

# **RESPONSE TO THE OFFICE OF LAW REFORM'S CONSULTATION PAPER ON DIVORCE IN NORTHERN IRELAND**

**12 April 2000**

As the paper is primarily concerned with an important issue of social policy this Commission clearly has an interest in ensuring that whatever recommendations it contains are consistent with internationally accepted rules and principles for the protection of human rights. We are therefore pleased to see that on pages 27-28 and 60 some of the pertinent human rights standards are adverted to. Having considered those standards and the minimal jurisprudence which has developed around them in international courts and committees, we are satisfied that the draft recommendations contained in the Consultation Paper do not violate them. We have also considered the UN's Convention on the Elimination of Discrimination Against Women (1979), especially Article 16, and the UN's Convention on the Rights of the Child (1989), especially Articles 9, 18 and 27, but again we do not see anything there to undermine the recommendations in this report. We are continuing to press the UK government to hasten its efforts to reform its matrimonial law so that it will be able to ratify Protocol 7 of the European Convention.

This Commission approves of the proposed objectives for the divorce system in Northern Ireland (pages 28-29) and agrees that there is value in making at least some of these explicit on the face of new divorce legislation. Any such guidance to those who have to interpret the legislation is to be welcomed. We would support the inclusion of an additional objective whereby children caught up in a divorce are fully informed and consulted about developments in the proceedings. We find the objectives more helpful than the aims set out on page 36. We agree that the case has been made out for the development and improvement of the positive elements of the existing divorce system rather than for a complete overhaul as in Part II of the Family Law Act 1996.

With reference to Chapters 6 and 7 of the report, we accept that the ground for divorce in Northern Ireland should continue to be the irretrievable breakdown of the marriage and on balance we believe that this should be proved in a purely no-fault way. To that extent we find the Republic of Ireland's approach preferable to that of Scotland (but the Irish requirement of four years' separation out of the preceding five is too demanding). Although a purely no-fault system could potentially result in discrimination against the less well-off, we feel that this issue can be addressed during the ancillary relief proceedings. We agree with the position now reflected in England's Family Law Act 1996, namely that blame for marriage breakdown is essentially a non-justiciable issue.

As regards Chapter 8, the emphasis on mediation, as required by Council of Europe Recommendation R (98) 1, is also to be applauded. It fits with the requirement under Article 8 of the European Convention on Human Rights to respect one's private and family life. The Commission is in favour of disputes of all kinds being solved amicably if possible, provided fundamental human rights are safeguarded in the process, especially those concerning a fair hearing (as elaborated upon in Article 6 of

the European Convention). The report's proposals concerning an integrated system of finance, child care and property remedies, together with the proposals on judicial discretion, should help to provide those safeguards, although we feel that the right to marry (which in our view should carry with it the right to re-marry), as enshrined in Article 12 of the European Convention, should not be unduly jeopardised by any such discretion. On the question of the appropriate ground for maintenance orders in magistrates' courts, we approve of the Australian model outlined on page 72 of the report but we would wish this to be made conditional upon express rights of fair hearing and equality of arms. We also believe that mediation services should take fully into account the needs of children involved in the divorce.

We think that the safeguards dealt with in the first part of Chapter 10 of the report are sensible. As regards the proposals in relation to the protection of spouses and children we believe that a finding of grave financial or other hardship to the respondent should *not* be an absolute bar to divorce; a judicial bar to stay the proceedings would be more appropriate. Likewise we feel that this power to stay should be available prior to the issue of a decree absolute.

The Commission accepts that a court should have power to rescind a consent-based divorce decree if it can be shown that the respondent was misled into giving his or her consent (on the analogy of the position in marriage law). We also approve of the retention of the two-year ban on divorce after marriage.

As regards the position of children, the Commission would support an express legislative provision to give effect to Articles 3 and 12 of the UN Convention on the Rights of the Child (1989), which, respectively, require courts of law and other administrative authorities to give primary consideration to the best interests of the child and confers on children who are capable of forming their own views a right to express those views freely through a representative where appropriate. We are of the view that the current reform proposals do not adequately protect children's rights in these two respects at least.

We hope these few comments will be of some assistance to you and your Department during your further consideration of the issues. For her convenience we have copied this response to Ms Judena Goldring, Director of the Office of Law Reform.

Northern Ireland Human Rights Commission