to how it can expedite the overall process on a procedural basis:

If it is your (the clients) intention to seek a divorce, I've a checklist. I'm going to ask you to get yourself a folder, a Manila

folder, a hard drive or whatever. Paper copies of everything. If you haven't got your marriage cert, get it now...because I've found out what the end user needs for the divorce...and I'm working my way backwards.

It is therefore contended that where mediation is attempted prior to legal procedures, it may aid in the over-arching dispute resolution process. Distinct from judicial separation or divorce proceedings, which necessitate a statutory period of separation, mediation is absent of barriers to entry and can be engaged at any stage. Due to this accessibility, it would be both helpful and efficient that mediation be attempted by those who are waiting to meet the relevant statutory requirements. Where attempted, it may aid parties in the preparation for the subsequent legal process. For mediation to be utilised as this preliminary step, greater public awareness of the process, its availability and its outcomes is critical, giving rise to the need for a public legal education campaign.

5.7.4 Improved Service Provider Training

This chapter previously discussed the differing roles performed by mediators and solicitors. One central factor giving rise to these differences are the professional training routes undertaken. As training is highly impactful in shaping the practices and culture of a profession, it is vital to consider its potential impact on the desire to integrate these services. In the discussion which follows, it will be argued that an increased level of legal training for mediators may improve the standard of mediation agreements so that they align with legal standards and lend themselves towards influencing the subsequent legal/court process.⁷⁶⁹ Furthermore, it is foreseen that LAB/FMS in-house training could enhance service synergy through facilitated solicitor/mediator interaction, subsequently improving services providers awareness and understanding of the other process, thereby potentially encouraging further suitable referrals.

⁷⁶⁹ Marian Roberts and Maria Federica Moscati, *Family Mediation: Contemporary Issues* (Bloomsbury 2020).

Quality:

While the FMS delivers an inhouse training programme for their trainee mediators as yet to be discussed, it is essential that universal standards are established for this profession. Historically, a largely self-regulating profession, s. 9 of the 2017 Act now requires the Minister to prepare a code of practice which may include provisions pertaining to ‘continuing professional development training requirements for mediators.’ To fulfil this function, the mediation council accounted for in s. 12 would have a pivotal role. Despite the 2017 Act being enacted and commenced for over 5 years, no such code of practice nor council has been developed. Recognising this lacuna, Mediator 7 noted the:

lack of regulation in terms of mediation as a profession...

and how:

it's really important that we get the Mediation Council set up.

It's really important that we become a regulated body.

Absent of regulation, there is no restriction on who is able to call themselves a mediator in Ireland.⁷⁷⁰ While this title is freely adopted, accredited bodies such as the Mediators Institute of Ireland (MII) and the Irish Professional Mediators Organisation (IPMO) have established their own training requirements and codes of practice.⁷⁷¹ Unsurprisingly, the majority of those mediators interviewed expressed frustration at the failure of the State to fully implement s. 9 and s. 12 of the 2017 Act. Mediator 4 noted:

⁷⁷⁰ Organisations such as the MII and IPMO require their members to have completed an accredited training course and have obtained professional indemnity insurance prior to practising. See: Mediators Institute of Ireland, ‘Membership’ <<https://www.themii.ie/membership/types-of-membership/membership>> accessed 7 May 2025; Irish Professional Mediators Organisation, ‘Eligibility for Membership’ <<https://www.theipmo.ie/Membership>> accessed 7 May 2025.

⁷⁷¹ Mediators Institute of Ireland, ‘What is an MII Accredited Training Course?’ <<https://www.themii.ie/training/accredited-mediation-training/>> accessed 11 November 2024. Specified by the Mediators Institute of Ireland is that an MII accredited ‘training course is at least 60 hours duration, of which 20 hours may be reading/research etc.’ See also: Irish Professional Mediators Organisation, ‘Eligibility for Membership’ <<https://www.theipmo.ie/Membership>> accessed 7 May 2025.

there are very low barriers to entry, which is a problem the mediation industry has, if it wants to be respected.

While Mediator 7 highlighted the need ‘to raise the whole boat’ they further specified that the FMS should not be complacent with this inadequacy, noting how it could be:

doing more in that area. I think we can do more to provide training and knowledge to mediators who work outside of the service and internally.

This view arguably demonstrates the need for a holistic approach to family law reform with various stakeholders pulling together to achieve the desired outcome. Though beyond the remit of the FMS to establish a mediation council and draft a code of practice, as Mediator 7 suggests, it may be in a position to mitigate certain inadequacies within the profession through the development of a more skilled workforce.

While performing different roles, this professional landscape contrasts significantly with the legal profession where the requirements of barristers and solicitors are well established in an Irish context and require multiple years of training. In the absence of sufficient mediation regulation, it is arguable that the standard of service delivery can vary substantially between these two professions and create an impediment to service synergy, as will be discussed. Furthermore, participants in the study suggested that it can even contribute to hostility between service providers. In discussing the different training routes, Mediator 6 described how:

You’ve got a long voyage of becoming a solicitor, which requires usually a law degree, and an apprenticeship and final exams, and all of the work that is required in order to become a professional, right?...So you’ve got kind of a natural pool of people who have come through a hard-earned slog to become solicitors...So you know, then they come across us [mediators]...most people who have been, you know, either nurses, lawyers, teachers, or social workers, or people who

have just decided that they want to come back into the world of work and feel that mediation would be a really good thing to do. And they trained, you know, do a 60 hour certified mediation course and then they're a mediator, and then they suddenly are able to put a plaque up against the wall and off they go doing mediation.

Proceeding to discuss the potential hostility arising due to this stark contrast in training requirements, Mediator 6 described how:

you have this kind of idea that we as mediators, sort of go well, you know, we know how to resolve conflict. We're wonderful. We can bring two people into a room and get an agreement. And children's voices will be heard through us or through the parents. And we'll have resolved something. And there's our lovely agreement. And can you [solicitors] just please give effect to it, you know? And in that whole mix I think, from a legal perspective, is who do you [mediators] think you are like? You know, this is something that's like, you know, I very rarely could say this to my own colleagues because they would see me as being kind of like, almost like treason or a traitor or something like that, you know? Well, not quite. But like, if I said that, they would just go, but [Mediator 6] you know, we're the ones that are in the line of duty. We're the ones that are constantly telling the Legal Aid Board lawyers what we do, we're always trying to explain what we do. They just don't get it. But we're trying. We're trying, this that and the other, but from a reciprocal point of view, their interest in what we do is limited, they don't really care what we do.

Mediator 6 highlights a level of unease between the professions where the intricacies of the roles are not respected. Arguably, this position falls within the scope of cultural

barriers as identified by Clark.⁷⁷² In light of the pathway toward qualifying as a solicitor, it is unsurprising that solicitors may be discontent when the intricacies of their role are not accounted for. Noting the potential impact of professional development, Clark opines that ‘established, traditional cultural patterns may shape lawyers’ attitudes to new ways of working (including mediation) should not be underestimated.’⁷⁷³ With an absence of cohesion at present, this section will investigate how additional training may mitigate this limitation of service delivery.

Though there is an absence of barriers to entry for private mediators, a recent FMS job advert suggests that the entry requirements as a mediator employed by the FMS are more stringent. For example, the post required a candidate to have completed 40 hours of separating couples training and a ‘minimum of 100 hours face to face family mediation (separating couples) work with clients signed off by a qualified family mediation supervisor’ or ‘Advanced Membership of the Mediator’s Institute of Ireland’.⁷⁷⁴ While it is evident that FMS seeks to recruit mediators with a high degree of experience, this is not always possible and thus it has developed its own in-house training programme for trainees. Operating two full time training programmes, those who complete Programme 1 are potentially offered a place on Programme 2. Programme 1 largely mirrors that of the 60 hours mediation training required and offered by IPMO/MII. Programme 2 is more advanced and consists of two modules, the first is a family mediation knowledge-based course and the second is a module consisting of case experience.⁷⁷⁵ Though contributing to a high standard of service delivery, the provision of this training is not without difficulty, as Mediator 8 noted that:

you’ve also got to remember, we’re at the mercy of the public and we’re running a free service. So remember, in a situation where people can cancel at a whim, with no significant justification, it means that you know a trainee can be very

⁷⁷² Clark (n 710).

⁷⁷³ *ibid* at page 259.

⁷⁷⁴ Legal Aid Board, *Family Mediator Multiple Locations Information Booklet* (LAB 2024) at page 3. See also: Mediators Institute of Ireland ‘How to Become an Advanced Member’ <<https://www.themii.ie/membership/types-of-membership/advanced-membership/>> accessed 5 January 2025.

⁷⁷⁵ Legal Aid Board, *Trainee Mediator 2021-2022 Information Booklet* (LAB 2021).

unfortunate and find in a day, they might have two cancellations out of three...and between that then and the requirement, not maybe to have any legal knowledge whatsoever and also a heavy burden in terms of drafting being thrust upon you, maybe in a situation where you have no familiarity with writing, that makes it a steep learning curve.

While Mediator 8 identified the challenging nature of implementing a training programme, they also drew attention to the absence of a requirement for legal knowledge which can operate as a barrier to service synergy, particularly in the drafting of mediation agreements which are intended to form the basis for securing a court order. Mediator 8 proceeded to note how:

solicitors may be frustrated occasionally and understandably with documents that may be sent to them because they feel they have to undo them. And they've made their life more difficult, not less difficult.

Similarly, O'Shea and Conneely note that 'Insufficient legal knowledge on the part of the mediator can result in agreements that are contrary to public policy or show disregard for possible legal outcomes.'⁷⁷⁶ While recruiting and retaining mediators with a desirable level of experience is important, particularly given the absence of regulation in this area, what the FMS can take control of is the delivery of legal training to those already employed. In highlighting the ongoing role of in-house training, Mediator 8 explained:

it's very important for family mediators to have some knowledge of family law. I'm not necessarily saying that they have to be solicitors or barristers or necessarily have a law degree, but they do have to have a core knowledge of family law. In a situation where they do not have that core knowledge

⁷⁷⁶ Sinéad Conneely and Róisín O'Shea, 'Family Mediation: the Irish Perspective' in Marian Roberts and Maria Moscati (eds), *Family Mediation: Contemporary Issues* (Bloomsbury Professional 2020) at page 69.

of family law, that experience of drafting or capacity to recognise significant legal issues, that poses a problem, a big problem!

