

Response of the Equality Authority to the  
Law Reform Commission Consultation Paper on Legal Aspects of Family Relationships

The Law Reform Commission Consultation Paper, *Legal Aspects of Family Relationships*<sup>1</sup> addresses a variety of questions concerning the law as it relates to children and their parents, as well as the legal position of other persons who play a role in the life of the child. The consultation paper primarily focuses on three legal concepts relevant to parenting, namely, guardianship, custody and access, which the Commission suggests renaming ‘parental responsibility’ (guardianship), ‘day-to-day care’ (custody) and ‘contact’ (access). In particular, the paper discusses the legal responsibilities and rights of unmarried fathers as well as those of a variety of other people with whom a child may have an ongoing relationship.

The Commission is to be commended for its thorough, clear and learned review of this area of the law. The Equality Authority welcomes this opportunity to consider the Commission’s report, and to respond to those parts of the report that fall within its remit in promoting equality on the nine grounds contained in the Equal Status Acts 2000-2008 and Employment Equality Acts 1998-2008.

This is undoubtedly a complex and contentious area of law and policy that requires careful consideration. The law as it currently stands dates back to a time when patterns of family life differed significantly from those currently prevalent in 21st century Ireland. The past twenty years have witnessed a considerable growth in the diversity of family patterns, with a growing number of children being raised by unmarried cohabiting couples (both same-sex and opposite-sex)<sup>2</sup> and in one-parent families.<sup>3</sup> Similarly, the number of children growing up in blended families (families made up of children from more than one relationship) is steadily rising. Increasingly, biological parents are sharing *de facto* parenting roles with partners who

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<sup>1</sup> LRC CP 55-2009

<sup>2</sup> The 2006 census indicated that there were 121,800 cohabiting couples living in Ireland, approximately 1/3 of whom had children. See [www.cso.ie](http://www.cso.ie)

<sup>3</sup> Census 2006 enumerated approximately 190,000 one-parent families.

are not the biological parents of the relevant child. In some cases, moreover, people other than the biological parents of a child have assumed a parenting role in circumstances where the biological parents are unwilling or unable to perform this role.

The current legislative framework copes poorly with these new realities and would benefit from careful reconsideration. In this particular respect, the Commission's paper is especially welcome, affording as it does the first opportunity in over a generation to engage in a root-and-branch review of the legal rules that apply to parenting in the increasingly complex and diverse context of modern Irish family life.

## **1. Setting the Theoretical Framework for Discussion**

The Law Reform Commission makes a number of proposals. It also seeks comments and suggestions relating to a variety of other issues regarding the welfare of children in private law proceedings. It is important that any discussion of this area of law is underpinned by a clear and cogent theoretical framework, one that is mindful of the responsibilities and rights, as well as the dignity of all relevant parties.

### ***1.1 Human Rights and Equality Considerations***

Any discussion of this area of law must have regard to, and be framed by the relevant international and national human rights framework. Reform must be guided, furthermore, by considerations underpinning equality law and should seek, in particular, to eliminate discrimination on the nine grounds contained in the Employment Equality Acts and Equal Status Acts. Those Acts address, in particular, discrimination on the basis of gender, marital status, family status, age, race, colour, nationality or ethnic or national origins, religion, disability, sexual orientation, and membership of the Traveller community. While the Acts are addressed primarily to employment and the provision of goods and services, the overriding ethos of equality legislation offers an important touchstone for reform in the context of family relationships, with the grounds of gender, disability, marital status, family status and sexual orientation being of particular relevance.

In this specific context, legal reform should be guided and informed by the United Nations Convention on the Rights of the Child as well as the relevant case law of the European Court of Human Rights. A variety of other international instruments, including provisions in the

EU Charter of Fundamental Rights,<sup>4</sup> also highlight the rights of the child. In international law, particular emphasis is placed on the seminal importance of the best interests principle discussed below,<sup>5</sup> as well as the right of the child to be heard in proceedings concerning his or her welfare.<sup>6</sup> The right of the child to maintain contact with both parents in cases where the child's parents separate or where the child is taken into care is also a prominent theme in international instruments and case law.<sup>7</sup>

The Authority is mindful also of the terms of the United Nations Convention on the Rights of Persons with Disabilities. Article 3(h) of that Convention highlights as a principle the importance of "...ensuring respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities." Article 7(1) of that Convention, moreover, requires States Parties to "...take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children." Article 7(2) prioritises the best interests of the child as the primary consideration in all actions concerning children with disabilities. Article 7(3) highlights the need to ensure that children with disabilities have the right to express their views on all matters affecting them, stressing the further requirement of age-appropriate and disability-appropriate mechanisms to allow children with disabilities to realize this right.

Article 23(3) of the Convention emphasizes the entitlement of children with disabilities to equal rights with respect to family life. With a view to realizing this "...States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families." Article 23(4) discourages the forced separation of a child from his parents except where this is necessary to secure the best interests of the child. Where a child with a disability cannot be cared for by his immediate family, Article 23(5) requires that "...every effort be made to provide alternative care within the wider family, and failing that, within the community in a family setting."

Article 23, moreover, requires the elimination of discrimination against people with disabilities in relation to marriage, family, parenthood and relationships. Article 23(4)

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<sup>4</sup> See Article 24 of the EU Charter of Fundamental Rights.

<sup>5</sup> See, for instance, Article 3 of the UN Convention on the Rights of the Child and Article 24(2) of the EU Charter of Fundamental Rights.

