

## Parental Responsibility for Unmarried Fathers and Contact with Children Post-Separation

The Commissioner for Children and Young People's office was established by the Commissioner for Children and Young People (NI) Order 2003. The primary aim of the Commissioner is to safeguard and promote the rights and best interests of children and young people (CYP) in Northern Ireland. To achieve this, the Order provides the office with a range of duties and powers. Under Articles 7(2)(3) of the legislation, NICCY has a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to children and young people by relevant authorities. Article 7(4)(b) the Order also enables the Commissioner to provide advice on such occasions as she feels are appropriate or necessary.

The Commissioner is further required to have regard to any relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC) when conducting her work. It is on this basis this advice is submitted; the general aims, themes and specific provisions of the UNCRC can purposefully shape this proposal in order to safeguard the best interests of children and young people.

For the sake of clarity, issues of contact, residence and parental responsibility fall outside NICCY's legal remit, due to restrictions in the legislation. However, the legal team frequently receive calls from parents, carers, young people and other professionals wishing to discuss such issues which relate to the 'best interests' principle of the UN Convention.

The UNCRC clearly acknowledges the primary role of parents and the family in the care and protection of children as well as the obligation of the State to help them in carrying out these duties. Article 5, for example, states that:

*"State Parties shall 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, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention."*

The UNCRC also specifically states that governments shall make every effort to keep families intact and shall provide support and assistance to parents in fulfilling their responsibilities with regard to the upbringing and development of their children. Article 18 of the UNCRC, for example, states that:

*"State Parties shall 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 shall be their basic concern."*

This echoes the more general recognition of the best interests of the child being a primary consideration as set out in Article 3 of the UNCRC. Article 3 further recognises the State Parties requirement to:

*"..ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."*

Article 9 of the UNCRC gives the clear direction to State parties regarding children who are separated from their parents as follows:

*"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*

*2. In any proceedings pursuant to paragraph 1 of the present article, **all interested parties shall be given an opportunity to participate in the proceedings and make their views known.***

*3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.*

*4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the*

*submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.” (our emphasis added)*

The UNCRC is therefore clear that children have the right to maintain a relationship, including via direct contact, with a non-resident parent on a regular basis, except where it is not in the child’s best interests to do so. Reflecting this through the prism of Article 12, which enshrines the right of children to express their views freely on all matters affecting them, it is clear that children should be consulted, and have their views given due weight, when decisions are being made about whether they are to have contact and following this, the duration, frequency and other practical arrangements regarding such contact.

In relation therefore to the specific questions posed in the consultation:

**Q1. Should the law automatically confer parental responsibility on the father of a child, even if he is not married to the mother of the child? Give reasons for your answer.**

In recognising the role of parents, the UNCRC, as set out above, does not distinguish between the role of mothers and fathers, whether married or unmarried and therefore the law should confer parental responsibility on the father of the child, regardless of whether he is married to the mother of the child.

**Q2. If the law did automatically confer parental responsibility on both parents, regardless of marital status, should it also allow for that responsibility to be revoked? Please give reasons for your answer.**

It is NICCY’s position that to allow for the revocation of parental responsibility would be to undermine the initial concept of the automatic acquisition of parental responsibility itself.

Currently the only way that a parent can be divested of parental responsibility is under an order from the High Court freeing a child for adoption under Articles 17 and 18 of the Adoption (NI) Order 1987, which is accepted as being one of the most draconian orders that the Court can make in the context of children’s family lives. We understand that this is to be reviewed under the new Adoption Bill which is soon to be issued for consultation.

**Q3. Do you think that the automatic conferral of parental responsibility to an unmarried father would help change attitudes and reduce parental conflict? Please give reasons for your answer.**

NICCY’s position is that parents should always act in the best interests of their children and that regardless of whether the proposed change in the law reduces conflict or

increases it, it is essential that any conflict which touches on the life of a child is addressed, in the best interests of the child and also in a timely and decisive fashion.

**Q4. Do you think there are sufficient safeguarding arrangements in place with regard to contact? Please give reasons for your answer.**

Before a Court directs contact, either with conditions or not, it will have undertaken a thorough review of the welfare of the child, as required by Article 3 of the Children (NI) Order 1995. This decision will be informed having regard to all of the information in the case, both from parents and professional witnesses. In particular, the Court will have had regard to the welfare checklist set out in Article 3(3) of the 1995 Order, which specifically requires the Court to consider any harm that the child has suffered or is at risk of suffering. Also, the wishes and feelings of the child will have been considered, as set out in the welfare checklist as well as Article 12 of the UNCRC.

As set out in the consultation document Contact Centres are also available. Generally these are used as a short term measure in order to re-establish contact or to allow contact to take place in a controlled and supportive environment. This allows children to continue to have contact with non resident parents where otherwise they may not have any contact in line with the child's right to family life under the various provisions of the UNCRC and the Human Rights Act 1998.

**Q5. Are there any other safeguarding arrangements which could be put in place to protect the welfare of the child?**

The role of the Court Children's Officer (CCO) is vital in identifying any potential issues which may impact on the welfare of children. The CCO generally speaks with both parents and usually the child, in appropriate circumstances. It is vital that during this process any risks are set out clearly to the Court so that they can factor this into their determination.

We are aware that e.g. in Massachusetts there are independent Court appointed Investigators who are tasked by the Court to investigate any potential risks or concerns that are raised by either party, the child or Social Services in order to give further assurance to the Court regarding perceived risks.

**Q6. How do you think parents can be helped to better understand their responsibilities toward their child?**

Article 42 of the UNCRC also requires State Parties to make the Convention known to parents and children. Making training available to both parents and children regarding their rights is essential. It is vitally important when seeking to educate parents on their responsibilities towards their children that they are also educated on their rights as parents

and the rights that their children have as independent 'rights holders' as well as the role of 'duty bearers'.