Thus, from the perspective of service synergy, it is important that service providers are trained to ensure that their mediation agreements are capable of implementation in the legal process. While this issue may be tackled internally within the FMS, as is occurring to a certain extent at present, this could be greatly enhanced universally with the establishment of the Mediation Council to ensure the standard of the profession as a whole. Despite the delay in its formulation, the former Minister for Justice Helen McEntee, confirmed that a ‘Mediation Council Shadow Group has now been convened’ with the first meeting having taken place on the 20 June 2024 and aspires to establish ‘a body as envisaged by Section 12 of the Mediation Act, 2017.’⁷⁷⁷ Included within the terms of reference is that the Group will ‘consider how to maintain and develop standards in the provision of mediation, to include a system of CPD training; develop a common Code of Practice, with potential input and involvement as needed from other statutory bodies...’⁷⁷⁸ Albeit overdue, such progress is welcomed as it illustrates the desire of the State to positively augment the standard of service delivery, along with demonstrating the heightened period of development the family law system is currently undergoing.

Awareness:

Further to the standard of service delivery, qualitative data illustrates the importance of service providers having an appropriate understanding of both professions in order to meaningfully integrate the FMS & LAB. Identifying the lack of awareness at present, Mediator 7 noted that:

solicitors don’t really know what we do, but we equally don’t know as much of what they do and the limitations and the

⁷⁷⁷ Dáil Debate 23 July 2024, State Bodies.

⁷⁷⁸ *ibid.*

complications of their role and the legal obligations they have.
So, there's definitely work that we can do in that area.

While it is arguable that the LAB has sought to make improvements in this aspect of service delivery through the establishment of co-location centres, service providers awareness of the other process is still lacking, as Mediator 2 noted that:

If you were to ask me to explain exactly what happens to a client who approaches the Legal Aid Board for, you know, separation and divorce 10/11 years on, I am still clueless as to the operational procedures in the law centres and this is not for the want of mediators asking to be informed and advised so that we can, you know, kind of shape, tailor, you know what we're doing to better lay down that pathway for clients. Yeah, but it just hasn't happened...None of the CEOs...have addressed this fundamental issue. How do we get that collaboration, that pathway kneeled down, ironed out for clients. So if you're asking me what happens, I have no idea what happens over in the law centre.

This absence of awareness on the part of mediators is problematic from the perspective of service synergy. Similarly, solicitors can fail to grasp the added value of mediation, Mediator 2 identified how some LAB solicitors have a 'pathological lack of trust' in the mediation process. Having highlighted this internal absence of confidence and awareness, Mediator 7 proposed a solution in noting:

one way to break down barriers is that, you know you're here, you're understanding why the decisions are being made.

Building on this proposition, Mediator 2 suggested how:

it's very pragmatic, I think every Board member and every senior manager of all the different sections within the Board need to get themselves into the mediation offices to develop

their understanding of what is actually happening under their remit or within their organisation.

Mediator 2 further opined how there:

should be a requirement that any new staff member joining the Board, whether they are working in the law centres or the mediation offices, spend one week in the other service.

While understanding the other process is important, Mediator 4 questioned whether awareness is sufficient in noting:

Umm I do feel that there's something missing in the incentivisation of lawyers and the depth of their understanding of the utility of more therapeutically positive forums. And I don't know how that gap can be bridged cause you know most of the lawyers in Legal Aid Board will have gone on a course to understand mediation. But do you know, maybe they need to live it? You know, maybe they need to partner up with their local mediators and do three or four cases and watch in a lived way, in a real applied way. And then when they meet their client, the next time, the future client, they'll know how a more therapeutically positive forum can address the needs that this person has. And whether that can fit into the frontline war zone that that those amazing people who are solicitors in the Legal Aid Board operate within, that's a question, that's a deep question for the human resource and senior management of the Legal Aid Board.

From the views expressed, it is evident that there is opportunity for additional training requirements to be introduced. Furthermore, there needs to be a concerted effort to share learnings between these professions with the ultimate aim of enhancing service synergy through the mitigation of cultural barriers. Given that both mediation and legal services operate under the remit of the LAB, the delivery of both training and enhanced

inter-organisation engagement, should be achievable. While improving service provider training and awareness would likely require a long term strategy, it is arguable that other reforms could be implemented and have immediate effect.

5.7.5 Improving Case Management & IT Services

McGowan notes that ‘Although the Family Mediation Service and the Legal Aid Board are part of the same organisation, their services are not integrated. Each service runs its own case management system and clients are not tracked from one service to the other.’⁷⁷⁹ While discussing the client experience with participants, it was noted that the current IT case management systems present a major challenge to service synergy. Highlighting this inadequacy, Solicitor 6 specified how:

the IT would make you want to cry at times because it just makes everything so difficult. We don't have a proper case management system.

Expressing similar dissatisfaction but in relation to the FMS case management system, Mediator 2 specified how:

You'll never make sense of our case management system. I wish you well.

Required to support the delivery of these processes, this section will discuss how developments in case management could enhance service synergy and improve the client experience, particularly if a unified system were implemented.

A major flaw associated with the operation of the current operating systems is their absence of integration. Mediator 4 observed how:

⁷⁷⁹ McGowan (n 692) at page 189.

there doesn't seem to be a clear systematic approach on the communication between the two services on their waiting lists and where the client sits.

This limitation has unfortunate consequences, as Mediator 2 noted how they:

have no way of knowing what happens to our agreement.

While inhibiting service providers' ability to stay abreast of their cases for the full duration of the dispute, this absence of communication can negatively alter the client experience where referrals are made. Solicitor 7 noted how the:

issue that I have come across is really the lack of communication between that forum [mediation] and us. I have had situations where you know down on my file, client is in mediation and client will get back to me once they have an update. And then months and months and months go by and I am hearing nothing and then the client rings and goes well am I divorced now? And I am like what you're in mediation aren't you? No, no, no, we had got an agreement six months ago, longer, did you not get that?

While Solicitor 7 directed this critique at the mediation profession, arguably it would be more appropriate to criticise the case management system. Such issues are not confined to the LAB's system, rather previously discussed were those difficulties associated also with the FMS system. As noted in Chapter 3, mediators as per their systems requirements, will close a case after 3 months due to inactivity, despite it having been referred to a law centre for legal advice. In such instances, the case tracking system fails to provide an accurate account of the particulars of the dispute and in doing so the fundamental support and encouragement provided by service providers with regards to their clients may be lost.

Communication between the LAB and FMS needs improvement in order to enhance service synergy. Were their systems integrated, it would enable the identification of

case progression regardless of the service engaged. Through developing a capacity to track cases for the full duration of the dispute, it is foreseen that the potential for cases to be 'lost' between services would be significantly reduced. While the reforms identified on the basis of empirical evidence have great potential to positively enhance the client experience, in relation to service synergy, it is arguable that the most significant barrier is the provision of legal advice to those in mediation.

5.7.6 Pilot the Provision of Legal Advice for FMS Clients

The findings of this research indicate that the majority of FMS clients do not proceed to law centres, with the application of the means test identified as a contributing factor.⁷⁸⁰ Drawing on the empirical data collected, it is recommended that the LAB consider the establishment of a pilot scheme whereby legal advice is made available to those who have successfully executed a mediation agreement for the purposes of securing a judicial separation or divorce, allowing for verification of compliance with regulatory requirements and practice standards. It is anticipated that such a scheme would enhance access to justice and client autonomy, as well as serving to improve service synergy. While it is beyond the scope of this research to construct a framework for this pilot, the data collected highlights several core areas that would require consideration.

Eligibility has been identified as a key barrier preventing mediation clients from accessing legal advice, highlighting a clear need for reform in this area. Sharing this majority view, Mediator 2 noted how:

I know that there's legislation and I know it's about you have to be eligible for legal aid [and advice]. But at this stage, given the change in divorce legislation, given the introduction of the Mediation Act, is the board of the Board not prepared to look at putting forward a case that, for people that are involved with them, who are not eligible for legal aid, having some sort of

⁷⁸⁰ See Chapter 2, Table 1 & Figure 1 on page 92.

service provision, including an opportunity to seek legal advice during the mediation process?

If there is to be an increased incorporation of mediation alongside litigation for a more efficient and effective means of resolving judicial separation and divorce disputes, consideration must be given to the provision of legal advice in such instances. Concern in this regard has re-emerged in relation to the enactment of the Family Courts Act 2024 which includes provisions aimed at increasing the uptake of mediation while failing to address the issue of legal advice.⁷⁸¹ Although the reforms are welcomed,⁷⁸² the centrality of legal advice to the mediation process should not be overlooked, particularly in light of these research findings.

In consideration of the current proposal, advice would need to be provided by different legal professionals to avoid a conflict of interest, stemming from a solicitor's duty to their (potential) client. Recognising this concern, Mediator 8 outlined how:

there is a case to be made for, possibly a solicitor being readily available to give legal advice in this situation. And now I'm conscious of, you know, again, conflict of interest issues, the fact that there are again, you know, two clients who probably will require independent legal advice. But you know again that has to be thought through, but it is certainly an issue.

Beyond the requirement for advice to be 'independent', its nature and quality are essential to ensuring the system functions as intended, meeting the needs of clients while enabling solicitors to uphold their professional responsibilities. Of central importance in this regard is that solicitors have the necessary information. This is an area of service delivery that was identified as a limitation of the mediation process. Recognising how they could do more to ensure solicitors are better informed and better

⁷⁸¹ The Family Courts Act 2024. Further to listing mediation as a guiding principle in s. 8, the 2024 Act also amends both the 1989 Act and 1996 Act in order to introduce a joint application procedure. Taken together, it is arguable that these provisions target the increased use of private ordering in marital disputes.