<sup>6</sup> See, for instance, Article 12 of the UN Convention on the Rights of the Child and Article 24(1) of the EU Charter of Fundamental Rights.

<sup>7</sup> See, for instance, Article 9(3) of the UN Convention on the Rights of the Child and Article 24(3) of the EU Charter of Fundamental Rights.

emphasizes that a child should not be separated from his or her parent or parents by reason of a disability of the child or of either parent. In this context, the Authority is mindful that in considering whether a parent should be granted custody of a child, the courts, amongst other matters, look to the capacity of the parent to cater to the needs of the child.<sup>8</sup> While parental capacity may be an appropriate criterion, the Convention demands some considerable care in ensuring that the fact of disability is not used to deny custody to a parent. As Geoffrey Shannon observes, to acknowledge that parental capacity is a criterion of relevance:

“...is not to say that the more capable parent will always be granted custody. Nor should it suggest that parents with needs of their own, owing for instance to disabilities, should be denied custody.”<sup>9</sup>

### ***1.2 The Best Interests Principle***

In this context the predominant consideration is that of the best interests of the child, a concept that is sometimes called ‘the welfare principle’. This principle presupposes that in all cases concerning the legal position of children, the welfare<sup>10</sup> or best interests of the child is the primary consideration of relevance. The best interests test is well established in international law<sup>11</sup> and EU law<sup>12</sup>, and is reflected in domestic law as it relates to private law disputes<sup>13</sup>, care proceedings<sup>14</sup> and adoption proceedings<sup>15</sup>.

The Authority is mindful that what is in the best interests of a particular child in a particular case will depend to a significant extent on each specific situation. The circumstances in which a child is conceived, born and raised often differ significantly. As a result, family law confers considerable discretion on judges and other state actors,<sup>16</sup> leaving to them the decision as to what steps and remedies will best suit the interests of the child given the particular facts and circumstances of the child and his or her parents. While it is important to

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<sup>8</sup> See for example *CC v. PC* [1994] 3 Fam. L. J. 1985

<sup>9</sup> Shannon, *Child Law*, (Dublin: Thomson Round Hall, 2005) at 2-21, p. 39.

<sup>10</sup> Welfare is defined in the Guardianship of Infants Act 1964, s.2 as comprising “the religious, moral, intellectual, physical and social welfare of the child.” In *D.F.O’S v. C.A.* unreported, High Court, April 20, 1999, McGuinness J. added that the emotional welfare of the child was also to be considered as a “most important aspect of welfare”. The Irish courts have noted that these various aspects of the child’s welfare should be considered collectively and in their totality. Typically, no one criterion is to be considered in isolation from the others: see *M.M.D.S. v. P.D.O.S.* (1974) 110 ILTR 57 *per* Walsh J. and *MacD. v. MacD.* (1979) 114 ILTR 66 *per* Finlay C.J.

<sup>11</sup> See, for instance, Article 3(1) of the UN Convention on the Rights of the Child 1989.

<sup>12</sup> See Article 24(2) of the European Union Charter of Fundamental Rights.

<sup>13</sup> See s. 3 Guardianship of Infants Act 1964

<sup>14</sup> See s. 3(2)(b)(i) Child Care Act 1991

<sup>15</sup> See s. 2 Adoption Act 1974

<sup>16</sup> Such as, in the case of adoption, the Adoption Authority.

ensure that there are clear principles and policies in place, it is submitted that it is important also to maintain sufficient flexibility in the law to allow judges to take steps that will suit the particular needs of each child in a variety of diverse scenarios. In particular, there may be some risk in fostering a ‘one-size-fits-all’ approach that imposes a universal remedy regardless of the great diversity of parenting arrangements that may be encountered in practice.

### ***1.3 Emphasising Parental Responsibilities***

Placing the child at the centre of legal and policy considerations is particularly useful in framing a clear theoretical framework for legal reform. This focus on the child’s best interests serves to move the debate around parenting from one that emphasises parental rights (usually competing) towards one that more appropriately prioritises the *responsibilities and obligations* of parents towards children. It also emphasises that children are not ‘prizes’ to be won in intra-family disputes but rather people with entitlements and interests that transcend those of adults and indeed those of the State in legal disputes concerning children. The Children (Scotland) Act 1995, for instance, stipulates that the rights conferred on a person with parental responsibility in that jurisdiction are bestowed “...in order to enable him to fulfil his parental responsibilities in relation to his child”.<sup>17</sup> This formula underlines that parental rights, while undoubtedly important, are subservient to and indeed concomitant with the duties and obligations that parents owe to their children.

In this regard, the Authority welcomes the changes in terminology proposed by the Law Reform Commission in Chapter 1 of its paper. These proposed changes represent a shift from an approach that foregrounds parental authority and rights to one that highlights and places greater emphasis on the responsibilities of parents and others towards children, and the corresponding rights enjoyed by the latter. The new terminology, in particular, underlines the central position of the child and of considerations of the child’s best interests in this context, placing the child firmly at the centre of enquiries relating to arrangements for his or her parenting. These changes may also serve to clarify the precise nature of the responsibilities associated with each concept, the proposed new terms conveying much more aptly the character of the responsibilities and rights involved than the terminology that is currently employed.<sup>18</sup> It is hoped that in tandem with these changes, greater efforts are made to clarify

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<sup>17</sup> S. 2 of the Children (Scotland) Act 1995.

