



One Family's Discussion Paper on the Law Reform Commission's (LRC) Consultation Paper on Family Relationships February 2010

1. Introduction

One Family welcome the opportunity to contribute to the Law Reform Commission's consultation paper on *Legal Aspects of Family Relationships* in Ireland. In particular One Family supports the child-centred approach informing the LRC's report and their recognition of the wide range of family forms that exist in Ireland today and which are increasingly recognised in international law.

One Family is Ireland's leading organisation providing specialist support services for people parenting alone and sharing parenting for 38 years. Through our integrated services model we offer specialist supports around parenting and family relationships as well as progression from welfare to work.

One Family has sought expert legal advice on its response to the LRC report and has consulted with its Board, staff and members in preparing our response. We held a seminar with leading family lawyers in order to inform ourselves, our members and other interested family support organisations.

We acknowledge the complexity of the issues involved and the wide ranging impact of the proposed changes on family life in Ireland which is becoming increasingly diverse. We recognise that many of the proposed changes, if implemented, will cause fear and real concern to many families and we ask the LRC to ensure that its final report is fully informed by the real situations that many families find themselves in when they faced with disputes between different family members. We ask the LRC to ensure that its final recommendations continue to be strongly based on the best interests of the child perspective and that these recommendations are clearly explained and communicated to families in Ireland. We also ask that the resources implications of properly implementing the proposed changes, both human and financial, be spelt out in the final report. We also strongly recommend that the impact of any changes subsequently made are fully evaluated and reviewed to ensure that they are having the desired effects and to inform any further change in the future aimed at ensuring greater equality between all family types. We believe that it is important to maintain good data on births, birth registrations and analysis of such data should yield important information for future developments.

In this discussion paper we spell out the principles that underpin One Family's response to the LRC consultation paper, highlighting the areas where we are in agreement with the LRC's recommendations. We also identify five possible packages of responses or options to the more contentious area of non-marital fathers' rights and responsibilities that we believe emerge from the LRC's paper and give our view on the next steps required to achieve real and meaningful reform in this area.

2. Context

It is important to consider the LRC's analysis and recommendations in the context of the wider issues that affect family relationships in Ireland today. These include civil partnership legislation and recent important judgements in the Irish and international courts in relation to adoption and abduction that have important implications for the law as it affects family life in Ireland today. We would have liked to see these events examined by the LRC in its report and their possible implications for decisions on family law cases in the future teased out in the report. It is particularly important in our view that principles enshrined in the UN Convention of the Rights of the Child which Ireland has ratified inform the LRC's work.

It is also important in our view to look at the proposed changes in this report in the context of the proposal to hold a constitutional referendum on children's rights this year. If passed what impact would such an amendment have on children's rights in family law and in how the best interests of the child is ensured in the practice of family law cases? The current constitutional position which only recognises the family based on marriage is also a key consideration here. Without a change in the Constitution to recognise all de facto families along with the introduction of explicit children's rights in the Constitution we do not believe that it will be possible to ensure that all children are treated equally and that all decisions can be made in the best interest of the child.

3. Principles underlying Reform

In preparing our response to the LRC's consultation paper we have identified a number of principles that One Family believes should underpin any reforms in this area. These principles are:

- The substance not the form of the family should be the basis for changes in the law on family relationships, as enshrined in the ECHR
- Greater equality for all family types should be the long-term objective of reforms in this area
- Recognition of the role of the wider family in achieving the best interests of the child

- Right of the child to know both parents and be consulted on matters affecting him/her
- Right of the child to an identity, including family relations
- Parents have both rights and responsibilities and one is not possible without the other
- A child's experience of their father and their mother is a very important shaping factor in her/his life
- Every effort and support should be in place to maximise the opportunity for agreement between family members unless this is manifestly not in the best interests of the child
- Conflict is a reality for many families and the safety of family members must always be a consideration
- Resources are required to assist in minimising the effect of such conflict especially on the children concerned.
- Resources need to be invested in ensuring that the best interest of the child are fully and adequately represented in family law cases and that decisions made in the courts are fully informed by best practice in this area
- Every effort should be made to optimise certainty and consistency in how family law cases are decided and to fully inform and involve the parties concerned.
- Effort should be focused on encouragement and voluntary engagement with family rights and responsibilities at least and until there is clear evidence that such approaches are not having the desired affects.
- Draw on experience of other countries with longer experience of such legislation.