⁷⁸² See Chapter 3 for an in-depth discussion of the 2024 Act and its potential to positively augment the client experience of judicial separation and divorce.

able to perform their role, in the context of enhanced synergy, Mediator 7 specified how:

we might send a client to a solicitor in the Legal Aid Board and say can you give them advice on this issue? We don't provide any information to the client, so we're not providing them with a summary of where they've got to in terms of mediation. We're not providing their budget sheets, we're just saying oh, can you just go and get advice on the family home and obviously a solicitor says well, I'm working in a vacuum here. I've no idea of the financial situation of both parties...So I think we can do much better at how we share this information or there has to be a better way to communicate that both from us and the client...But I do think we could provide more information and we could specifically say clients are stuck here. Can you give them advice on the family home and this is the information that we have so far and this is their thinking on option one, option two. I think that would be useful to the solicitors.

Further to solicitors requiring contextual knowledge of the dispute, they also need verifiable information. In identifying this pre-requisite, Solicitor 5 opined that:

in order to advise your client, you have to have a sworn affidavit of means. You're not doing your job if you just go on the basis of something that's just drawn up, you know on faith.

Based on these insights, comprehensive consideration is required to determine how contextual and verifiable information could be conveyed. With regards to the contextual information, it is worth noting that in England and Wales it is not uncommon for mediators to draft a memorandum of understanding, setting out: the outcome of mediation; any terms agreed financially or with regards to children; along

with the areas in which the parties are in need of legal advice.⁷⁸³ While this document would enable solicitors to attain a working knowledge of the dispute, additional verifiable information would also be required. Within the legal sphere, such information is obtained through the completion of affidavits. Solicitor 1 outlined the procedure for completing affidavits, noting that:

I sometimes send a draft affidavit of means and a draft affidavit of welfare to the client and say, fill these out now to the best of your ability so we get an idea of your income and expenditure...So our law clerk kind of takes over at that stage to run that part of the process. Getting the client back in to complete the affidavit properly. Finding out more, you know, saying to them what is your expenditure for example...our law clerk does most of that.

Once drafted appropriately, the affidavit then needs to be sworn which is completed at a nominal cost by a Commissioner for Oaths or practising solicitor who is not representing the party.⁷⁸⁴ This procedure presents a unique opportunity as it is not LAB solicitors themselves drafting the affidavit rather this function is delegated to law clerks, who could potentially be assigned this role in a pilot were the resources available.

Though a deeper consideration is required, the data collected indicates that establishing a pilot scheme for the provision of legal advice to those in mediation is a legitimate aspiration for the LAB/FMS. Given the identified obstacles for mediation clients who are seeking to resolve their marital dispute but do not meet the means test at present, this pilot, whilst a significant undertaking has great potential to improve service synergy, access to justice, and party autonomy, thus vastly enhancing the client experience. With the increasing recognition of the contributory roles performed by

⁷⁸³ Lisa Parkinson, *Family Mediation: Appropriate Dispute Resolution in a new family justice system* (2nd edn, Family Law 2011) at page 302-304.

⁷⁸⁴ Citizens Information Board, 'Affidavits'

<<https://www.citizensinformation.ie/en/justice/witnesses/affidavit/>> accessed 7 January 2025. The swearing of an affidavit is completed by an independent Commissioner for Oaths or practising solicitor. Parties would likely be directed outside of the LAB to complete this process, however, the cost for doing so is nominal: swearing an affidavit is €15 for the District Court and €20 for the High Court.

these services in facilitating a comprehensive dispute resolution system, it is vital that the LAB heavily consider this proposal.

5.8 Conclusion

This chapter critically evaluated the integration of LAB & FMS services with a view to enhancing the client experience in judicial separation or divorce disputes. While service synergy has long been a stated aim of the LAB, the findings of this research indicate that reforms to date have had limited impact in this regard. Despite this, these services continue to present a unique platform for collaboration. The empirical data identified factors associated with barriers to better service integration. Central to this are accessibility routes and the necessity for services to be available within a timely fashion. In seeking to improve the client experience through enhancing access to justice, autonomy, and service synergy, numerous reforms informed by the research findings have been proposed. While these reforms were considered individually, they are related and speak to multiple issues. Given their inter-dependency, it is argued that a holistic approach to developing and enhancing service delivery is required. The legal aid scheme is currently under review, this coupled with the recent enactment of the Family Courts Act 2024, presents as an optimal time to advocate for meaningful change. The next chapter, the concluding chapter of this thesis, will critically discuss how reforms in service delivery could vastly improve the client experience of separation and divorce with the LAB & FMS.

Chapter 6 Conclusion

6. Introduction

This socio-legal research seeks to critically explore the journey of judicial separation or divorce experienced by clients of the Legal Aid Board and Family Mediation Service, along with ascertaining how legal and mediation professionals understand and describe their client's journey. With a desire to maximise the data resources, available due to the unique collaboration with the LAB by way of the IRC EPS, a mixed-methods approach was implemented. The central research objective for the quantitative phase was to ascertain and consider various performance metrics of the Irish Legal Aid Board & Family Mediation Service, establishing an evidence-base upon which to compare and consider the dispute resolution processes and their capacity to provide timely and desired outcomes for their clients. In ascertaining the lived experience in the subsequent qualitative phase, multiple perspectives were considered following interviews with: clients, solicitors, and mediators. Together, the findings achieved by way of a human-centred design offer a robust foundation for informing future reform and policy development.

With the client experience as a primary focus, this study falls within the scope of a human-centred design, which in the current context seeks to improve both the functionality and user experience of the state funded family law dispute resolution system, guided by the needs and preferences of its users.⁷⁸⁵ Ascertaining and considering the client experience prior to proposing any reforms ensures that the developments implemented are responsive to real-world needs and problems. In adopting such an approach, this study offers a variety of evidence-based recommendations specific to a framework that is undergoing a contemporary period of development. With this novel evidence-base, it is hoped that this study will inform future reform both within the LAB/FMS and the wider family law dispute resolution landscape. Prior to highlighting such proposed reforms aligned with the study's

⁷⁸⁵ Margaret Hagan, 'A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Interventions to Make Courts User-Friendly' (2018) 6(2) *Indiana Journal of Law and Social Equality* 199.

thematic areas, the enduring shortcomings of the family law framework identified as negatively impacting the client experience will be outlined.

6.1 A System Under Strain

Numerous aspects of the resolution process were identified quantitatively and/or qualitatively as adversely affecting the client experience. When considered alongside LRC publications from the 1990's it is evident that many of these issues are long-standing, suggesting an absence of sufficient reform.⁷⁸⁶ Directly impacting the client experience, this study provided contemporary empirical support for the: (i) substantial time taken to resolve judicial separation and divorce disputes; (ii) the adversarial nature of the process; (iii) the vast judicial discretion afforded; and (iv) an absence of a client focus. These issues will now be considered, with attention to their continued relevance and implications for reform.

An on-going critique of the LAB has been the wait time to access services contributing to a protracted dispute resolution process. In exploring the timeliness for service delivery, it was identified empirically, that the LAB has made significant progress in reducing its wait times, with a direct connection to resourcing established. However, this progress has not resulted in a subsequent reduction in case duration periods as might be expected. In observing the rise in the time taken to resolve these disputes comprehensively, it was highlighted that despite the wait times for LAB services decreasing, such a development has coincided with a rise in wait times to access the Circuit Court, resulting in an overall rise in case duration periods. This observation demonstrates the necessity for a collaborative approach (amongst all stakeholders) to family law reform, in order to positively augment the client experience.

A further common criticism of the resolution of marital disputes in Ireland is the adversarial nature of the process.⁷⁸⁷ While this remains a prominent concern, empirical findings from this study also highlight that, in certain cases, an adversarial approach

⁷⁸⁶ Law Reform Commission, *Consultation Paper on Family Courts* (LRC 1994). See also: Law Reform Commission, *Report on the Family Courts* (LRC 52 1996).

⁷⁸⁷ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* (LRC CP 50 – 2008). See also: Law Reform Commission, *Report on the Family Courts* (LRC 52 1996); Joint Committee on Justice and Equality, *Report on Reform of the Family Law System* (JAE 2019).

may be necessary or even appropriate. With a desire to retain this capacity, this thesis advocates for a regime that is structured towards an amicable resolution process with a capacity for an adversarial approach as needed. Through a consideration of the empirical data obtained, it was identified that the landscape at present lends itself towards adversarial proceedings, demonstrated primarily through the absence of a joint application for judicial separation and divorce. While this issue has persisted for many years, it was further noted that the Family Courts Act 2024, once implemented, provides for such a joint application procedure, representing a significant step toward reducing adversarial attitudes in family dispute resolution. A further factor identified as contributing towards an adversarial process is the vast discretion afforded to the judiciary which results in a lack of consistency and predictability. This, it was noted, gives rise to inflated client expectations. Though the capacity of the LAB to rectify this issue is limited, it was highlighted how its service providers place a large emphasis on negotiated outcomes, favouring an amicable resolution of marital disputes, recognising the positive impact this can have on family members.

This judicial discretion was further associated with limiting party autonomy during the process, and beyond its resolution. Despite the regime being structured in this manner, to provide support for the family, especially dependent spouses and children, the analysis conducted demonstrates an increased willingness on behalf of the judiciary to consider individual autonomy where appropriate. While its comprehensive recognition is statutorily inhibited, this shift in the views of the judiciary demonstrates an increased willingness to consider cases on an individual and context sensitive basis, reflecting a gradual move toward a more client-centred approach within the dispute resolution process. Despite this study highlighting the enduring nature of these shortcomings, reform efforts have not been entirely absent.