<sup>18</sup> Additionally, these changes in terminology will bring Ireland into line with relevant provisions of

to parents the implications of and responsibilities associated with each of these concepts, as well as the consequences of birth registration. This task would be made considerably easier if the terms used in law were themselves fully and appropriately defined within the legislation.

#### ***1.4 Equality and the Child's Best Interests***

The aforementioned emphasis on the child's best interests is fully compatible with a perspective that emphasises equality. In fact, the best interests of a child arguably require that his or her relationships with a variety of people who play or have played an important beneficial role in the child's life are legally recognised. The Status of Children Act 1987 eliminated most overt instances of discrimination against children born outside of marriage. In particular, it conferred equal rights of succession and maintenance on children, regardless of whether they were born inside or outside marriage. That Act and the subsequent Children Act 1997 strengthened the role of fathers in the lives of children born outside marriage, by facilitating the father's acquisition of guardianship responsibilities in respect of the child, by agreement<sup>19</sup> or, alternatively, by court order.<sup>20</sup> The Employment Equality Acts 1998-2008 and Equal Status Acts 2000-2008 also provide important protections against discrimination on the basis (amongst other grounds) of marital status<sup>21</sup> and family status in the context of employment and the provision of goods and services respectively.

Nonetheless, the true and meaningful equality of all children cannot be achieved if the families of which they are members are not recognised in Irish law. Non-recognition of families outside of marriage serves negatively to affect the children who form part of these families, such that non-recognition of a child's family disadvantages that child. In this context, it is submitted that an equality perspective progresses the best interests of the child. Such an approach serves to emphasise both the symbolic and practical importance to a child

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international and European Union law. For instance, Council Regulation (EC) No 2201/2003 of 27 November of 2003, which concerns "...jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility", uses the term "parental responsibility". The UN Convention on the Rights of the Child, Article 9(3), moreover, speaks of the child's right to "...maintain personal relations and direct contact" with its parents. The EU Charter of Fundamental Rights, Article 24(3), uses similar language when it speaks of the right of a child "...to maintain on a regular basis a personal relationship and direct contact with both [of] his or her parents..."

<sup>19</sup> S. 2(4) Guardianship of Infants Act 1964, as inserted by s.4 Children Act 1997 allows the parents to confer guardianship on a father by means of a statutory declaration signed by both the mother and father of the child. See also the Guardianship of Children (Statutory Declaration) Regulations 1998, S.I. No. 5 of 1998.

<sup>20</sup> S. 6A Guardianship of Infants Act 1964, as inserted by s. 12 Status of Children Act 1987 and as amended by s. 6 and s. 12 Children Act 1997

<sup>21</sup> The Civil Partnership Bill 2009 proposes to replace the ground of 'marital status' with a ground of 'civil status' to include civil partners as a category against in respect of whom discrimination is not permitted.

of equal recognition and support for the family that cares for him or her. It serves also to foreground the child's equal right to contact with and care from a variety of people who are important to that child's sense of wellbeing and belonging.

Clearly, in this context one must treat the child's best interests as the primary criterion of relevance. Flexibility will also be important, given the wide diversity of situations in which a child may be conceived, born or raised. Nonetheless any review of the law must also have regard to the importance to the child that the family of which he or she is a part is considered to be of value and worth. In particular, the circumstances of a child's conception and birth should not in and of itself result in the child being treated less favourably than other children. Nor should any child's family receive any less support or recognition on the basis that the family does not meet a particular legally prescribed ideal.

An equality perspective also serves to emphasise the importance of the active, meaningful and equal participation of both fathers and mothers in the lives of their children, as well as the need to recognise and value the contribution of others who are committed to the raising of a child. In this regard, it is worth highlighting the Equality Authority's specific commitment, in its current Strategic Plan 2009-2011<sup>22</sup>:

“To support initiatives responding to priority issues for specific equality grounds through the European Year Legacy Action Plan by:

- a. Promoting the status of men as carers, in particular the equal sharing of caring rights and responsibilities between women and men and continuing dialogue with men's organisations on issues of equality for men...”<sup>23</sup>

In the Equality Authority/ESRI research report on *Gender Inequalities in Time Use: The Distribution of Caring, Housework and Employment Among Women and Men in Ireland*<sup>24</sup> McGinnity and Russell conclude that while “Irish women's participation in paid employment has increased dramatically” since 1990, women in general continue to spend substantially more of their time engaged in work within the home than is the case for men.<sup>25</sup> In particular, the authors highlight that, even in dual-income households, where both parents are in paid employment, parenting remains a “gendered time constraint”, the authors concluding that

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<sup>22</sup> Equality Authority, *Strategic Plan*, 2009-2011, (Dublin, 2009) at p. 25.

<sup>23</sup> *Ibid.* p. 25

<sup>24</sup> McGinnity and Russell, *Gender Inequalities in Time Use: The Distribution of Caring, Housework and Employment Among Women and Men in Ireland*, (Dublin, Equality Authority/ESRI, 2008).

<sup>25</sup> *Ibid.* at p. 69

“...parenthood brings a reallocation of time for both men and women, leaving a more traditional division of labour in couples with children.”<sup>26</sup> The authors add that those childcare functions that are performed by men and women respectively generally differ in character, with men “more likely to be involved in social/emotional care” while women perform a greater proportion of physical and supervisory care functions.<sup>27</sup> It is clear, then, that despite significantly increased participation by women in paid employment, childcare functions still fall disproportionately to women. Additionally, there is considerable and ongoing evidence from the Equality Authority’s casework that being a parent with caring responsibilities can disadvantage parents (particularly mothers) in the workplace.

