



Submission in relation to consultation on discussion paper on the rights and duties of cohabittees

Submission to Law Reform Commission

September 2004

Background

Progressing the work of Cherish, established in 1972, One Family provides voice, support and action for one-parent families through membership, professional services and campaigning. Our aim is to affect positive change and achieve equality and social inclusion for all one-parent families in Ireland.

We work to achieve our aims through

Voice we are the national membership organisation of one-parent families, supporting organisations and others concerned with the issues facing one-parent families.

Support we offer a comprehensive range of professional services to one parent families, to those experiencing a crisis pregnancy and to those working with one-parent families.

Action we campaign with and on behalf of our members to affect positive change for one-parent families.

One Family works with all types and all members of one-parent families, respecting the realities of family life in Ireland.

Background

Working toward the achievement of positive change, equality and social inclusion for all one-parent families in Ireland, One Family broadly welcomes the treatment of the issue of non-marital relationships by the Law Reform



Commission on this occasion. Particularly given that 2004 marks the 10th anniversary of the UN International Year of the Family, it is imperative that current and persistent barriers to the full equality and equal status of all families and family types, in legal, policy and service provision arenas be addressed.

In this regard, One Family is delighted to be in a position to comment on the recommendations within the discussion paper. To clarify, the organisation's interest in this arena in the context of this submission will be with the concerns related to those one-parent families formed by the ending of a non-marital cohabitating relationship involving children. This is due to the persistent lack of rights observed by One Family for this significant client grouping who access our services.

This submission will be presented in two main sections:

1. The Constitution
2. General observations

1. The Constitution

A report on family life in Ireland published earlier this year by the Department of Social and Family Affairs highlighted the need to provide a broader definition of the family in light of modern societal changes. The report identified the issues that arose during public consultation fora hosted by the Minister last year¹. In the course of these deliberations, Minister Coughlan stressed that State policy should not favour one family form over another. Alluding to the fora discussions the Minister stated:

“Given the major social and demographic changes that have occurred in Ireland in recent years it is necessary now to bear in mind the different forms of family in developing policies to

¹ Daly. M.(2004), *Families and Family Life in Ireland: Challenges for the Future*, Dublin, Department of Social and Family Affairs



promote the well-being of individual members, and social cohesion, a point that came through from many participants at the fora”.

The Law Reform Commission’s recommendations broadly do not reflect the changes in family structures alluded to in this Report. It is suggested generally, and with great respect, that the Commission’s Paper is often overly cautious in its approach, thus diminishing the prospect of delivering full equality in this arena.

Paragraph 1.14 of the LRC Report dismisses the need for lengthy discussion of Article 41 “because the Commission is of the view that the law as it stands allows the Oireachtas to legislate in respect of the non-marital family insofar as it does not place such relationships in a more favourable position than the marital family”. One Family does not share this optimism.

Why is the legal definition of “family” in Ireland so rigid, so inflexible and fixed? The answer to this question lies in Article 41 of the Constitution and the interpretation afforded to this provision by the Irish Supreme Court. In the face of a restrictive interpretation of the “family”, individuals have sought redress under international law through international human rights treaties. The most significant international human rights treaty from an Irish perspective is the European Convention on Human Rights (ECHR). Article 8 of the ECHR guarantees as a basic right, the right to respect for private and family life, home and correspondence. It is concerned more with the substance rather than the form of the relationship. The ECHR unlike the Irish Constitution makes no distinction between the family life of a marital and non-marital family. The law in Ireland on the other hand leans strongly against the non-marital family. *De facto* families are effectively outside the ambit of legal protection in Ireland. Yet given that the ECHR has now been incorporated into Irish law, this situation of non-recognition can no longer feasibly prevail.



There is a need for a Constitution which affords equal rights to all families. We should not forget the children of these families who are a voiceless and vulnerable minority group in society. Indeed, the omission of any reference to children other than as appendages in the Law Reform Commission's Report is a significant shortcoming. The relative invisibility of children in the Report must be addressed.

2. General Observations

One Family believes that all family types and structures are of equal benefit to the development of their members and to the well-being of society alike. Thus One Family strongly believes that all such families should be treated as equal within the parameters of law and public policy. As such One Family is disappointed in general with the thrust of the paper towards recommending a two-tier system of family law provision in relation to those provisions for marital and non-marital relationships.