6.2 Existing Efforts and Emerging Gaps: Reforming Family Law Dispute Resolution in Ireland

Following the introduction of judicial separation and divorce in 1989 and 1996 respectively, substantial legislative reform in Irish family law had been limited for many years. In terms of service provision, there have been notable developments within the Legal Aid Board/FMS, as it has sought to address operational challenges

within the scope of its remit. In an effort to reduce long wait times for legal aid and advice, the LAB reintroduced the private practitioner scheme for marital disputes. Additionally, the LAB/FMS introduced a priority list procedure to facilitate prompt access to both legal and mediation services where appropriate, though this study identified some concerns about its practical effectiveness. Recognising mediation as a less adversarial approach to dispute resolution, the LAB/FMS has also continued to support its uptake through the co-location model, which is increasingly being implemented. While legislative developments had been limited for some time, recent reforms such as the Mediation Act 2017, Family Law Act 2019, and Family Courts Act 2024, may support a more user-focused dispute resolution landscape, though these statutory reforms fall outside the immediate scope of LAB/FMS procedural responsibility. Though holding potential to impact the lived experience of marital breakdown, they still require a concerted effort to determine their comprehensive implementation and achieve their intended outcomes. While these reforms are welcomed and despite the process-level improvements identified within the LAB/FMS, there continues to be issues in service delivery with regards to the LAB/FMS and the wider dispute resolution landscape which require further consideration. This study having considered the challenges encountered by clients, offers numerous evidence-based recommendations. These proposed reforms which range in scale reflect the need for a holistic, system-wide approach to family law reform. While not limited to the LAB/FMS, their implementation holds great potential to significantly enhance the experiences of those who rely on their services.

6.3 Justifying the Method, Revealing the System: A Thematic Synthesis of the Client Experience

In implementing the unique and robust methodology detailed in Chapter 2, a range of matters were considered and analysed with regards to the client experience. Recognising the significance of the client experience, the topics of discussion in the substantive chapters of this thesis arose directly from the data, demonstrating their value and applicability. Creswell and Poth opine that a data-driven inquiry strengthens the authenticity of research outcomes, as it encourages reflexivity and responsiveness

throughout the analytical process.⁷⁸⁸ This data-guided approach ultimately supports the construction of knowledge that is both contextually relevant and empirically substantiated, affording enhanced weight to the proposals offered. Furthermore, through anchoring interpretations in participants experiences, there is a reduced risk of bias thereby enhancing the trustworthiness of this study. In light of these identified advantages, the limited empirical research in the Irish legal scholarship, and the potential for substantial legal reform over the next decade, it is desirable that there continue to be an uptake in socio-legal studies in an Irish context. Having adopted such an approach, this section will discuss the key themes arising from the methodology implemented. While the predominant focus was the LAB/FMS due to the strategic partnership formed by way of the IRC EPS, matters beyond the strict confines of the LAB and FMS were also considered.

Through investigating the client experience, the data secured and the associated analysis conducted identified three central themes: (i) access to justice; (ii) autonomy; and (iii) the integration of the LAB and FMS. In exploring these themes, the evolving nature of family law is apparent. Access to justice has expanded beyond the provision of legal supports to incorporate matters within the non-legal sphere. Party autonomy is no longer satisfied through ensuring marital breakdown remedies are accessible, rather the specifics of how these remedies are attained is now at the centre of discussions on autonomy. Furthermore, in integrating these dispute resolution mechanisms it is no longer sufficient to simply house them within the same building, rather achieving meaningful service synergy requires a concerted effort with regards to both professions, in how they are promoted and delivered. A recognition of these developments demonstrates the necessity for an on-going approach to reform in a family law setting. While a comprehensive overhaul is required at present to fully implement the 2024 Act, such an arduous task may have been mitigated through on-going reform, enabling the system to stay abreast of societal developments. Although these themes were predominantly discussed on an individual basis, a degree of overlap was noted with regards to the reforms identified as is now discussed.

⁷⁸⁸ John Creswell and Cheryl Poth, *Qualitative Inquiry and Research Design* (5th edn, Sage 2024).

6.4 Strengthening the Client Experience Through Reform

Various evidence-based proposals are offered throughout this thesis and considered in depth. For the purposes of this chapter, these proposals are categorised as either primary or secondary/supporting recommendations. Primary recommendations constitute those with a capacity to impact service delivery within/across the three substantive themes identified. In contrast, the supporting recommendations are those viewed as central to the successful implementation of the primary recommendations. In outlining these reforms, it will be illustrated how they respond to the core issues identified through the research and offer a pathway toward a more cohesive, client-centred dispute resolution framework. Each of the recommendations proposed are grounded in at least one of the three thematic areas as outlined below.

Continually advocated throughout this thesis, is that the Irish State introduce underlying guidelines, principles and formulae (where appropriate) to support the resolution of marital disputes, a reform which would require legislative action of the family justice system rather than organisational change within the LAB or FMS. Based on the empirical data collected, it is anticipated that this reform would have the capacity to positively augment the client experience across the three central themes identified and discussed. In providing such guidance, it is anticipated that the current judicial discretion and lack of predictability associated with the regime would be curtailed. Their introduction would also support parties in the resolution process as they would have a greater awareness of what could reasonably be expected in their circumstances. In doing so, they would operate as a fundamental safeguard for those who seek remedies in the absence of legal supports. With an identified capacity to support private ordering, there is also an increased likelihood that agreements formed outside of the legal process could more easily transition into the legal sphere, thereby enhancing service integration. Though having great potential to positively augment the client experience, the implementation of this reform would necessarily fall outside the remit of the LAB/FMS and require statutory intervention.

A further core recommendation discussed on an on-going basis, albeit primarily situated within access to justice and service synergy, is the potential to simplify certain aspects of service delivery. Given the variety of areas identified, some fall within the remit of the LAB/FMS and others within the broader family law system as a whole.

The process of obtaining a court order was identified by participants as complex with service providers noting that it can be challenging for their clients to come to terms with. In particular, the absence of a joint application, resulting in certain service providers listing all those reliefs beyond which they are actually seeking in the civil bill, was identified as potentially contributing to an adversarial process. However, it appears that the Family Courts Act 2024 will address this shortcoming through the introduction of a joint application for those seeking a decree of judicial separation or divorce. Additionally, the introduction of a standardised set of court rules and the use of more accessible, plain language were also identified as potential measures to enhance user engagement and understanding. There is also a foundation for these reforms within the 2024 Act, which provides for the establishment of the Family Courts Practice and Procedure Committee, a body well-positioned to oversee and guide such improvements.

Another area identified for procedural simplification is the current inability to apply to both the LAB and the FMS through a single joint application, a shortcoming which falls within the administrative remit of the LAB/FMS. At present, clients must navigate separate application processes for each service, which can create unnecessary delays, administrative burden, and potential disengagement particularly when a transition between services becomes necessary. Introducing a unified application process would streamline access and increase the likelihood that each client's circumstances guide the most appropriate dispute resolution pathway from the outset. Such a system would also enhance service responsiveness by ensuring that all necessary information is captured at the initial point of contact, allowing smoother transitions between mediation and legal aid where required. In effect, it would reduce duplication, improve continuity of support, and centre the process around client needs rather than institutional structures. To realise this objective, it is likely that the existing case management systems used by LAB and FMS would need to be replaced or significantly upgraded. An integrated case management system capable of supporting both services would be essential, not only to handle shared applications but also to support effective coordination, data sharing, and performance monitoring across both arms of service delivery. This reform, while ambitious, could make a meaningful contribution to a more coherent and client-focused family justice system.

The need to adopt a collaborative and client-centred approach to dispute resolution has also been identified. Within the context of legal service provision, it is recommended that clients have timely access to both legal aid and legal advice where they are unable to afford private representation. Implementing this recommendation may also encourage greater participation in mediation, offering the potential to resolve disputes in a more holistic and constructive manner. Importantly, this proposal reflects a broader shift towards recognising each client's individual needs as the central guiding factor in determining the most appropriate resolution pathway. In embracing both a collaborative and client-centred approach, there is also a recognised need to improve access to non-legal supports, such as suitable accommodation and timely welfare assessments, particularly in cases involving children. Albeit the LAB/FMS may be in a position to identify suitable professionals with regards to assessments, this recommendation as a whole extends beyond the direct remit of the LAB/FMS and requires coordinated engagement across wider State welfare and support services. Ensuring that both legal and non-legal supports are available and accessible would likely enhance the overall client experience of the dispute resolution process, while also minimising potential harms and supporting more sustainable outcomes.

In adopting a broad perspective, this study has highlighted the need to increase the legal literacy of citizens by way of a public legal education campaign, a reform which primarily responds to the theme of access to justice and would need to be implemented at a system-wide level rather than through the LAB/FMS alone. It has long been noted and accepted that there is a need to grow the awareness surrounding dispute resolution mechanisms and family law in general. Despite State funded mediation and legal services being available for numerous decades, this study has demonstrated on an empirical basis that clients' understanding of what these services provide, and the resolution processes as a whole is still lacking. While organisations such as FLAC, Citizens Information, and the UCC family law information website have sought to mitigate this lacuna, a governmental effort is needed to convey information prior to disputes arising. Such engagement could empower individuals to be proactive and make informed choices when disputes arise, ultimately contributing to more efficient and equitable outcomes.

In highlighting and discussing the evidence-based reforms proposed, it is clear that there is a degree of overlap, which in and of itself leads to a final proposal. To increase the likelihood of the recommendations identified having the desired outcome, there is a clear necessity for collaboration beyond the LAB & FMS. Rather, cross-sector engagement spanning educational institutions, policymakers, community stakeholders, and relevant government bodies will be essential to foster a shared vision, align resources, and ensure coherent implementation. A unified, systems-level response that acknowledges the interconnectedness of these reforms will not only enhance their effectiveness but also contribute to long-term sustainable change. In delivering the suggested reforms in a coordinated and compassionate manner, they stand to empower individuals at a vulnerable time, supporting them not just legally, but holistically.