### ***1.5 The Voice of the Child***

Despite the commitment to the child’s best interests, children are not typically entitled to take proceedings on their own behalf. For instance, a child is not entitled on his or her own initiative to seek contact (access) with a parent or relative, even though contact is universally framed as a *child’s* right.<sup>28</sup> With some rare exceptions, a child generally must rely on others to enforce his or her rights. Although the wishes of the child must be considered by a court if the child is of sufficient age and understanding,<sup>29</sup> Dr. Ursula Kilkelly notes that Irish case law “...indicates a mixed judicial response to the duty to hear children’s views and the weight to be attached to them”.<sup>30</sup>

The UN Convention on the Rights of the Child, in Article 12, asserts the right of the child to have an opportunity “...to be heard in any judicial or administrative proceedings affecting the child...”, a principle reflected in section 25 of Guardianship of Infants Act 1964.<sup>31</sup> Both the aforementioned UN Convention and the Act of 1964 recognise that the extent to which this may be realised is dependent on the age and maturity of the relevant child. The UN Convention on the Rights of Persons with Disabilities, Article 7(3), moreover, emphasises the particular right of children with disabilities “...to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.”

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<sup>26</sup> *Ibid.* at p. 72

<sup>27</sup> *Ibid.* at p. 70

<sup>28</sup> See sections 11 and 11B of the Guardianship of Infants Act 1964.

<sup>29</sup> S. 25 Guardianship of Infants Act 1964

<sup>30</sup> Kilkelly, *Children’s Rights in Ireland*, (Dublin, Tottel, 2008) at 7.040, p. 223

<sup>31</sup> See also Article 3 of the European Convention on the Exercise of Children’s Rights.



While it may not be desirable generally to involve children directly in court proceedings, the Commission should consider measures to ensure that the child's voice is genuinely heard in cases involving his or her welfare. This may be facilitated by the activation of provisions allowing for the appointment of a guardian *ad litem* to allow separate representation of the child in private law proceedings.<sup>32</sup> Such a move was envisaged (albeit only in limited circumstances) by s. 28 of the Guardianship of Infants Act 1964, but this measure has not yet been brought into force.<sup>33</sup> This failure to facilitate independent representation for the child in private law proceedings brings Ireland into potential conflict with Article 12(2) of the United Nations Convention on the Rights of the Child.<sup>34</sup> It also precludes ratification by the State of the European Convention on the Exercise of Children's Rights, Article 4 of which confers on the child the right to apply for a special representative in proceedings concerning the child's welfare.<sup>35</sup>

In many cases, the law, while providing remedies in respect of children, either does not afford or limits the independent right of the child himself or herself to invoke such remedies. For instance, despite the fact that access (contact) is universally recognised as a right of the child, such a right may only be invoked by people other than the child.<sup>36</sup> Additionally, only the guardians or parents of a child may seek an order relating to the welfare of a child under s. 11 of the Guardianships of Infants Act 1964; the child himself or herself cannot independently apply under this section, even though it is the child's own welfare that is being considered. The Commission may wish to consider generally whether mechanisms should be introduced to allow the child himself or herself, or an independent person acting on the child's behalf, to invoke such rights where the parents or guardians of the child choose not to do so.

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<sup>32</sup> See also Article 12(2) of the UN Convention on the Rights of the Child, which envisages, as a means of ensuring that the views of the child are considered in judicial and administrative proceedings, the appointment of a representative or appropriate body.

<sup>33</sup> By contrast, section 26 of the Child Care Act 1991, permitting the appointment of a guardian *ad litem* in care proceedings, if necessary to promote the interests of the child and the interests of justice, *has* been brought into force.

<sup>34</sup> See the discussion in Kilkelly, *Children's Rights in Ireland: Law Policy and Practice*, (Dublin: Tottel, 2008) at 7.037, pp. 221-222. See also Children's Rights Alliance, *From Rhetoric to Rights: Second Shadow Report to the United Nations Committee on the Rights of the Child*, (Dublin: Children's Rights Alliance, 2006) at pp. 22-23

<sup>35</sup> A point made by Kilkelly, *op. cit.*, at p.222, who adds that "...a case may also be made that this situation breaches obligations under Art. 6 of the [European Convention on Human Rights]."

<sup>36</sup> Section 11 and 11B of the Guardianship of Infants Act 1964

### ***1.6 Access to Effective Legal Remedies***

The Equality Authority has previously noted the seminal importance of accessibility so that all sections of the community have equal access to effective legal and social remedies.<sup>37</sup> This means, in particular, that the law should be framed in as clear, comprehensible and accessible a manner as possible, and that litigants be enabled to access affordable mechanisms offering prompt recourse to the law. Difficulties may arise where litigants do not have access to civil legal aid, particularly where one party is legally represented and the other not represented, leading to an ‘inequality of arms’ before the court. It is also necessary to ensure that the courts are provided with and exercise effective means of enforcing remedies, so that the remedies granted by courts are not defeated through the non-cooperation of one or other parent.