In preparing our response we have tried to assess each recommendation and 'request for views' from the LRC using these principles. In this way we have identified a number of areas where we are convinced that change is needed. These are outlined below. Following that we examine areas where preferred change is in our view not so clear cut and we have outlined a number of options for change in the rights of non-marital fathers especially.

4. Proposed Changes Recommended in the Laws Governing Family Relationships

Drawing on the principles above One Family recommends the following changes as outlined in the LRC report:

1. Child friendly, accessible, accurate, consistent and internationally used language be introduced as proposed. This includes replacing guardianship with parental responsibility, custody with day to day care, and access with contact with the emphasis on the rights and welfare of the child as the guiding principle. Considerable effort to be dedicated to ensuring that

family members, legal practitioners and other professionals who work with children and families understand the true meaning of each of these terms and the rights and responsibilities that they confer.

2. Statutory detailed definitions of these terms be considered along the lines of the Scottish and New Zealand models to maximise clarity and to assist the court in making decisions on these matters, including a statutory definition of the term 'in loco parentis'.
3. These changes to include provision for the children's views and wishes to be taken into account in all family law proceedings including in relation to access/contact. This should include the possibility of extending the right to apply for access/contact to children and should include the appointment of an independent and appropriately trained person/ *guardian ad litem* to facilitate the representation of the child's voice and to ensure that the best interests of the child are fully represented in such proceedings,
4. Ensure that appropriate support and facilities are available to minimise the child's exposure to conflict following decisions by the courts or by individual family members in relation to the child's contact arrangements.
5. Consideration be given to the possibility of requiring consultation by those with guardianship/parental responsibility on certain issues and not on others in the best interests of the child e.g. medical emergency versus leaving the country.
6. Introduce a central register of declarations of guardianship/parental responsibility to be held by the Registrar with adequate resources and authority.
7. Ensure adequate resources are available to provide accurate information, advice and encouragement on the rights, responsibilities and impact of joint birth registration and on guardianship/parental responsibility.
8. Extend the opportunity to reregister a child's birth.
9. Remove the initial leave to apply stage for guardianship/parental responsibility and contact for other family members acting in loco parentis, based on a statutory definition of the term 'in loco parentis'.
10. Explore the possibility of creating a new category of special guardianship/parental responsibility which will allow other guardians to be appointed when it is in the best interests of the child and in line with best international practice.

11. Allow stepparents and others in loco parentis in families to apply for guardianship/special guardianship/parental responsibility and custody where such a process is established to be in the best interests of the child/ren in question and where a bona fide interest in the child has been established through a continuous, stable, positive relationship with the child. Explore further the implications of a child having more than two guardians.
12. Develop a co-ordinated framework within which these changes can be made.
13. Extend the exemptions to the presumption of paternity in the context of marital couples as this is likely to open up the circumstances where an unmarried father can apply for guardianship/parental responsibility in respect of his child.
14. Ensure that all those involved in family law cases are adequately trained and resourced to ensure that the best interests of the child are heard and understood.

5. Options around birth registration and guardianship/parental responsibility

Proposed changes in relation to compulsory birth registration, linking of birth registration and guardianship/parental responsibility, and in the rights of non-marital fathers are, we believe, hugely complex from a best interests of the child perspective, and given available knowledge and experience of the proposed alternatives. We have therefore outlined 5 potential 'broad' options in this area. We believe that the LRC should examine and research each of these options in significant detail, taking into account recent legal cases and the impact of the introduction of such changes in other countries. For instance this would involve examining in further detail the possible implications on numbers of joint birth registrations of linking such registrations with guardianship/ parental responsibility and reviewing the impact of automatic and statutory presumptions of guardianship/ parental responsibility in other jurisdictions.

Based on such a review we believe that a second consultation report should then be issued spelling out these findings and asking for further submissions. The proposed changes are so fundamental and important that we believe that it would be premature to opt for any of these options based on current information, analysis and consultation.

