

Amen

Submission on section 40 of the Civil Liability and Courts Act, 2004

This submission is a response to the invitation from the Department of Justice, Equality and Law Reform for the views of interested parties in relation to:

1. What classes of persons, in addition to solicitors and barristers, should be allowed to be present during court cases, which are held otherwise than in public, for the purpose of drawing up reports of those cases and
2. Who (e.g. schools, passport office etc.) should be supplied with copies of, or extracts from, court orders in cases heard otherwise than in public.

Question 1.

It is Amen's view that the classes of persons should be expanded beyond the legal professionals and, at a minimum, should include the following:

- a) Stenographers
- b) Advocates other than solicitors and barristers and
- c) McKenzie friends

Background:

In making these recommendations we have taken account of a number of considerations. The first, and most important, is the devastation caused to the lives of innocent men by a family law system that in its legislation, standards and operations discriminates against men as a matter of routine. Men and men's groups have consistently been denied the democratic right to participate in, or have their views and interests represented on, bodies dealing with procedures or to have men's experiences and interests considered in the formulation of legislation. While there are some recent examples of public bodies recognizing that men's experiences and interests should also be heard, the Department of Justice, Equality and Law Reform remains stubbornly committed to a sexist policy of denying men and their representative organizations their democratic rights. An example would be that, in all the bodies dealing with the development of the courts services, the Minister for Justice deemed women's groups to be the sole and exclusive representatives of consumers' interests. This was compounded by an indefensible decision to set up a sub-committee, consisting of three prominent feminists, to deal with family law.

Another important consideration is the fact that men are put at a severe disadvantage by the operations of the Legal Aid Board. Men and women involved in family law cases usually enjoy similar living standards and have roughly equal financial resources available to them prior to separation or divorce. The situation changes following separation or divorce. Men, as routine losers in these cases, invariably lose their homes, lose most of their earnings in maintenance and end up living in sub-standard expensive rented accommodation, (often deemed unsuitable for their children's accommodation needs). Yet the Legal Aid Board will continue to support their wives and, in many cases, leave these men without legal representation. Judicial separations cost in the region of €10,000 for a party not in receipt of legal aid. Women regularly abuse this position by making repeated applications to courts simply because it costs them nothing and inflicts further expense on their husbands. Despite the provisions of the Solicitor's Amendment Act 1994 solicitors rarely give any indication, either oral or written, of the costs likely to

be incurred. This uncertainty causes added stress for men. The concept of 'equality of arms' is deemed to be a necessary component of fair play in the justice system. It is one of the fundamental principles of the European Court of Human Rights (EHCR). There is absolutely no doubt that, to compound all the other disadvantages, men do not enjoy 'equality of arms'. They are regularly left in a position where they have no option but to represent themselves in a hostile environment. Legal Aid in family law cases was introduced in response to the *Airey v Ireland* case, which was heard by the European Court of Human Rights. The EHCR stated in its judgement:

"It seems certain to the court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not.... it is not realistic, in the Court's opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the Government, the judge affords to parties acting in person".

Providing legal aid to one party, while leaving the other party to either represent himself or engage a solicitor and barrister at an exorbitant and, usually, unaffordable legal cost, does not uphold the principle of 'equality of arms' or meet the requirements of the EHCR judgement. In fact it does the exact opposite. This denial of natural justice is compounded by the fact that lay litigants are regularly denied the right to use a non-legal, less-expensive (but probably more effective) advocate, a stenographer or have a McKenzie friend present.

Despite all the public money invested in the Court Service in recent years, the service is characterized by inefficiency, lack of accountability and a contempt for the citizen's right to natural justice.

a) Stenographers - reasons:

At present there are no proper records kept of proceedings in family law cases. The evidence given, the cases presented, the comments and the decisions made in these cases have the most drastic effects on the lives of men, women and children, so it is disgraceful that no accurate records are kept of proceedings.

The time limit for lodging appeals in separation cases is 14 working days. Written judgements are never available for at least a month after the hearing. Those who have the benefit of legal representation will have an experienced solicitor available to take a note of the judgement. These judgements are usually long and complex and are sometimes written up by the applicant's (usually the woman) solicitor. Lay litigants, (usually men because of cost implications), are again put at a severe disadvantage. This amounts to a denial of natural justice. Amen has raised this problem with the Courts Service and has suggested that the time for lodging appeals should run from the date the written judgement issues to the parties. However, as this change would reduce the injustices suffered by men, the Court Service complied with the anti-man ethos of its parent Department and this denial of natural justice continues. Having a stenographer keep records would enable court decisions to issue within a reasonable period after the case.