### ***1.7 Alternative Frameworks for Dispute Resolution***

The adversarial nature of Irish law arguably does not readily suit the needs of families in distress or dispute. In particular, the adversarial framework potentially encourages parties to a legal dispute involving children to view child custody as a ‘winner takes all’ scenario whereby the spouses/parents are propelled to dispute custody rather than framing arrangements that allow the child meaningful contact with both parents. In this regard, it is suggested that legislative policy should continue to support and encourage alternative means of dispute resolution, such as mediation and separation agreements. In particular, sections 20 and 21 of the Guardianship of Infants Act 1964 require solicitors to advise their clients on alternatives to court proceedings, including counselling, mediation and custody agreements. To ensure widespread access to such services, it is vital also that they are funded appropriately.

## **2. Parenting and Employment**

Given the specific remit of the Equality Authority in relation to employment and the supply of goods and services, the Authority is mindful of the interrelationship between parenting and employment. It is important in this regard to recognise that parents may play a role in supporting children by work that takes place both within and outside the home, through employment and home-making alike, with each element contributing to the general wellbeing of the family.

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<sup>37</sup> See for instance Equality Authority, *Implementing Equality for Lesbians, Gays and Bisexuals*, (Dublin, 2002) at p. 29

The Authority has previously highlighted, through research, the importance of promoting an appropriate work-life balance, thus facilitating employees in fulfilling a parenting role. Current legislation, and in particular the Maternity Protection Acts 1994-2004, confers on mothers and expectant mothers a right to maternity leave, as well as a variety of entitlements, including a right to time off work in order to receive ante-natal and post-natal care, for attendance at ante-natal classes (with provision also being made for attendance by expectant fathers) and for the purpose of breast-feeding. The Acts also require that work conditions do not imperil a pregnant mother, the mother of a new-born child or a mother who is breast feeding. Additionally, health and safety leave is available to mothers in cases where it is not practicable to reassign the employee from work that presents a risk to the mother or child.

The Parental Leave Acts 1998-2006 facilitate up to 14 weeks of unpaid parental leave for employees with children, including natural and adoptive parents as well as persons acting *in loco parentis* in respect of a child. The Acts also provide for *force majeure* leave where, for urgent family reasons, owing to an injury to or the illness of (amongst others) a child of the employee, or a child in respect of whom the employee is *in loco parentis*, the immediate presence of the employee is indispensable.

While these measures are of significant value, three specific points are worthy of consideration. The first is that fathers, while able to avail of parental leave, do not enjoy any right to paternity leave *per se*. Given the Authority's strategic aim to promote "the status of men as carers, in particular the equal sharing of caring rights and responsibilities between women and men",<sup>38</sup> the Authority considers that the provision of an appropriate period of paid paternity leave would facilitate and support shared caring arrangements in the early stages of the child's life. It would, in particular, allow a father to assist and better support the mother and child at the critically important and challenging time following the child's birth. The Authority is conscious that the precise implementation of such a proposal will require further and detailed consideration, though this should not detract from the general principle that fathers should be entitled to an appropriate period of paternity leave.

Second, the Authority notes that there is currently no provision allowing a mother to share a portion of her own maternity leave and benefits with the father of the child, or alternatively

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<sup>38</sup> Equality Authority, *Strategic Plan*, 2009-2011, (Dublin, 2009) at p. 25.

with her spouse or partner. While acknowledging that the provision of maternity leave is primarily addressed to the health and safety of the mother and child, the Authority believes that a mother should be allowed, after an appropriate period, voluntarily to transfer an appropriate portion of her leave. The recipient of this portion of leave may be the father of the child, or alternatively a spouse or partner of the mother, (including a same-sex partner or civil partner), the purpose being to allow the father, spouse or partner to provide for the care of the child. Given the aim and purpose of maternity leave, the amount of leave that may be allocated to the father, spouse or partner may, of necessity, be limited, though in principle the transfer of an appropriate portion of leave should be facilitated, subject to the full and free consent of the mother. While the precise dimensions of such an arrangement may need further and detailed consideration, the Authority commends the principle as a mechanism that would afford the family greater flexibility in making child-care arrangements.

Third, currently there is no provision for leave where a parent is required to attend court in family law proceedings concerning the child of that parent. The Authority believes that a parent who is required to attend court in relation to family law proceedings relating to a child should be afforded leave to do so.

While these matters may be beyond the specific remit of the Commission's consultation paper, they are pertinent to the exercise by parents of responsibilities and rights associated with parenting. It may thus be worth considering these matters in the context of the Commission's final report.

### **3. Unmarried Fathers and Parental Responsibility (Guardianship)**

Perhaps the most difficult and contentious question posed by the Commission's consultation paper relates to the legal position of an unmarried father on the birth of his child.<sup>39</sup>

Currently where a child is born to parents who are married to each other, the child's mother and father automatically acquire joint guardianship in respect of the child.<sup>40</sup> By contrast, where a child is born outside marriage, only the mother will acquire automatic guardianship. An unmarried father is not automatically deemed to be a guardian, though he may become a

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<sup>39</sup> That this is an ongoing debate, spanning several decades, is illustrated by the discussion of this point in the Law Reform Commission's *Report on Illegitimacy* (LRC 4-1982) from 1982.

<sup>40</sup> S. 6(1) Guardianship of Infants Act 1964

guardian either by means of a statutory declaration made jointly by both parents,<sup>41</sup> or by court order.<sup>42</sup> This means that a child born to married parents automatically enjoys the guardianship of two persons. A child born outside marriage, on the other hand, has no automatic right to this second guardian. The child's right to a second guardian is, in such cases, contingent on the father's willingness to seek and accept guardianship, and then on either the mother's willingness to accept him as a joint guardian or, in the alternative, on the assent of a court.