- a. The current Government has taken steps towards improving the family law system. For example, the need for some form of national machinery to advance the development of support services has, in part, been met by the Family Support Agency. Yet, no reference is made to ADR (Alternative Dispute Resolution) as an option for cohabittees. Indeed the short time limits suggested by the Commission Report would appear strongly to militate against taking the ADR route.
- b. The reforms proposed by this Discussion Paper apply only to those who are not party to an existing marriage. Thus, the LRC paper recommends provisions which will be inapplicable to a large and growing number of families who have reconstituted due to the forming of subsequent relationships by those previously in marital relationships with new partners who have not, cannot or do not wish to dissolve their previous marital relationship. As such, not only does the paper suggest provisions which will not give rights to all cohabitational families, it diminishes the impact of the



provisions for an increasing number of families in Ireland, and the children within them. For example, the exclusion of those who are still married presupposes that the law doesn't countenance obligations to more than one person. However, divorce legislation permits one person to be obliged to a spouse and former spouse indefinitely.

- c. One Family is concerned that the distinction in provisions for those families with children of the relationship diminishes the rights of children in cohabiting families and at worst reduces them to commodities rather than affording them independent rights as members of families. This would appear contrary to dominant and emerging legal and policy discourse, particularly that surrounding the UN Convention on the Rights of the Child and the European Convention on Human Rights.
- d. The paper's treatment of the areas and provisions appears to presuppose access to resources at an equal level by all cohabiting couples. This would include equality of access to legal resources, accurate information on rights and entitlements, etc. One Family's experience is that family relationships are not based on formal agreements such as the regular agreement and adjustment of wills, powers of attorney etc. The paper also appears to focus almost solely on those couples who would have higher levels of material resources than on those who do not. This is evident in the almost total absence of reference to those who perhaps share occupancy of non-owned accommodation, whether publicly, socially or privately rented and those in receipt of social welfare payments.
- e. The paper also appears to propose redress through the court system as a matter of course through the recommendation of relatively short time limits for legal redress. These inadequate time periods could create pressure on families to seek legal redress prior to having fully explored mediation or other non-adversarial processes of resolution of issues on separation. Accordingly,



the time limits stipulated in the Commission's recommendations at para 3.88 (page 65) and 5.36 (page 93) should be extended.

f. The paper generally presents a non-holistic treatment of family life and instead needs to recognise the realities of family life. For example, the paper deals exclusively with "relationships" rather than with families, and children are treated as almost ancillary to relationships rather than an integral part of the family. The lack of any reference to the rights of children and issues involving parental responsibilities and duties of care to their children in the event of relationship breakdown creates an unrealistic and unhelpful distinction between the family relationships within marital and non-marital relationships.

g. One Family is generally concerned that the lack of any suggested theoretical and legal framework and specific recommendations leaves issue resolution at the discretion of the courts and may prevent those in non-marital relationships entering into agreements. The reference to specific rights only in "exceptional circumstances" is regrettable and supposes that people in non-marital relationships do not contribute equally or perhaps at all to the relationship. Not only is this an unrealistic summation of the lives of a growing number of families but it again creates a two-tiered system of family rights which is unjustified.

The proposed reforms, in particular, generally lack firm guidelines or principles providing a theoretical backdrop against which such agreements could be negotiated. As in many areas of family law, the lack of 'bright-lines' suggesting a likely court resolution to a family law case and the discretion generally afforded to judges, make it difficult to negotiate settlements in such cases.

h. The reference to "exceptional circumstances" as a prerequisite to claiming proprietary or monetary relief wrongly presupposes that instances where a



person makes sacrifices on behalf of their non-marital family will be rare. In One Family's experience, it is in fact quite common to find non-marital partners foregoing jobs and career prospects in order to help raise a family outside of marriage. Such efforts are, on the breakdown of relationships, effectively ignored by the current family law system.

i. One Family is generally disappointed that the Commission did not give a full consideration of the constitutional issues regarding the provision of further rights and duties for cohabitantes. In paragraph 1.17 the Commission's analysis of the scope afforded it by the constitutional definition of the Family , while broad, is not mirrored in the Commission's recommendations which would give less than equal rights to those in non-marital relationships vis-à-vis married couples. One Family is of the firm belief that all family forms are equal and should be treated as such and calls for a root and branch review of the constitutional barriers and impediments to the full equality of all families in Ireland.

One Family is also concerned that the Commission chose to ignore the treatment of issues for step-parenting families. In order to be of utility in providing for families in Ireland into the future, this issue needs to be given full consideration.

ENDS

This submission is made on behalf of One Family – voice, support and action for one-parent families. Queries should be directed to Anne Bowen, Social Policy & Communications Officer, T: 01 662 9212 F: 01 662 9096 E: policy@onefamily.ie