6.5 Supporting Change: Targeted Reforms to Strengthen the Family Law Framework

As previously noted, secondary recommendations were proffered to support the delivery of the primary recommendations discussed and are therefore intended to operate across all three themes identified. These secondary/supportive proposals constitute additional resources/funding and increased training for service providers. Insufficient resources is commonly identified as a rationale for failing to implement reforms, with it being noted that concern has already been expressed over the sufficiency of the resources available to implement the reforms of the legal aid review as yet to be identified. While the LAB was previously described as being chronically underfunded for an extended period, recently, resource availability has expanded on an annual basis, with the then Minister for Justice Helen McEntee having specified in 2024 that ‘it [the Legal Aid Board] is a crucially important service and the funding for it has increased year on year. The number of people we have been able to help has also increased year on year, but, of course, we want to be able to do more.’⁷⁸⁹ Though operating as a central component for the implementation of the primary recommendations, such resources would also be required to enhance service provider training.

⁷⁸⁹ Select Committee on Justice, 17 October 2024.

Drawing on the empirical data obtained, this thesis discussed the importance of providing additional training to service providers. While enhancing the standard of service delivery and increasing the potential for service integration, there is also a need for general change management training. In order to accommodate new procedures, pilot projects, case management systems etc. service providers would be required to undertake some element of training to ensure the capacity to fulfil their role as required. Such training is not only essential for ensuring procedural consistency and competence, but also for fostering a shared professional culture that supports collaborative and client-focused dispute resolution.

The successful implementation of the primary recommendations will require additional resources in some form, chiefly in the form of finances and/or human capital. While an increase in availability has been identified, careful consideration is required on behalf of the LAB to ascertain how these resources could have the maximum impact in positively augmenting the client experience. Though an initial and ongoing expenditure is required, this study identified an evidence-base suggesting that investing in civil legal aid can deliver long terms savings for the State. It is therefore recommended that the implementation of the primary recommendations, both by the State and LAB, be viewed longitudinally so as to maximise their potential and avoid a further period of limited reform as has occurred historically.

6.6 Concluding Reflections

The research findings provide an evidence-based framework for reforms aimed at enhancing the client experience in marital disputes. Through simplifying procedures, enhancing the capacity for individual autonomy, and fostering increased collaboration between legal aid and mediation services, the Irish family law system can become more accessible, efficient, and responsive to the individual needs of its users. With this potential, the reforms proposed currently align with the objectives of the family law system in light of the ongoing review of the legal aid scheme and the enactment of the Family Courts Act 2024. This shared ethos comes by way of the universal desire to ensure that those who are in need of support have adequate access to it, along with mitigating the unfortunate consequences that frequently arise when seeking to resolve family disputes. As the Irish State continues to refine and alter its family law system,

it is imperative that these recommendations be considered and implemented to achieve a more equitable and effective dispute resolution framework.

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<<https://www.themii.ie/membership/types-of-membership/membership>>

Mediators Institute of Ireland, ‘What is an MII Accredited Training Course?’

<<https://www.themii.ie/training/accredited-mediation-training/>>

Shannon G, ‘Joint Committee on Justice and Equality 13 March 2019’

<https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/submissions/2019/2019-03-13_opening-statement-dr-geoffrey-shannon-special-rapporteur-on-child-protection_en.pdf>

Tusla, ‘Barnahus Ireland’

<<https://www.tusla.ie/barnahus/>>

United Nations Development Programme, ‘Our mission, our goals, our mandate’ (UNDP 2023)

<<https://www.undp.org/about-us>>

University College Cork, 'Family Law Information'

<<https://www.ucc.ie/en/familylaw/>>

Appendices

Appendix A:



Participant Information Sheet: *Legal Aid Board Clients*

‘From Dispute to Decree: A Critical Exploration of the Clients Journey Through the Legal Aid Board Family Dispute Resolution Services’

Hi there, we need your help! Research is being conducted into the way clients of the Legal Aid Board obtain a separation or divorce. If you are using mediation or legal aid to obtain a separation or divorce, we want to hear your experience of the process. If you can share some of your time, the researcher will want to discuss with you the various stages of the process that you believe were done well or could be improved upon. At no point will the researcher be interested in the particulars of your case, rather this information will be completed avoided. It is the role of these interviews to find out what your experience has been like as a client of the Legal Aid Board, so that recommendations can be made that may ultimately improve the service for future clients. For further in-depth details on the study please see the information below.

As a client of the Legal Aid Board dispute resolution services, you are invited to take part in a study being carried out by Gordon Rumley, an Irish Research Council funded PhD candidate at the School of Law, University College Cork. This document explains what their work is about and what your participation would involve, so as to enable you to make an informed choice.

The purpose of the study is to learn more about the clients experience of getting a separation or divorce via the Legal Aid Board’s family dispute resolution models (litigation and mediation).

As a client of the Legal Aid Board, your insights and contributions to this research would be invaluable. Participation in this study is completely voluntary. Participation or non-participation in the research will not impact on the service provided to you by the Legal Aid Board or any future engagement you may have with the Legal Aid Board’s services. Furthermore, the individual interview transcripts will not be shown to any Legal Aid Board staff members.

In the event that you are interested in participating, please note the following:

1. It is a requirement that you have or are using the Legal Aid Board's services to obtain a separation or divorce.
2. You will be asked to take part in an interview with the researcher.
3. The interview will take approximately thirty minutes.
4. The interview will take place either online or in-person.
5. The interview will be recorded.
6. Your participation will be confidential. This will be ensured by removing any identifying details and assigning each participant a pseudonym.
7. You can refuse to answer specific questions, or decide to withdraw from the interview at any time.
8. You can choose to withdraw your details and contributions from the study for a two-week period after the interview has been concluded.

If you become distressed by any of the topics discussed during the course of the interview, you may stop the interview at any time, and the researcher will provide you with contact details of available support services.

Is this study confidential?

Yes: all of the information you provide will be de-identified and securely stored, accessible only to the researcher. The only exception to this is where information is disclosed which indicates that there is an immediate serious risk to you or to others, which may require the researcher to notify the emergency services or Tusla as appropriate.

Once the interview is completed, the recording will immediately be transferred to an encrypted laptop and wiped from the recording device. The interview will then be transcribed by the researcher, and all identifying information will be removed. Once this is done, the recording will also be deleted and only the de-identified transcript will remain. This will be stored on the University College Cork OneDrive system and subsequently on the UCC server. The data will be stored for a minimum period of ten years following the submission of the thesis, as per the UCC Code of Research Conduct. The information you provide may contribute to findings and conclusions drawn in the thesis, in addition to research publications and/or conference presentations.

No negative outcomes are anticipated from your participation in this study. However, should you experience distress arising from the interview, it is advisable that you make contact with an appropriate support service e.g. your GP, Safe Ireland (1800 341 900), or alternatively the Samaritans (116123).

This study has obtained ethical approval from the UCC Social Research Ethics Committee.



If you have any queries about this research, you can contact the researcher:

Gordon Rumley

Tel: +353851522716

E-mail: grumley@ucc.ie

If you do not wish to speak with the researcher directly, you can alternatively contact the research supervisors of this study:

Prof. Louise Crowley

Professor in Law, University College Cork

Tel: 021 490 3879

E-mail: l.crowley@ucc.ie

Dr. Mary Tumelty

Lecturer in Law, University College Cork

Tel: 021 490 2854

E-mail: mary.tumelty@ucc.ie

If you wish to take part in this study, please contact Gordon Rumley (grumley@ucc.ie).

Appendix B:



Participant Information Sheet: *Legal Aid Board Service Providers*

'From Dispute to Decree: A Critical Exploration of the Client's Journey Through the Legal Aid Board Family Dispute Resolution Services'

As a service provider of the Legal Aid Board dispute resolution services, you are invited to take part in a study being carried out by Gordon Rumley, an Irish Research Council funded PhD candidate at the School of Law, University College Cork. This document explains what their work is about and what your participation would involve, so as to enable you to make an informed choice.

The purpose of the study is to learn more about the clients experience of getting a separation or divorce via the Legal Aid Board's family dispute resolution models (litigation and mediation). It is necessary to gain an understanding of this journey based on the lived experiences and perspectives of those involved i.e. service users (clients) and service providers (solicitors and mediators within the Legal Aid Board).

As a service provider of the Legal Aid Board, your insights and contributions to this research would be invaluable. Participation in this study is completely voluntary. Furthermore, individual interview transcripts will not be shown to any Legal Aid Board staff members.

In the event that you are interested in participating, please note the following:

1. It is a requirement that you have experience in resolving separation or divorce disputes with the Legal Aid Board.
2. You will be asked to take part in an interview with the researcher.
3. The interview will take approximately one hour.
4. The interview will take place either online or in-person.
5. The interview will be recorded.
6. Your participation will be confidential. This will be ensured by removing any identifying details and assigning each participant a pseudonym.
7. You can refuse to answer specific questions, or decide to withdraw from the interview at any time.
8. You can choose to withdraw your details and contributions from the study for a two-week period after the interview has been concluded.

If you become distressed by any of the topics discussed during the course of the interview, you may stop the interview at any time, and the researcher will provide you with contact details of available support services.



Information in relation to confidentiality and data storage

All of the information you provide will be de-identified and securely stored, accessible only to the researcher. The only exception to this is where information is disclosed which indicates that there is an immediate serious risk to you or to others, which may require the researcher to notify the emergency services or Tusla as appropriate.

Once the interview is completed, the recording will immediately be transferred to an encrypted laptop and wiped from the recording device. The interview will then be transcribed by the researcher, and all identifying information will be removed. Once this is done, the recording will also be deleted and only the de-identified transcript will remain. This will be stored on the University College Cork OneDrive system and subsequently on the UCC server. The data will be stored for a minimum period of ten years following the submission of the thesis, as per the UCC Code of Research Conduct. The information you provide may contribute to findings and conclusions drawn in the thesis, in addition to research publications and/or conference presentations.

