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Winner of the Council of Europe Human Rights Prize

CAJ's response to the

Family Law Bill

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What is the Committee on the Administration of Justice (CAJ)?

CAJ is an independent non-governmental organisation, which is affiliated to the International Federation of Human Rights (IFHR). CAJ monitors the human rights situation in Northern Ireland and works to ensure the highest standards in the administration of justice. We take no position on the constitutional status of Northern Ireland, seeking instead to ensure that whoever has responsibility for this jurisdiction respects and protects the right of all. We are opposed to the use of violence for political ends.

CAJ has since 1991 made regular submissions to the human rights organs of the United Nations and to other international human rights mechanisms. These have included the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, the Human Rights Committee, the Committee Against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, the Special Rapporteurs on Torture, Independence of Judges and Lawyers, and Extra judicial, Summary and Arbitrary Executions, the European Commission and Court of Human Rights and the European Committee on the Prevention of Torture.

CAJ works closely with international NGOs including Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch.

Our activities include: publication of human rights information; conducting research and holding conferences; lobbying; individual casework and legal advice. Our areas of expertise include policing, emergency laws, children's rights, gender equality, racism and discrimination.

Our membership is drawn from all sections of the community in Northern Ireland and is made up of lawyers, academics, community activists, trade unionists, students, and other interested individuals.

CAJ was awarded the Council of Europe Human Rights Prize in 1998 in recognition of our work in defence of rights in Northern Ireland. Previous recipients of the award have included Medecins Sans Frontieres, Raoul Wallenberg, Raul Alfonsin, Lech Walesa and the International Commission of Jurists.

Response from the Committee on the Administration of Justice to the Family Law Bill

Introduction

CAJ welcomes the opportunity to comment on the Family Law Bill. We commend the extension of the right to acquire parental responsibility to step-parents. We are concerned however that in seeking to clarify and facilitate the acquisition by unmarried fathers of parental responsibility the Bill may not provide adequate protection for children and women. We believe that the text as proposed fails to take account of the range of situations which need to be addressed in what is a complex and sensitive area.

In particular we have some serious concerns about the consultation process and the potential impact of certain clauses in the Bill. Most of these reflect the apparent failure to consider the impact the Bill is likely to have on the rights of women and children. In this regard we are concerned that, according to the explanatory notes to the Bill, while the consultation process took into account the views of men's groups, there is no mention either of women's or children's groups. Such an omission, in the context of a consultation process on a piece of family legislation is unfortunate.

Parental Responsibility

Clause 1 of the Bill proposes to amend the Children (NI) Order 1995 (the Order) to facilitate the acquisition of parental responsibility by unmarried fathers. The explanatory notes state that this is the "primary purpose" of the Bill.

Article 6(1) of the Order defines parental responsibility as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property." These are clearly considerable powers of control over a child's life.

CAJ would welcome efforts to ensure that unmarried fathers who have agreed to found a family with the unmarried mother are not disadvantaged in their legal position vis a vis married partners. However the Bill proposes no mechanism to distinguish between persons who have agreed to found a family (whether married or unmarried) and those who have not. To protect the rights of women, it is essential that they are not effectively forced to found a family where there was no agreement to do so. This could potentially constitute discrimination (Article 14, ECHR) in relation to the unmarried mother's right to found a family (Article 12, ECHR) and or infringe her right to privacy and family life (Article 8, ECHR). The absence of a mechanism to consider the circumstances and the potential for abusive partners to force women to co-operate in jointly registering the child's birth could infringe her right to a fair hearing (Article 6, ECHR).

McMichael v UK (1995) 20 EHRR 205 is relevant in this regard. In this case the applicant, an unmarried father, complained that he had been discriminated against contrary to article 14 of ECHR taken together with article 6 (right to a fair hearing) and

article 8 (privacy and family life). The court held that there was an objective and reasonable justification for the difference in treatment between married and unmarried fathers as follows:

“It is axiomatic that the nature of relationships of natural fathers with their children will inevitably vary from ignorance and indifference at one end of the spectrum to a close and stable relationship indistinguishable from the conventional matrimonial based family unit at the other. The aim of the relevant legislation is to provide a mechanism for identifying ‘meritorious’ fathers who might be accorded parental rights thereby protecting the interests of the child and the mother. In the Court’s view this aim is legitimate and the conditions imposed on natural fathers for obtaining recognition of their parental role respect the principle of proportionality.”