In some cases men have engaged stenographers, at considerable expense to themselves. However, they can only do so at the discretion of the judge, and this is often refused after

the expense has been incurred. Should the litigant wish to appeal this decision it involves extra expense. All lay litigants should be entitled to have stenographers as of right.

Over the past few years massive amounts of public money have been spent on refurbishing court buildings. If the Courts Service and the Minister had their priorities right they would expend resources on making their services more efficient and ensuring that citizens are not denied natural justice before looking after buildings. Having accurate records of court proceedings would go some way towards restoring natural justice to the system and would make judges and legal professionals more accountable (it would probably be strongly resisted by those judges and lawyers who wish to remain unaccountable).

Court stenographers should be present in all family law cases to keep an accurate record of proceedings and the transcripts should be automatically sent to the parties to the case along with the written judgement. The time for lodging appeals should run from the date the written judgement issues to the parties.

b) Advocates other than solicitors and barristers – reasons.

For reasons outlined above men regularly have to represent themselves as they are unable to afford legal representation. Many men in these situations have poor financial resources, have no experience of court procedures and, in some cases, do not have high levels of oral communication skills or literacy levels. **Such men, indeed all citizens, should have the right to represent themselves or employ an advocate of their choice, who need not be legally qualified.** No doubt the legal profession would be strongly opposed to such a move, citing the fact that they are ‘officers of the court’, however, citizens rights should take precedence over the vested interests of the lawyers.

Current practices amount to a denial of a citizens basic right to choose his own representation as well as being anti-competitive. By and large solicitors, including Legal Aid Board solicitors give a very poor quality representation to men in family law cases. Their normal approach is to condition men to accept defeat before the case even begins. While non-legally qualified advocates may not have legal training they would probably have a good knowledge of the law and would defend their male clients more robustly than solicitors do at present.

c) McKenzie friends – reasons:

‘McKenzie friend’ is a term used to describe a friend who accompanies a lay litigant in an in-camera case, helps with organization of papers etc. but does not participate in the proceedings and does not act as an advocate. It is taken from a noted English case *McKenzie v McKenzie (1970)*. Given that courts are intimidating arenas for most people, having a friend available can be a very valuable support for a lay litigant, who is already severely disadvantaged. Many of the arguments above relating to non-legal advocates would also apply to ‘McKenzie Friends’. Again, ‘McKenzie Friends’ are only allowed to be present at the judge’s discretion and are regularly refused. **All lay litigants should be entitled to have a ‘McKenzie Friend’ accompany them in court if they so wish.**

Question 2.

Irish family legislation states that cases must be held otherwise than in public. This is usually referred to as the 'in-camera rule'. In the case *RM v DM* (2000) the High Court ruled that such provisions "*...insofar as they provide for hearings to be held otherwise than in public do imply an absolute embargo on the production in subsequent proceedings of information which derives from or was introduced in proceedings protected by this rule*". In this case the husband was refused permission to use documentation relating to his divorce as evidence in a case he was bringing against his counsel. In *M.P. v A.P.* (High Court, June 1996) a husband was denied permission to report to the Psychological Society one of its members' evidence in a custody action under the 1989 Act that he considered biased against him.

Copies of, or extracts from, court orders and records of court proceedings should be available to schools, passport office, doctors, bodies investigating complaints arising from court proceedings including the Bar Council, the Law Society and bodies investigating judges, psychiatrists, psychologists and others who give evidence in these cases and others who may have to deal with the fall-out from these cases or whose work or duties are affected by these decisions.

Summary of Recommendations:

- 1. Court stenographers should be present in all family law cases to keep an accurate record of proceedings and the transcripts should be automatically sent to the parties along with the written judgement. The time for lodging appeals should run from the date the written judgement issues to the parties.**
- 2. Such men, indeed all citizens, should have the right to represent themselves or employ an advocate of their choice, who need not be legally qualified.**
- 3. All lay litigants should be entitled to have a 'McKenzie Friend' accompany them in court if they so wish.**
- 4. Copies of, or extracts from, court orders and records of court proceedings should be available to schools, passport office, doctors, bodies investigating complaints arising from court proceedings including the Bar Council, the Law Society and bodies investigating judges, psychiatrists, psychologists and others who give evidence in these cases and others who may have to deal with the fall-out from these cases or whose work or duties are affected by these decisions.**

We make this submission in good faith, but, on the basis of past experience and given that it is designed to ameliorate, to some extent, the injustices suffered by men in the family law system, we do not expect that it will be treated with the respect it deserves by the current Minister for Justice.