The Commission's suggestion of a strong presumption in favour of the father, while an incremental step, will nonetheless maintain the current situation whereby responsibility will be conferred only on unmarried fathers who *seek to exercise* such responsibility, (through the courts if the mother's consent is not forthcoming) while mothers and marital fathers will continue automatically to assume such responsibilities on the birth of a child.

The Equality Authority has specifically committed itself to supporting initiatives "...[p]romoting the status of men as carers, in particular the equal sharing of caring rights and responsibilities between women and men and continuing dialogue with men's organisations on issues of equality for men...".<sup>43</sup> The Authority thus recommends that steps be taken to progress and promote equal sharing of parental responsibilities by those in a parenting role in respect of the child, where this is appropriate in the particular circumstances. In this regard, as a matter of principle, the fact that a child is born inside of or outside of the context of marriage should have no bearing on the child's right to be cared for and supported by both of his or her parents.

If guardianship is viewed as a vehicle primarily for conferring responsibility in respect of a child, the case for conferring parental responsibility on both father and mother automatically on the birth of a non-marital child, has much to recommend itself:

- It removes the distinction between marital and non-marital fathers, emphasising that parental responsibility is predicated on the relationship between the parent and child and should not depend on the relationship between the parents of the child;
- It emphasises that mothers and fathers alike each have equal responsibilities towards their child.

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<sup>41</sup> S. 2(4) Guardianship of Infants Act 1964 as inserted by the Children Act 1997

<sup>42</sup> S. 6A Guardianship of Infants Act 1964 as inserted by the Status of Children Act 1987

<sup>43</sup> Equality Authority, *Strategic Plan*, 2009-2011, (Dublin, 2009) at p. 25

The Authority recognises that the wide and complex varieties of circumstances in which a child may be conceived, born and raised require a range of responses that are flexible in addressing the best interests of the child in those diverse circumstances. There may be exceptional cases in which it will not be either in the child's best interests, or in the interests of the well-being of the mother, for the father (or indeed other guardians) to retain parental responsibility. These exceptional situations will necessitate a mechanism whereby a person may be removed as a guardian. Such situations may include, in particular, where that person has consistently failed to meet his responsibilities towards the relevant child or where that person has been convicted of a serious criminal offence or has committed a serious civil wrong against the person of the child or other guardian. This removal must be subject to periodic review and subject to appeal.

Exceptional circumstances should not shape general policy and principles of the law as it applies to the majority of cases of childbirth. The Authority takes the view that the better approach is to permit automatic conferral of parental responsibility on unmarried fathers in all cases, subject to a mechanism whereby parental responsibility may be withdrawn for exceptional reasons as outlined above.

Therefore, given the goal of the Authority to promote the equal sharing by those in a parenting role of caring responsibilities in respect of their children, the Authority is of the opinion that as a matter of principle, an unmarried father should be granted automatic guardianship (parental responsibility) on the birth of his child. This principle should be placed on a statutory footing. In light of the discussion above, however, such recognition may be removed or displaced where it would not be in the child's best interests to allow that father to retain joint parental responsibility. Such situations may include, in particular, where that person has consistently failed to meet his responsibilities towards the relevant child or where that person has been convicted of a serious criminal offence or has committed a serious civil wrong against the person of the child or other guardian. This removal must be subject to periodic review and subject to appeal.

#### **4. *De Facto* Parenting Arrangements**

The final chapter of the Commission's consultation paper deals with parenting and contact arrangements involving adults who are not the biological parents of a child. As a result of the increased diversity and fluidity of modern family life, a growing number of children live with

and are cared for by people who are members of their extended family, or who are the partners or spouses of a biological parent (those partners or spouses not being themselves the biological parents of the child).

Despite these arrangements, the law as it currently stands affords very limited recognition to persons, other than biological parents, who are performing a parenting role in respect of a child. In particular, while the law currently extends access to a wide range of persons,<sup>44</sup> guardianship and the right to seek custody are, by contrast, generally confined to the biological parents of a child. Other persons may only acquire guardianship on the death of an existing guardian<sup>45</sup> or by adoption.<sup>46</sup>

This lack of legal recognition has implications for a wide variety of people who may be exercising *de facto* parental responsibilities in respect of a child, either on a temporary or indefinite basis. In particular, the absence of a straightforward facility for conferring guardianship (parental responsibility) on non-biological parents who are exercising a parental role (where such conferral would be appropriate) may create significant practical difficulties in specific circumstances. The non-biological parent may, for instance, be unable to consent to medical treatment in cases of emergency, where the child's guardian is not immediately available. Similar difficulties may arise where the child requires consent for school activities. A non-biological parent may also be precluded from seeking custody (a day-to-day care order) in appropriate circumstances, for instance, where it is clear that the child's parents are unable or unwilling to care for the child.