No negative outcomes are anticipated from your participation in this study. However, should you experience distress arising from the interview, it is advisable that you make contact with an appropriate support service e.g. your GP, Safe Ireland (1800 341 900), or alternatively the Samaritans (116123).

This study has obtained ethical approval from the UCC Social Research Ethics Committee.

If you have any queries about this research, you can contact the researcher:

Gordon Rumley
Tel: +353851522716
E-mail: grumley@ucc.ie

If you do not wish to speak with the researcher directly, you can alternatively contact the research supervisors of this study:

Prof. Louise Crowley
Professor in Law, University College Cork
Tel: 021 490 3879
E-mail: l.crowley@ucc.ie

Dr. Mary Tumelty
Lecturer in Law, University College Cork
Tel: 021 490 2854
E-mail: mary.tumelty@ucc.ie

If you wish to take part in this study, please contact Gordon Rumley (grumley@ucc.ie).

Appendix C:



Consent Form for Clients of the Legal Aid Board

I agree to participate in Gordon Rumley's research study.

The purpose and nature of the study has been explained to me in writing.

I am participating voluntarily.

I give permission for my interview with Gordon Rumley to be recorded.

I understand that I can withdraw from the study, without repercussions, at any time, whether before it starts or while I am participating.

I understand that I can withdraw permission to use the data within two weeks of the interview, in which case the material will be deleted.

I understand that anonymity will be ensured in the write-up by disguising my identity.

I understand that anonymised extracts from my interview may be quoted in the thesis and any subsequent publications if I give permission below:

(Please tick one box:)

I agree to quotation/publication of extracts from my interview ☐

I do not agree to quotation/publication of extracts from my interview ☐

Signed: Date:

PRINT NAME:

Appendix D:



Consent Form for Solicitors / Mediators of the Legal Aid Board

I..... agree to participate in Gordon Rumley's research study.

The purpose and nature of the study has been explained to me in writing.

I am participating voluntarily.

I give permission for my interview with Gordon Rumley to be recorded.

I understand that I can withdraw from the study, without repercussions, at any time, whether before it starts or while I am participating.

I understand that I can withdraw permission to use the data within two weeks of the interview, in which case the material will be deleted.

I understand that anonymity will be ensured in the write-up by disguising my identity.

I understand that anonymised extracts from my interview may be quoted in the thesis and any subsequent publications if I give permission below:

(Please indicate preference below)

I agree to the anonymised quotation/publication of extracts from my interview ☐

Signed: **Date:**

PRINT NAME:

Appendix E:

Independent Samples T-Test Assessing the Number of Referrals in 2019 Between Co-located Centres and those which are not

Office type	N	Mean	Standard deviation	Standard error of mean
Co-located office	6	12.33	9.771	3.989
Regular law centre	25	13.96	31.941	6.388

	Levene's test for equality of variances		t-test for equality of means							
	F	Sig.	t	df	Significance		Mean difference	Standard error difference	95% confidence interval of the difference	
					One-sided p	Two-sided p			Lower	Upper
Equal variances assumed	.429	.518	-.122	29	.452	.904	-1.627	13.338	-28.905	25.652
Equal variances not assumed			-.122	26.804	.415	.831	-1.627	7.531	-17.085	13.831

	Standardizer	Point estimate	95% confidence interval of the difference	
			Lower	Upper
Cohen's d	29.339	-.055	-.946	.836
Hedges' correction	30.126	-.054	-.921	.814
Glass's delta	31.941	-.051	-.942	.841

Appendix F:

Interviews with LAB Clients

- Can you tell me about your experience of seeking a divorce/separation with the LAB?
- Could you provide me with a brief overview of the various steps you had to go through in seeking your divorce/separation?
- Can you tell me why you chose to pursue mediation over litigation or vice versa?
- At the first consultation, do you feel that you were adequately aware of what both the litigation and mediation processes would entail?
- What were the most significant challenges you encountered with the mediation/litigation process?
- Were there any beneficial aspects to pursuing either mediation or litigation as a source of dispute resolution?
- If you came to an agreement on the terms of your dispute, how did you proceed following the drafting of this agreement?
- Do you believe there are any particular changes that could be made to the mediation/litigation processes that would improve the client experience of seeking a divorce/separation with the LAB?
- How long did it take to resolve your dispute?
- Were there any particular factors you considered in deciding whether to pursue a separation or divorce?
- Did the onset of the pandemic impact the progress of your case?
- Did you receive any additional support such as legal advice throughout the dispute resolution process? (if party chose the mediation route).

Interviews with Solicitors (litigation-focused)

- Can you provide me with a brief overview of the various steps a client will have to navigate in seeking a separation/divorce via litigation with the LAB?
- In your experience, how do clients find the process of litigation?
- What do you feel are the most significant challenges to pursuing litigation for a client?
- What do you feel are the most beneficial aspects to pursuing litigation for a client?
- What do you believe are the most challenging or complex stages in the litigation process?
- How long does litigation usually take?
- At the first consultation, do you believe that clients are adequately aware of what both the litigation and mediation processes entail?
- Are there any particular areas of the divorce/separation process that you believe are in need of reform in order to improve the clients experience?
- Are there any procedural distinctions in pursuing a divorce versus separation?
- What impact has the Family Law Act 2019 had on you as a solicitor and on LAB clients seeking a separation or divorce?
- What are the most common reasons provided by clients for not completing the litigation process in full?
- Do many clients attempt mediation prior to pursuing litigation?
- Did you have to adapt your dispute resolution approach following the onset of the pandemic?
- Has the Mediation Act 2017 had any impact on how you handle separation and divorce disputes?
- Have you any experience of resolving separation/ divorce disputes via mediation?

Interviews with Mediators

- Can you provide me with a brief overview of the various steps a client will have to navigate in seeking a separation/divorce with the FMS?
- In your experience, how do clients find the process of mediation?
- Do you feel there are any drawbacks or challenges to pursuing mediation for a client?
- What do you feel are the most beneficial aspects to pursuing mediation for a client?
- In your experience as a mediator, what do you believe are the most challenging stages in the mediation process (prompts, for example: having the parties agree to mediate, the formulating of agreements, having agreements accepted by the courts)?
- How long does mediation typically take?
- At the first consultation, do you feel that clients are adequately aware of what both the litigation and mediation processes entail?
- At what stage in the process do parties typically decide to go to mediation?
- What mediation model is most commonly adopted by FMS mediators?
- What is your experience of resolving cases that have been referred from a LAB law centre to the FMS?
- What are the most common reasons provided by clients for not completing the mediation process in full?
- Are there any particular areas of the divorce/ separation process that you believe are in need of reform in order to improve the clients experience?
- What impact has the Mediation Act 2017 had both on you as a mediator and on FMS clients seeking a separation or divorce?
- What impact has the Family Law Act 2019 had on you as a mediator and on FMS clients seeking a separation or divorce?
- Are there any procedural distinctions in pursuing a divorce versus separation?
- In your experience, how often do parties receive supplementary support such as legal advice, throughout the dispute resolution process?
- Did you have to adapt your dispute resolution approach following the onset of the pandemic?

Appendix G:

*Intellectual Property Agreement Relating to IRC Enterprise Partnership Scheme
Postgraduate Scholarship*

Between

University College Cork – National University of Ireland, Cork

&

Legal Aid Board

This Agreement is made and entered into between:

Legal Aid Board, 48-49 North Brunswick St, Georges Lane, Smithfield, Dublin 7, D07 PEOC ('Enterprise Partner')
and

University College Cork – National University of Ireland, Cork a body incorporated under Charter with its seat at **Western Road, Cork ('The Research Body')**
individually a "Party" or collectively the "Parties"

WHEREAS **Legal Aid Board** being the Enterprise Partner, the Research Body, with the knowledge of the **Gordon Rumley** and the **Louise Crowley** have signed an Award Acceptance Form by which they have agreed to comply with the Terms and Conditions for the conduct by the Scholar at the Research Body of an Enterprise Partnership Scheme Postgraduate Scholarship funded by the Irish Research Council (the "IRC Terms and Conditions");

and

WHEREAS **Legal Aid Board** and the Research Body wish to agree the terms for ownership and management of intellectual property arising from the Enterprise Partnership Scheme Postgraduate Scholarship ("the Scholarship") in this Agreement;

In consideration of the Enterprise Partner's contribution towards the scholarship and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, **IT IS HEREBY AGREED** as follows:

1. Definitions:

"Academic Supervisor" shall mean the person or persons responsible for supporting and guiding the academic quality of the Scholarship, in this instance **Louise Crowley** or other such party as nominated by the HEI from time to time.

"Award Acceptance Form" shall mean the IRC award letter and IRC Terms and Conditions as referred to in the Award Acceptance Form signed by the Parties, copies of which are annexed hereto at Annex 2.

"Background Intellectual Property" shall mean Intellectual Property or Material (regardless of the form or medium in which they are disclosed or stored) controlled or owned by any party prior to the beginning of the Project or generated independently of the Project by that party and which is brought into or used as part of the Project and excluding for the avoidance of any doubt any Intellectual Property created during the Project.

"Background Register" means the schedule set out at Annex 1(A) which sets out the Background Intellectual Property introduced by each Party to the Research Project.

"Council" or "Prime Sponsor" shall mean The Irish Research Council (see www.research.ie).

"Confidential Information" shall mean, in relation to a Party, all Intellectual Property, Materials or other information (in whatever form communicated or recorded) belonging or relating to that Party which is disclosed to another Party or to which that other Party has access, and which (a) is expressly marked as confidential or proprietary, or (b) has been described as confidential by the Party in writing to the other Party within thirty days of disclosure. The Parties agree that Foreground Intellectual Property constitutes Confidential Information of the Research Body.