This confirmed that the current law complied with the ECHR.

CAJ believes that the new mechanism proposed – that the father would register the birth with the mother is not capable of providing protection to the mother and certainly not the child. There is no requirement whatsoever for the unmarried father to provide or intend to provide any emotional or practical care to the child or the mother in order to acquire joint authority with her over the child. This does not address the disadvantageous position of women in relation to stereotypical gender roles and may place unmarried women in a more subordinate position within their families than is the case at present. Equality is not being promoted if a woman carries all the burden of caring for the child but only half of the authority to take decisions in relation to him or her. (See Appendix – International Human Rights Standards)

Nevertheless, in circumstances where the partners have agreed to found a family, there does seem to be a discrepancy in the rights of married and unmarried people, which could usefully be addressed. In relation to adult heterosexual relationships, the Mental Health (NI) Order 1986, article 32, accords unmarried partners the status of ‘next of kin’ for the purposes of decisions regarding compulsory detention of a partner if they have been living together for a period of six months. It may be useful to explore whether a similar residency period with the mother and child would be sufficient to protect the child’s interests and establish the unmarried fathers parental rights automatically at the same time and in the same way as both adult partners acquire responsibility for each other in respect of mental health issues. The potential impact of this and any other proposal would, however, need to be properly researched to ensure that there was no foreseeable negative impact on the rights of the mother and child.

This does not deal with circumstances where an unmarried father does not live with the child’s mother but would wish to contribute to the child’s upbringing and development. Nor does it deal with the situation where the unmarried father does not live with the child’s mother but is equally involved in caring for him or her. These are complex matters and the legislation in this area needs to be sufficiently flexible to deal with them. For example it may be useful to consider drawing a distinction between promoting contact and kinship relationships and acquiring control.

Article 3 of the UN Convention on the Rights of the Child stipulates that the best interests of the child shall be "a primary consideration" in all actions concerning children. We do not believe that the automatic granting of parental responsibility to an unmarried father who plays no constructive role in caring for the child is necessarily in the best interests of the child. The Convention also asserts that control should only be exercised over a child to the extent necessary to provide him or her with necessary care and support and should diminish as the child develops and is able to take his or her own decisions independently. No one should exercise control unless this is necessary to provide some form of care. The child should have a right to a say in matters affecting him or her and government must ensure that law and policy do not make a child more vulnerable to abuse. (See Appendix – International Human Rights Standards)

The concepts of care and control need to be closely allied in order to protect the child's best interests, particularly in private law cases (that is, disputes between individuals)¹. We are concerned that no link has been made in the Bill between the acquisition of parental responsibility and caring for the child.

Although the term 'parental responsibility' is used in the Children (NI) Order 1995, what is being described is parental authority. The law does not require a person with parental responsibility to be engaged in any way in the child's social and emotional life. An absence of malice is presumed. Those who acquire parental responsibility automatically (ie married parents and unmarried mothers) retain it permanently regardless of their behaviour towards the child. There is no distinction made between people who provide care and those who simply exercise control, once they have the legal right to do so. There are no criteria for the courts to use in deciding who shall acquire parental responsibility. Higgins, J (in *Re E (T26/99/OCP)*) notes that case law in England and Wales refers to the fact that the welfare of the child is the court's paramount consideration and "suggest that three factors are relevant, but they are not an exhaustive list ... These factors are –

1. the degree of commitment by the father towards the child;
2. the degree of attachment between the father and the child;
3. the reasons why the father is applying."