Given the great diversity of situations in which a child may be parented by a person who is not his or her biological parent, it will be evident that there is no universal remedy that will suit all cases. The Authority is mindful, in particular, that in cases where a non-biological parent shares a *de facto* parenting role with a biological parent of a child, there will typically be another biological parent with responsibilities and interests that must also be considered. As such, the issue of conferring responsibilities and rights on persons other than the biological parents of a child is by no means a straightforward matter. It is clear also that the appropriate legal response to each situation will depend in large part on the specific facts of each case. In particular, the question as to whether the conferral of parental responsibility will

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<sup>44</sup> See section 11 and 11B of the Guardianship of Infants Act 1964

<sup>45</sup> See sections 7 and 8 of the Guardianship of Infants Act 1964

<sup>46</sup> Adoption Acts 1952-1998.

serve the best interests of the child is likely to differ significantly depending on the particular fact scenario present in each case, a consideration that underlines the importance of ensuring flexibility and avoiding ‘one-size-fits-all’ approaches to this complex issue.

Given the specific remit of the Equality Authority, and in particular its role in promoting equality on the grounds of sexual orientation, marital status and family status, (and anticipating a new role in the context of civil status)<sup>47</sup> the Authority wishes to highlight and address a number of issues of note in this context.

***Parental Responsibility and the Spouses/Civil Partners of Parents.*** The Commission has invited submissions on whether step-parents should be able to apply for or be conferred with guardianship/parental responsibility. While such a facility may be useful in specific cases, the conferral of such responsibilities and rights needs to be considered in the context of the specific circumstances of each child. While the best interests of the child are the primary consideration in any case concerning the child’s welfare, the responsibilities and rights of the child’s other parents will also need to be taken into account before any decision is made.

The term ‘step-parent’ is traditionally understood as referring to the spouse (meaning a husband or wife in a marriage recognised by law) of a child’s parent. In anticipation of the passing of the Civil Partnership Bill 2009, the Authority is mindful also of the position of civil partners who may enter into or be in a civil partnership with a person who is already a parent or who becomes a parent of a child. Given the Authority’s specific brief to promote equality on the ground, amongst others, of sexual orientation, and anticipating an expanded role in the context of civil status, the Authority maintains that such measures as are recommended in the case of the spouse of a biological parent should apply equally to the civil partner of such a parent. The Authority thus recommends that to the extent that the Commission determines that a facility should be introduced allowing for the conferral of parental responsibility on non-biological parents in appropriate cases, such a facility should apply equally to the spouses and civil partners of biological parents.

In this context, a useful model is offered by Section 4A of the Children Act 1989, applicable in England and Wales. There, a person may acquire parental responsibility in respect of the biological child of that person’s spouse or civil partner if the spouse or civil partner who is

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<sup>47</sup> Under the Civil Partnership Bill 2009.



the biological parent already has parental responsibility in respect of the child.<sup>48</sup> This may occur by agreement with the spouse or civil partner who is the biological parent of the child. If the other biological parent also has parental responsibility, the agreement of that other parent is also required. Alternatively, parental responsibility may be conferred by court order. It is important to emphasise that this facility is available on an equal footing to civil partners as well as spouses. Notably the relevant legislation defines a ‘step-parent’ as including both a spouse and a civil partner of the biological parent.

Whether this remedy is an appropriate measure will depend on the circumstances of each specific case. Nonetheless, the granting of parental responsibility in appropriate cases is arguably preferable to the current very limited options available in Irish law. In the Irish context, unless an existing guardian dies, the only means by which the new spouse of a parent may currently acquire guardianship is by adoption. This requires both existing parents (and any other guardians) to give up any parental responsibilities and rights that they may have,<sup>49</sup> and for the newly married couple to adopt the child. In particular, the spouse who is already a parent must first give up his or her own child for adoption, and then jointly adopt that same child. Where the child was born within a previous marital relationship, adoption will not be possible unless very exceptional circumstances apply.<sup>50</sup> Joint adoption, moreover, is not available to unmarried couples, including same-sex couples, nor will it be available to civil partners under the Civil Partnership Bill 2009, as currently formulated.

Clearly, a mechanism that would allow the new spouse or civil partner, in appropriate cases, to acquire parental responsibility by means other than adoption would expand the range of legal options available in such cases. Given the stark consequences of adoption, it is arguable that a mechanism allowing parental responsibility to be extended, in appropriate cases, to a spouse or civil partner would generally be preferable to adoption. In particular, such a facility would obviate the need for the existing guardians to waive their guardianship

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<sup>48</sup> Section 4A of the Children Act 1989, as amended by s. 112 of the Adoption and Children Act 2002 and section 75 of the Civil Partnership Act 2004.

<sup>49</sup> An unmarried father without guardianship is in a particularly invidious position in this context. He may lose his status as parent without his consent, as he is not entitled to veto the adoption, though, under the Adoption Act 1988 he does have a right to be heard in relation to the proposal to adopt the child.

<sup>50</sup> Typically, with limited exceptions, a child born inside marriage may not be adopted. A child of married parents may be adopted where both of its parents are deceased. Exceptionally, the child of living married parents may be adopted under the terms of the Adoption Act 1988 in circumstances where the parents can be shown to have failed in their duty towards the child for at least 12 months, where such failure is likely to continue until the child is at least 18 and where the parents can be shown to have abandoned their parental responsibilities and rights in respect of the child.

responsibilities before the new spouse or civil partner may acquire guardianship. Any such mechanism should, of course treat spouses and civil partners equally.