"Effective Date" shall mean 1/04/2020

"Enterprise Mentor" shall mean the person or persons designated by the Enterprise Partner as being responsible for supporting and mentoring the Scholar in relation to the Enterprise Scholar's involvement in the Fellowship and shall, in this instance John Scanlon

"Enterprise Partner" shall mean **Legal Aid Board** ;

"EP Contribution" means the contribution of the Enterprise Partner, which is at one third of the total value of the Award, as detailed more fully in Annex 4;

"Field" shall mean and be limited to **From Dispute to Decree: A Critical Exploration of the Client's Journey Through the Legal Aid Board Family Dispute Resolution Services.**

"Foreground Intellectual Property", shall mean Intellectual Property created by a Party in the course of the Project and all rights therein;

"Higher Education Institute" or "HEI" shall mean a recognised Irish education body entitled to award a Masters or a Doctorate of Philosophy (PhD) degree and which is approved by the Council and shall, in this instance, be University College Cork, National University of Ireland, Cork.

"Intellectual Property" shall mean patents, trademarks, registered designs, drawings, utility models, design rights, business ideas, concepts, inventions, discoveries, breeders' rights, copyright (including the copyright in software in any code), database rights, trade secrets and other confidential information, technology, business or trade names, goodwill and all other rights of a similar or corresponding nature in any part of the world, whether registered or not or capable of registration or not, and including all applications and the right to apply for any of the foregoing rights.

"jointly-created" shall mean:

(a) in respect of patentable Foreground Intellectual Property, an Irish patent agent would, following the provisions of Irish patent law, conclude that there is more than

one inventor of those Foreground Intellectual Property, and that each of the Enterprise Partner and the Research Body employ (or otherwise engage) at least one of those inventors;

(b) in respect of any copyright work, following Irish copyright law, the work was produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors, and that each of the Enterprise Partner and the Research Body employ (or otherwise engage) at least one these authors; and

(c) in respect all other aspects of the Foreground Intellectual Property, the Foreground Intellectual Property has been created by the joint efforts of the Parties and no aspects of that Foreground Intellectual Property are severable or separable from each other;

"Know-how" shall mean unpatented technical information (including, without limitation, information relating to inventions, discoveries, concepts, methodologies, models, research, development and testing procedures, the results of experiments, tests and trials, manufacturing processes, techniques and specifications, quality control data, analyses, reports and submissions) that is not in the public domain.

"Liability" or **"Loss"** or **"Losses"** unless the context otherwise requires includes claims, demands, proceedings, suits, judgements, damages, losses, costs, expenses, fees, penalties or fines;

"Materials" shall mean any and all works of authorship and materials, including, without limitation, data, any functional, technical and/or performance specification, devices, machinery, samples, products, sensors and data derived therefrom, biological materials, software programs, any other inanimate or animate matter, any and all reports, studies, data, diagrams, drawings, charts, specifications, and such other materials in whatever medium (including without limitation, written or printed, electronic or otherwise, computer discs, floppy discs, CDs, diskettes, tapes or other formats).

"Personnel" means in relation to any Party, that Party's officers, employees, consultants, subcontractors, and any other individuals engaged by that person on the basis of a contract for services;

"Project", shall mean the work described in the Parties application to the IRC for the Scholarship, and as amended from time to time subject to the prior written agreement of IRC, the Research Body and Legal Aid Board but initially that research project entitled **From Dispute to Decree: A Critical Exploration of the Client's Journey Through the Legal Aid Board Family Dispute Resolution Services.**

"Scholar" shall mean Gordon Rumley

"Scholarship Term" shall mean 48 months from the Effective Date

"The Scholarship" shall mean *the IRC / Legal Aid Board Enterprise Partnership Postgraduate Scheme*.

"Scholarship Fund" shall mean the funding for the Scholarship.

2. Review of Progress:

2.1 The Scholar shall do all such things as required by the IRC Terms and Conditions, in particular but not limited to clause 9 of the IRC Terms and Conditions. The Scholar shall submit a written progress report to the Enterprise Partner on a date to be agreed between the Parties in each academic year following commencement of the Scholarship.

3. Responsibilities of the Enterprise Partner

The Enterprise Partner will comply with all its undertakings in the Award Acceptance Form and IRC Terms and Conditions, including, without limitation, the following:

3.1 The Enterprise Partner will contribute its share of the total Scholarship amount, 'the EP Contribution' as set out in Award Acceptance Form and as more particularly described in the Table at Annex 4.

3.2 The Enterprise Partner will appoint an Enterprise Mentor to work with the Scholar as set out in the Award Acceptance Form.

3.3 The Enterprise Partner is encouraged to provide a placement period for the Scholar at its facilities as part of this Scholarship, as outlined in clause 7.2 of the IRC Terms and Conditions

3.4 The Enterprise Partner is encouraged to cover the cost of all expenses (e.g. travel and accommodation costs) incurred by the scholar as a result of periods spent on placement with the Enterprise Partner. The scholar should not be out of pocket due to undertaking the placement.

3.5 Where possible and appropriate, the Enterprise Partner (and specifically the Enterprise Mentor) will cooperate with the Scholar and Academic Supervisor to create a Training and Career Development Plan as contemplated by clauses 7.10 and 7.11 of the IRC Terms and Conditions. The Enterprise Partner will ensure compliance with the reporting obligations set forth in clause 9 of the IRC Terms and Conditions, where relevant.

4. Confidentiality

4.1 Each Party (a "Receiving Party") shall treat as confidential any Confidential Information disclosed or made available to it by the other (the "Disclosing party").

4.2 Each Receiving Party undertakes to disclose the other's Confidential Information only to those of its officers, employees, agents and students to whom and to the extent to which such disclosure is necessary for the purpose of carrying out the Project, and provided said individuals have been made aware of the confidentiality obligations in this Clause.4.

4.3 Clauses 4.1 and 4.2 shall not apply to any information that:

- is or becomes publicly known without any breach of this Agreement or any other undertaking on the part of the Receiving Party to keep it confidential
- is known to the Receiving Party before its receipt from the Disclosing Party without any obligation of confidentiality to the Disclosing Party
- is lawfully in the possession of the Receiving Party prior to its receipt from the Disclosing Party as shown by receiving Party's written records without any restrictions on its disclosure
- has been lawfully disclosed to the Receiving Party by a third party which did not acquire the same under an obligation of confidentiality from or through the Disclosing Party, as shown by the Receiving Party's written records
- has been independently developed by the Receiving Party without reference to the information disclosed by Disclosing Party
- is approved for release in writing by an authorised representative of the Disclosing Party; or
- is by law or by any court or order of any governmental or regulatory authority required to be disclosed, to the extent of the relevant disclosure requirement.

4.4 If a Party is required by law to disclose any Confidential Information, it shall (to the extent it is permitted to lawfully do so) provide notice to the other Party prior to making such disclosure, so as to allow time to undertake legal or other action, to prevent such disclosure or otherwise obtain confidential treatment of such disclosure.

4.5 Each Party shall ensure that its respective employees, agents and registered students (as the case may be) who participate in the Project shall comply with the obligations of confidentiality as though they were parties to this Agreement.

4.6 The agreement may be terminated if there is a breach of confidentiality or a personal data breach relating to clients' data.

Data Protection

The Research Body will ensure that the Scholar is aware of and provided with a copy of the Board's Data Protection Policy in addition to the Research Body's data protection policies.

The Board has a duty of care to its clients and staff and it is necessary to undertake a to assess the risk posed to clients and staff of the Board.

The Enterprise Partner will undertake a Data Protection Impact Assessment (DPIA) if required prior to the commencement of processing of personal data involved in the project.

Data Protection

The Enterprise Partner will provide the Scholar with access to the data held by the Enterprise Partner and/or access to and use of the Enterprise Partner's records and IT systems. This will be subject to the following: -

- The Scholar must fully meet such requirements as may be set from time to time by the Enterprise Partner for researchers in relation to Garda vetting and any other matter;
- The Scholar will sign the Declaration set out in Annex 5 below herewith before carrying out any relevant research work for the Enterprise Partner.

The Board will facilitate access for the Scholar to the following for the purposes of informing and improving service delivery:

- Anonymised aggregate data generated in the Legal Aid Board's case management systems.
- Individual case level data collected and stored in the Legal Aid Board's case management systems.

Access will be provided to this data onsite and the data will be managed as agreed in Annex 5.

Interviews will be conducted by the Scholar as described in Annex 6

5. Intellectual Property

5.1 The Background Intellectual Property to the Project which will be detailed on a Specified Background is owned by the Enterprise Partner. Any Party introducing Background IP shall first complete and share with the other Party a Background IP Disclosure Form in the form annexed hereto as Annex 3. Background Intellectual Property shall be treated as Confidential Information for the purposes of clause 4.

5.2 Subject to existing contractual obligations, each Party hereby grants the other Party a royalty-free, non-exclusive licence to use its introduced Background Intellectual Property for the duration of the Project and for the purpose of and to the extent needed or necessary for carrying out the Project, but for no other purpose.

5.3 Nothing in this Agreement grants either party any right to the other Party's Background Intellectual Property, except the rights expressly granted in this Agreement.

5.4 In the event that

(a) any particular Foreground Intellectual Property has been developed using any Background Intellectual Property introduced by a Party in accordance with this Agreement; and

(b) that Background Intellectual Property is necessary to commercially exploit the Foreground Intellectual Property in question,

then the introducer of such Background Intellectual Property ("Specified Background") shall grant to the commercialising Party an option to negotiate a royalty-bearing, non-exclusive licence to use the introducing Party's Specified Background but only to the extent necessary to commercialise the Foreground Intellectual Property, and only in conjunction with and as an integral component of the Foreground Intellectual Property, in the Field, on fair, equitable and non-discriminatory commercial terms and subject to agreement on all licence terms and subject to the owning Party being contractually free to so SAVE THAT this obligation shall not apply in respect of any Background Intellectual Property which the introducing party has identified, prior to its introduction to the Project, as not being available for commercialisation. The foregoing option shall continue for the same period as the Option Period specified at Clause 5.7 in respect of each piece of Foreground Intellectual Property, and shall be on the same terms as the option in respect of Foreground intellectual Property set out at Clause 5.7 hereto, and shall be implemented in accordance with Clauses 5.7 and 5.8 hereto.