Elsewhere in his judgement, however, he states that "For my part, I doubt very much whether a court when considering whether or not to make a parental responsibility order is determining any question with respect to the upbringing of a child." CAJ accepts that Mr Justice Higgins is probably making an accurate observation about the current decision making process in the courts. It is, however, difficult to see how courts can be acting in a child's best interests if decisions about who acquires control are not based on an examination of whether the person needs authority to provide care and contribute to the

¹ CAJ would note that the circumstances of children in care (public law cases) are fundamentally different from those under discussion here. We would be in favour of parents maintaining joint control with public authorities, unless there are exceptional circumstances, for example, potential future harm. In all cases, to maintain the child's family, kinship, and community relationships, partnership between the authority and the child's family is essential.

child's upbringing. On such sensitive family matters, courts can usefully be provided with appropriate criteria, which would resolve these matters on the basis of applying the relevant international standards (see Appendix)

Finally, while we commend the extension of a right to acquire parental responsibility to stepparents, it will be important that the child's best interests are the primary consideration, that the stepparent is providing care for the child; and that the child's wishes and feelings in the matter have been given due weight. This can usefully be made explicit - preferably in the Bill, but if not, then in the rules of the court accompanying them.

Tests For Determining Parentage

This is a very specialist area and CAJ has no expertise in the potential impact of the legislation proposed. It would be important, however, to ensure that the best interests of the child be a primary consideration in decisions to make such a test. This stipulation could easily be added to the Bill. The child's view and that of the mother should be sought although no child should be forced to express a view. Decisions should then be taken within the context of the child's best interests.

Financial Implications

The explanatory notes suggest that the costs of implementing the Bill will be minimal. CAJ believes this to be unrealistic. According to the explanatory notes approximately 4000 unmarried fathers annually, who do not currently have parental responsibility for children, will acquire it in respect of those children whether or not they intend providing any care and support to them. There are likely to be a substantial number of applications for removal of parental responsibility in cases where the mother is the sole carer and/or in other circumstances where she believes it is not in her or the child's interests that the natural father have a control over the child's life. Therefore it is likely that there will be an increase in the workload of the legal aid department, the court and the social services with consequent strains on financial and other resources.

Recommendations

- 1) research should be carried out into the current situation and the impact of any proposed changes.
- 2) The principles set out in international standards should underpin the legislation. For example, the best interests of the child should be a primary consideration in all matters affecting him or her. Children's wishes and feelings should be taken into account and given due weight in matters affecting them.
- 3) The Assembly should reconsider its proposal to automatically grant parental responsibility to unmarried fathers and replace them with proposals which take account of the range of situations which exist.

- 4) The law in relation to the concept of parental responsibility should be reviewed to ensure that no one exercise control over children's lives, except to the extent necessary to provide care and contribute constructively to their upbringing.
- 5) It may be useful to make a distinction in law between promoting contact and kinship and acquiring or retaining control. The concepts of care and control need to be closely linked to protect the child's interests. This is not currently the case.
- 6) Unmarried fathers do need to be facilitated to provide care and support to their children. This should be done in such a manner as to recognize the rights of the mother and the children as well as those of the father. This matter could usefully be further explored in conjunction with women's and children's rights groups as well as men's and professional groups
- 7) In relation mental health issues, the law accords unmarried partners the status of 'next of kin' for some purposes if they have been living together for a period of six months. It may be useful to explore whether a similar residency period with the mother and child would be sufficient to protect the child's interests if it established the unmarried fathers parental rights automatically thereafter.
- 8) Courts can usefully be provided with specific criteria to use in relation to determining who should acquire parental responsibility and when they should lose it.

Appendix

Relevant International Human Rights Standards

In addition to the European Convention on Human Rights the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979 and the UN Convention on the Rights of the Child (UNCRC) 1989 have specific relevance.

The UK government is signatory to both Conventions. CEDAW asserts that signatories acknowledge that despite various international instruments “extensive discrimination against women continues to exist”. It also sets out some important commitments and rights in relation to gender equality and family life. These are as follows:

Signatories are “...Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.”...

“State Parties “condemn discrimination against women in all its forms...” (Article 2)

“State Parties shall take all appropriate measures:

- a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on the stereotyped role for men and women;
- b) to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children; it being understood that the interest of the children is the primordial consideration in all cases.” (Article 5)

“1. State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ...

- d) “the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children, in all cases the interests of the children shall be paramount;”...
- f) “the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.”(article 16)

(our emphasis)

In light of the above the Assembly should in formulating legislation:

- a) Take all appropriate measures to end discrimination against women in public and family life
- b) Educate the public with a view to promoting more equal gender roles in public and family life.
- c) Promote an understanding of maternity as a social function and the recognition of a common responsibility of men and women in the upbringing and development of their children, irrespective of their marital status and
- d) Only undertake a) to c) in a way which will protect children and is consistent with acting in their best interests.