***Same-sex Couples and Parenting.*** In an increasing number of cases, children are growing up in families headed by lesbian and gay couples. The circumstances in which this is occurring are diverse and raise complex issues that require careful attention.<sup>51</sup> While the situations in which lesbian and gay couples are parenting children are diverse and multi-faceted, the common thread is that in all such cases only a biological or adoptive parent may acquire guardianship responsibilities.<sup>52</sup> This potentially leaves the child in a very precarious and unstable legal position vis-à-vis the other, non-biological parent. The other partner may acquire guardianship responsibilities on the death of an existing guardian, but otherwise it is not possible for the same-sex couple to share parenting responsibility. The non-biological parent, in particular, may not be pursued for maintenance in respect of the child. Nor can the child seek to claim from the non-biological parent's estate should the latter die without making a will. The non-biological parent currently is unable to seek custody of the child, and, barring the death of one or other guardian, will not be able to acquire joint guardianship responsibilities.<sup>53</sup>

Given its specific concern to progress equality on the nine grounds set out in equality legislation, and anticipating a new role in the context of civil status, the Authority notes the proposal in the Civil Partnership Bill 2009 to introduce civil partnership as a means by which same-sex couples may enter into a legally recognised union. While welcoming this bill as an important step forward for civil rights in Ireland, the Authority has previously voiced its concerns at the relative absence in this Bill of provision for children being raised and cared for by civil partners.<sup>54</sup> In particular, the Bill generally ignores the *de facto* relationship that may exist between a person and the biological child of his or her civil partner.

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<sup>51</sup> See, for instance, the discussion in the Colley Group's *Options Paper: Presented by the Working Group on Domestic Partnership*, (Dublin, 2006) at pp. 17-18

<sup>52</sup> Although in the case of foster parents, s.43A of the Child Care Act 1991 allows the extension of certain guardianship responsibilities to the foster parents of children in long term foster care. As there is no bar on same-sex couples co-fostering a child, this may give rise to same-sex couples sharing guardianship responsibilities in respect of the child.

<sup>53</sup> The non-biological parent, as an individual, may possibly adopt the child, but the couple is precluded from joint adoption, as joint adoption is available only to married persons. Same-sex couples are not permitted jointly to adopt a child, a situation that has not been addressed by the Civil Partnership Bill 2009 as currently formulated.

<sup>54</sup> See the Equality Authority statements of December 3, 2009, "Equality Authority Welcomes Introduction of Civil Partnership Bill as Important Step Forward for Civil Rights in Ireland" at <http://www.equality.ie>. See also, Ryan, *Civil Partnership: Your Questions Answered*, (Dublin: GLEN, 2009), especially chapter 8.

In light of these gaps in the Civil Partnership Bill, the Authority urges the Commission to pay close attention to the complex legal issues arising for children being parented by same-sex couples. Given the diversity of situations in which a child may come to be raised by a same-sex couple, the precise legal response to such situations will, of course, depend on the facts of each case. In particular, some care will be required to ensure that the responsibilities and rights of other parties, such as the other biological parent, be considered. It is suggested, however, that there is a need for some mechanism permitting the civil partners to acquire joint parental responsibility in appropriate circumstances. This may well take the form of a measure similar to section 4A of the Children Act 1989 (England and Wales) as discussed above.

## **5. Access (Contact)**

It is well established that children generally benefit from contact with and the care of a wide variety of people that play a role in their lives. In particular, the European Court of Human Rights has recognised that even where a child has been taken into care, a child's welfare is generally best served by maintaining contact with his or her parents, and other relatives.<sup>55</sup> Similarly, the courts, in cases of relationship breakdown, have emphasised that the best interests of a child generally favour maintaining contact (access) with the parent who does not have day-to-day care and custody of the child, even if that parent is not conferred with custody of the child.<sup>56</sup>

The Authority notes that the range of persons entitled to apply for access/contact in respect of a child is already extensive.<sup>57</sup> The Commission has itself made a strong case for the simplification of the process by which persons other than parents may apply for access, eliminating the requirement to obtain leave prior to an application for access. Given the Authority's remit to promote equality on the nine grounds set out in equality legislation, the Authority would welcome the inclusion in the category of persons entitled to maintain contact with a child, persons who, while not technically related to a child, have (in the opinion of the court) a *bona fide* interest in the child.<sup>58</sup> These persons may include, for

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<sup>55</sup> See for instance *Eriksson v. Sweden* (1989) 12 EHRR 200.

<sup>56</sup> This may be the case even where the parent is considered to represent a possible risk to the child, in which case the court may consider supervised access.

<sup>57</sup> See section 11B of the Guardianship of Infants Act 1964, as inserted by section 9 of the Children Act 1997.

<sup>58</sup> This is already possible in cases where children are in the care of the State – see section 37 of the Child Care Act 1991.

instance, the parents and other relatives of a non-biological parent where a child is being or has been cared for by that non-biological parent. These persons technically may not fall within the definition of ‘relatives’ entitled to seek access to the child and thus it may be to the child’s benefit to extend contact in such cases. The Authority would also welcome the introduction of an express definition of the term ‘*in loco parentis*’ as used in s. 11B of the Guardianship of Infants Act 1964. Although this phrase is potentially wide enough to include the cohabiting partner of a parent who lives with and cares for a child of that parent, it is submitted that the legislation would benefit from express clarification of this point. This would place on a clear statutory footing the right of a non-marital cohabiting partner (opposite-sex or same-sex) of the child’s parent to seek contact with a child in respect of whom he or she has performed a *de facto* parenting role. Similarly, the right of a civil partner to seek access in respect of a child for whom he or she has provided care should also be expressly confirmed in anticipation of the enactment of the Civil Partnership Bill 2009.