At this stage we believe that it is important to obtain the views of stakeholders on the five possible broad 'packages' of options that we have identified. These are:

1. The Status Quo more or less

- a. Encourage joint registration of birth
- b. Keep birth registration and guardianship/parental responsibility separate
- c. Continue requirement for non-marital father to apply for guardianship/ parental responsibility, possibly with statutory guidelines for the courts on determining the child's best interests

2. LRC Recommendations

- a. Encourage joint registration of birth backed up by the necessary resources to remove current misunderstandings of the implications of such registrations.
- b. Keep birth registration and guardianship/ parental responsibility separate
- c. Introduce statutory presumption of guardianship/ parental responsibility for non-marital fathers except in circumstances to be defined in law where it would be contrary to the best interests of the child. (This we understand would require a non-marital father to apply to the courts for guardianship/ parental responsibility and the presumption would be that his application would be successful unless it was proven to be contrary to the best interests of the child)

3. Intermediary Option

- a. Provide greater support for joint birth registration with the option of completing a separate voluntary statutory declaration of guardianship/ parental responsibility, backed up by adequate and accurate information and advice on the implications involved
- b. Explore in greater detail the implications of the introduction of a statutory presumption of guardianship/parental responsibility for non-marital fathers including spelling out how :
 - i. the best interests of the child would be assured; and
 - ii. the welfare of the mother and child would be adequately safeguarded in cases where there the mother expressed concern for her safety and that of her child, building on best international practice.
- c. Consider the possibility of allowing automatic guardianship/ parental responsibility for both parents in civil partnerships¹

¹ New Zealand has also extended the automatic guardianship that applies to married parents to fathers in heterosexual civil partnerships and to fathers in a statutorily defined *de facto* relationship with the child's mother. (Section 17 of the *Care of Children Act 2004* (New Zealand))

- d. Examine the implications of allowing a non-marital father to apply to the court for his name to go on the birth register in cases where the mother objects.
- e. A guardianship/ parental responsibility central register be put in place and available to be seen by interested parties e.g. the child, other guardians.

4. Change in Line with International Trends

- a. Joint birth registration
- b. Compulsory birth registration leading to automatic guardianship/parental responsibility except in stated circumstances. (For example The Welfare Reform Bill 2009 in England and Wales recognises the possible risk in the situation where an unmarried mother comes forward on her own to register the child, and is asked by the registrar to identify the father. In these cases, if the mother declares that she “has reason to fear for her safety or that of the child” if the father is contacted, she will not have to comply with this requirement.² However, no such safety protection currently exists in situations where the unmarried father himself approaches the registrar asking to be on the birth certificate.)
- c. Parental responsibility acquired in this way can be removed by the court if this is found to be contrary to the best interests of the child.

5. Automatic guardianship/ parental responsibility for all parents

- a. This would put all biological parents on the same legal footing and all would have automatic guardianship/parental responsibility of their children.
- b. Such guardianship/parental responsibility could be removed by the courts where this was found to be in the best interest of the child
- c. This option has not been fully explored by the LRC and while it would bring full equality to all fathers it would appear that the LRC, in line with all the countries reviewed in the report, barring Australia³, believes that such an option is not in the best interests of the child.

6. Recommendations

As stated above we believe that further research, assessment and consultation is required before any changes are made in the area of birth

² Para 4 of Schedule 6 of the Bill, which amends the Births and Deaths Registration Act 1953 by adding a new Section 2B ‘Duties of an unmarried mother when acting alone’ (see page 92 of the Bill).

³ Australia is an exception in that it provides for automatic parental responsibility for all parents (Section 61C of the *Family Law Reform Act 1995* (Commonwealth)).

registration and guardianship/parental responsibility. However if the LRC decides to proceed with its recommendations without such a further step we would propose that the intermediary option outlined above, and repeated below, form the basis for proposed changes in this area, along with the changes we have already proposed in Section 4 above.

Intermediary Option

- a. Provide greater support for joint birth registration with the option of completing a statutory declaration of guardianship/ parental responsibility backed up by adequate and accurate information and advice on the implications involved
- b. Explore in greater detail the implications of the introduction of a statutory presumption of guardianship/parental responsibility for non-marital fathers including spelling out how :
 - i. the best interests of the child would be assured; and
 - ii. the welfare of the mother and child would be adequately safeguarded in cases where there the mother expressed concern for her safety and that of her childand building on best international practice
- c. Consider the possibility of allowing automatic guardianship/ parental responsibility for both parents in civil partnerships
- d. Examine the implications of allowing non-marital fathers to apply to the court for their name to go on the birth register independently of the mother in cases where the mother objects
- e. Guardianship/ parental responsibility central register be put in place and available to be seen by interested parties.

Final Comment

We believe that it is also important to base any changes made in the area of family law now on the premise that this area will be returned to in the future in order to assess the impact of any changes made and to consider how further changes can best be made to recognise and bring greater equality to all family types in Ireland.