It is our view and consistent with CEDAW that, while the promotion of gender equality is essential the acquisition of parental responsibility by any person is primarily a children's rights issue.

United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC does not define parents. For simplicity in making this response, however, CAJ will discuss all married and unmarried mothers and fathers as 'parents' within the meaning of the UNCRC.

The general principles which the Convention establishes are:

Article 2 – Non-discrimination:

Government "...shall respect and ensure the rights set forth in the present Convention to each child ...without discrimination of any kind irrespective of his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth, or other status".

As with CEDAW, UNCRC makes it clear that it would not be appropriate to disadvantage a child, in making decisions about them, solely on the basis of the marital status of their parents. In relation to parental responsibility, the desire of a parent to have the control which this legal status gives could not, however, prove definitively that a child would be disadvantaged if the parent did not acquire it. This would depend on the function of 'parental responsibility', the purpose of the parent acquiring control, and the likely effect on the child's life of such control being exercised in the child's particular circumstances.

Article 3 – Best interests of the Child:

This article requires that "In all actions concerning children ... the best interests of the child shall be a primary consideration ..." and that government "...shall ensure the child such protection and care as is necessary for his or her well being..."

The best interests principle must underpin consideration of all other rights and responsibilities set out in the Convention. No one should acquire or continue to exercise parental responsibility unless it is in the child's best interests that they do so. Similarly no one should seek to establish that a person is or is not a biological parent unless this is in the child's interests. The 'best interests principle' has been omitted from key clauses of the bill and is not discussed in the explanatory notes.

Article 12 – The Child's Opinion:

Government "...shall assure to the child who is capable of forming his or her own view the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. ..."

Although most of the children who would be affected by the bill in relation to acquisition of parental responsibility are too young to express a view, this may be less certain in relation to paternity testing. In both instances, all children who are able to express an opinion should have their views taken into account in the matters affecting them. No law should force children to express opinions on any matter when they do not wish to do so. The current experience of children in various sorts of families could reasonably be taken into account in considering the impact of current law and the potential impact of changes to it. Children who cannot express a view require additional protection.

Article 19 – Protection from Abuse and Neglect:

Government "...shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment or exploitation including sexual abuse while in the care of parent(s), legal guardian(s) or any other person who has care of the child..."

Government cannot ignore the potential for people who should provide care and protection to a child to abuse the child. The Assembly should be reasonably satisfied that the law does not facilitate persons who currently exercise parental responsibility in using this status to act maliciously, irresponsibly or abusively towards the child.

Nor can they give control over a child's life to people who do not provide care to him or her unless they can be reasonably sure that such persons can be relied upon to act in the child's interests.

Other articles in UNCRC have specific relevance in considering the raising of children in families and in communities.

State Parties must "...use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern." (art 18)

The equality principle is reiterated here in the context of both parents engaging in caring for and raising the child and acting in the child's best interests

A child has a "...right to know and be cared for by his or her parents."(article 7)

While most of this article deals with the child's right to a name and nationality, this part of the article seems to go some way to recognising the importance of kinship and biological connection. It must, however, be read in conjunction with the general principles outlined above. This applies equally to all parents.

Government is also required to "...respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child in a manner consistent with the evolving capabilities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the convention." (article 5)

The rights and responsibilities of parents and others to control the child's life should only be exercised in a manner which is consistent with the child's own evolving capacity to take his or her own decisions. The importance of the contribution of the child's extended family and community are also recognised

In short, to comply with UNCRC the Assembly should in formulating legislation:

- a) Ensure no child is disadvantaged because of the marital status of the child's parents.
- b) Ensure the child's best interests are a primary consideration in all matters affecting him or her.
- c) Give due weight to the child's views when he or she can express them.
- d) Ensure the child's protection and safety, whether or not he or she is able to express a view.
- e) Respect the importance of parents, extended family and community to the child and help the child maintain kinship connections where possible.
- f) Promote the principle of equality in both parents caring for and raising their child
- g) Ensure that control is only exercised, by any person, to the extent necessary to provide care for the child and not when the child's developing capabilities enable him or her to take decisions for him or her self.

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