5.5 As per the "*Inspiring Partnership - national IP Protocol 2016*" (2016) and clause 19.1 of the IRC Terms and Conditions Foreground Intellectual Property created by the Scholar and/or the Research Body shall be owned by the Research Body with appropriate accreditation to the Enterprise Partner.

5.6 Foreground Intellectual Property jointly created by the Scholar and/or the Research Body on the one hand and the Enterprise Partner on the other shall be owned by the Research Body.

5.7 The Research Body shall grant to the Enterprise Partner a first option to negotiate an exclusive licence to commercially exploit any Foreground Intellectual Property (excluding Know-How) owned by the Research Body in the Field, on fair, equitable and

non-discriminatory commercial terms ("the Option"). With respect to each piece of Foreground Intellectual Property, the Option shall commence on the date on which the Research Body notifies the Enterprise Partner in writing that the Foreground Intellectual Property in question is available for licensing, and shall continue for a period of six months from that date ("the Option Period"). The Research Body may, at its discretion, agree to extend the period of any Option, subject to the Enterprise Partner agreeing to pay any patent and other related costs which may fall due during the Option Period in respect of the Foreground Intellectual Property in question.

5.8 The Enterprise Partner and the Research Body agree to negotiate in good faith during the Option Period, terms for such a licence taking account of the Enterprise Partner's contributions in support of the Project and including fair and equitable compensation to the Research Body. If the parties are unable to agree the terms of a licence during the Option Period, the Enterprise Partner's right to negotiate a licence to the Research Body's Foreground Intellectual Property shall expire and the Research Body may use the Foreground Intellectual Property in whatever manner they wish at their sole discretion.

5.9 The Party owning Foreground Intellectual Property may take such steps or do such things as it considers reasonably necessary or desirable to protect such Foreground Intellectual Property from unauthorised use by third parties. Where patent applications are to be made for the Foreground Intellectual Property, such applications shall be made in the name of the Party in which the Foreground Intellectual Property is vested and the cost of such applications shall be borne by that Party. Nothing in this Agreement shall be construed as obligating an owning party to prosecute, assert or maintain any patents comprised in its Foreground Intellectual Property. Subject to any terms agreed in a subsequent licence agreement, each Party shall (at the cost of the requesting Party) provide reasonable assistance to the other Party in applying for patents and in defending all intellectual property claims made by third parties in respect of the Foreground Intellectual Property.

5.10 Each Party acknowledges that:-

- (a) the Research Project is of an experimental nature, and, as is the case in any Research Project, the results of the Research Project cannot be guaranteed; and
- (b) any Background Intellectual Property licensed and any Foreground Intellectual Property created pursuant to this Agreement are being licensed on, or provided "as is" basis, without warranty or representation (including as to merchantability, fitness for a particular purpose, accuracy, efficacy, completeness, capabilities or safety, or any other warranties or representations whether express or implied), and all warranties and representations with respect to the Background Intellectual Property and the Foreground Intellectual Property are hereby excluded to the fullest extent permissible by law
(including any warranty that the use of any Background Intellectual Property and/or Foreground Intellectual Property does not infringe the Intellectual Property of any third party);
and

(c) neither the Research Body, nor the Research Body's employees, students, servants or agents shall have any liability, whether in contract, tort, statute or otherwise in connection with any licence or use by the Research Body of any Background Intellectual Property or any Foreground Intellectual Property.

5.11 Nothing in this Agreement limits or excludes any Party's Liability: (a) for death or personal injury; (b) for any fraud; or (c) for any other sort of Liability that, by law, cannot be limited or excluded or (d) under Clause 5.14.

5.12 Subject to Clause 5.11, neither Party shall be liable to the other Party for any loss of profit, loss of revenue or loss of contracts or any indirect or consequential loss howsoever caused arising out of or in connection with the performance or non-performance by that Party of its obligations under this Agreement regardless of whether such losses were in the contemplation of the parties.

5.13 Subject to Clause 5.11, the aggregate liability of Research Body to the Enterprise Party in contract, tort or otherwise arising out of or in connection with or in relation to this Agreement, shall be limited to the total Scholarship Funding due to be paid by the Enterprise Party to Research Body.

5.14 The Enterprise Party shall indemnify and keep indemnified the Research Body on demand against all Losses suffered or incurred by the Research Body:

(a) in consequence of any breach of, or non-compliance with the Award Acceptance Form, which arises directly or indirectly from or in consequence of any act or omission on behalf of the Enterprise Party or its Personnel;

(b) arising in any way out of or in connection with the use by the Research Body of the Enterprise Party's pursuant to the Project including but not limited to any infringement of the Intellectual Property of any third party;

(c) arising in any way out of or in connection with the use or exploitation by the Enterprise Party of the Research Body's Background and/or Foreground Intellectual Property whether during the Project or pursuant to any subsequent licence from the Research Partner as provided for herein, including but not limited to any infringement of the Intellectual Property of any third party.

(d) from and against all Losses which may be suffered or incurred by the Research Body arising directly or indirectly out of or in connection with the employment or engagement, or the termination of the employment or engagement of the Personnel with Enterprise Partner.

6. Publication

6.1 The Parties recognise the IRC Policy relating to the placement of research publications in Open Access Repositories as set out in the IRC Terms and Conditions in particular clause 20.1.

6.2 The Academic Supervisor and Enterprise Partner, as appropriate (hereinafter 'Publishing Party') and Personnel directly involved in working on this Project (including the Scholar) shall be entitled to make oral, written or other public disclosures of the results of the Research and the Foreground Intellectual Property, including but not limited to:

- making presentations at seminars, symposia, professional meetings; and
- publishing in journals, theses or dissertations, or otherwise of their own choosing, methods and results in accordance with normal academic practice (hereinafter 'Publication');

provided that the publication process, outlined below has been followed and a Confidentiality Notice (under clause 6.2) has not been given.

The publication process requires that:

(i) the Publishing Party is notified, and furnished with a copy of the Publication concerned, at least thirty (30) days in advance of making the proposed Publication and (ii) the other Party shall review the proposed Publication and revert within 15 calendar days with consent to publish or a Confidentiality Notice which states (a) that requires the Publishing Party to delay the proposed Publication up to a maximum of 90 calendar days after receipt of the Confidentiality Notice, if in the other Party's reasonable opinion that delay is necessary in order to seek patent or similar for any of that Party's Background Intellectual Property or Foreground Intellectual Property which are proposed to be published (b) prevent the Publication of any of that Party's Background Intellectual Property.

- 6.3. If the Publishing Party does not receive a Confidentiality Notice within that period, any of its personnel may proceed with the proposed publication.
- 6.4 For the avoidance of doubt nothing in this Agreement shall prevent the submission of a thesis containing Foreground Intellectual Property or Confidential Information for the purposes of gaining the accreditation of PhD or Masters as long as both Parties shall take appropriate steps to ensure that either confidentiality agreements be put in place with external examiners or such work is put on restricted access, but only where necessary.
- 6.5 It is acknowledged and agreed that the all public lectures and/or publications or public interviews issued or arising from the Project must contain an acknowledgement of the Council in the manner and text as determined by the Council, under the terms of the IRC Terms and Conditions.
- 6.6 The outputs will include a published report, with ownership retained by the Research Body. The Enterprise Partner will have exclusive access to the report for a 3-month period prior to being put in the public domain. This period will allow the Enterprise Partner to examine and review the report and the

Enterprise Partner will have the right to insist on the removal of any identifying or personal data from the report, unless explicit consent has been provided by the data subject, to ensure that any personal data collected by the Enterprise Partner as part of its service delivery is not disclosed.

7. General

7.1 Save as expressly provided in this Agreement, there are no conditions, warranties, or other terms binding on any Party with respect to the actions contemplated by this Agreement, and any condition, warranty or other term in this regard which might otherwise be implied or incorporated into this Agreement, whether by statute, common law or otherwise are hereby excluded to the fullest extent permitted by law.

8. Term and termination

8.1 This Agreement shall commence on the commencement of the Award Acceptance Form, and shall continue until the earlier of:-

- (a) six months after termination of the Scholarship, or
- (b) six months after completion of the Project.

8.2 On termination or expiry of this Agreement for whatever reason all rights and obligations of the Parties under this Agreement, and all terms of the Agreement, shall automatically terminate except for:-

- (a) any obligations and/or rights of action which may have accrued prior to termination;
- (b) any obligations and/or rights of any Party which otherwise relate to or may arise at any future time from any breach or non-observance of obligations under this Agreement which arose prior to the date of termination or expiry;
- (c) Clauses 4 and 6 of this Agreement shall continue to be binding on the Parties for a period of five years in the case of Clause 4 and six months in the case of Clause 6 after the date of such termination or expiry; and
- (d) the following Clauses shall continue to be binding on the parties Clauses 5.5 - 5.14, 9, 10.

9. Insurance

9.1 **Insurances:** Each party shall effect and maintain in force at all times during the continuance of this Agreement and for a period of 24 months thereafter the following policies of insurance (with the minimum indemnity amounts):

- (a) Employer's liability insurance for any one event in the amount of €13,000,000.
- (b) General third party insurance including public liability and Product Liability for any one event in the amount of €6,500,000

(c) Professional Indemnity Insurance in the amount of €6,500,000

9.2 In each case, effected through brokers and with insurers of recognised good standing (as such expression is generally recognised within the Irish insurance sector).

10. Governing Law

10.1 This Agreement shall be governed and construed in accordance with the laws of Ireland and shall be subject to the jurisdiction of the Irish Courts.