Education is essential in order to ensure that parents can be helped and supported to better understand their responsibilities towards their child. E.g. services made available via DHSSPS during pregnancy are key in this regard. The services of General Practitioners, baby clinics and midwifery services are also important gateways where information could be disseminated / shared. Parenting support and advice schemes/organisations which provide same to parents could be essential stakeholders in this area.

Further, it is essential that support and advice services are made widely available to both parents both during and after relationship breakdown.

#### **Q7.How can we help children both during and after family separation?**

It is essential that children's voices are sought and heard at all times in family life but particularly during periods of conflict or during a separation. It is vital that children are given support during these times both within the family and, where appropriate, outside of the family via schools (through school based counselling and pastoral support), youth services and health services.

For young people whose mental health is impacted by family conflict or breakdown it is essential that they are able to access appropriate Child and Adolescent Mental Health Services in a timely way.

As before with parents, it is also crucial that children are supported by giving them information about their rights, in compliance with Article 42 of the UNCRC. Advice and advocacy services for children are fundamental to this.

It is imperative that the support offered to children is reactive, timely and accessible. This may involve using technology, websites, phone lines and advice pages.

#### **Q8.Do you think the Children (NI) Order 1995 should be amended to include a provision similar to section 11 of the Children and Families Act 2014? Please give reasons for your answer, highlighting any advantages or disadvantages which might flow from such a provision.**

Section 11, is a move towards a fuller realisation of the rights of children under the provisions of the UNCRC. It seeks to lay down a presumption that involvement of both parents in a child's life will further their welfare. However, this presumption is rebuttable, if

necessary, by evidence which shows that ongoing involvement does not promote the child's welfare.

In practical terms, Courts deal with situations like this on a daily basis where they balance evidence produced by both parties and ultimately determine what is in the child's best interests. It could also be argued that the Courts, in practice, already start from a de facto presumption in favour of contact, until evidence is produced that shows it is contrary to a child's best interests. Section 11 simply puts this starting point on a statutory footing.

**Q 9. Do you believe section 11 of the Children and Families Act 2014 affords sufficient protection to the welfare of the child? Please give reasons for your answer.**

Again, this proposed Section 11 would be in addition to the current safeguards, in terms of welfare, contained within the Children (NI) Order 1995 as set out above when contact is being determined.

**Q10. Do you believe a provision similar to section 11 of the Children and Families Act 2014 would help to produce a shift in parental attitudes and reduce or avoid parental conflict? Please give reasons for your answer.**

Again, as above, such an amendment could produce a shift in parental attitudes as it would reinforce the importance, to both parents, of children maintaining contact with them. The stating of a statutory presumption in favour of contact (save where it is not in the best interests of the child) would give a clear indication of a starting point for the Courts and could focus the minds of parents when contemplating or involved in litigation.

As before, whether it serves to reduce or avoid conflict remains to be seen, however where conflicts arise, it is important that these are resolved in a timely way and with the best interests of the child as a primary consideration.

**Q 11. If you do not favour the wording of section 11 of the Children and Families Act 2014 is there an alternative form of wording which would be more beneficial?**

N/A

**Q 12. Do you think the Children (Northern Ireland) Order 1995 should be amended to include a provision similar to section 12 of the Children and Families Act 2014? Please give reasons for your answer, highlighting any advantages or disadvantages which might flow from such a provision.**

Any proposed change to the definitions should have the best interests of the child as their paramount consideration. It would further be important to create a wide awareness of any

change as service providers often rely on the production of orders to assess eligibility, e.g. when seeking home to school transport, production of a residence order assists with the application.

**Q 13. Do you believe a provision similar to section 12 of the Children and Families Act 2014 would help to produce a shift in parental attitudes and reduce or avoid parental conflict? Please give reasons for your answer.**

The avoidance of words such as “residence” and “contact” may have some positive connotations for the parents however our concern would be for the children. It would be imperative that children impacted by this would be given sufficient information so that they would be fully aware of what this change means for them.

**Q14. Are there any alternatives to legislative change which would be more effective in securing better outcomes for children?**

Evidence shows that arrangements agreed by parents, without necessitating recourse to Court, are the most successful arrangements for children and young people. A key issue in relation to this is ensuring that the view of the child is sought and listened to, when decisions are being made regarding contact.

It is acknowledged there are certain provisions which allow children to have their views sought in a Court, however this could be strengthened with a duty to consult with every child, in an appropriate way, before any decision is made regarding contact.

The role that mediators and mediation services play is not to be underestimated in assisting parents to come to mutually agreeable arrangements. However, it is essential that the child’s views would be taken into account when any such arrangements are being discussed.

**Q 15: How can we ensure that children’s authentic views are factored in to the decision-making process?**

This issue goes to the very heart of the UNCRC (Article 12) and NICCY’s position. Ensuring the authentic view of the child is factored into the decision-making process is absolutely crucial in ensuring that decisions are made which are in the best interests of the child/children involved. There are two separate issues in relation to this. First, obtaining the child’s authentic view and second factoring it appropriately into the process.

In relation to obtaining the authentic view, age appropriate processes must be put in place to ensure that the child is able to put their view across. Whether this is via the child speaking to an appropriately trained independent third party, or by the child e.g. writing directly to the Judge or via pictures or drawing. It is essential that the unfiltered view of the

child is put directly before the Court. All professionals working within this area will be alert to the risk of children being “coached” to give a certain view.

Current practice is that children, in appropriate circumstances, generally give their views to the Court through the CCO as set out above. However, while respecting the professionalism of the CCOs, concern remains as this may act as a filter on the view of the child. The CCO is required to not only articulate the views of the child but also to give a recommendation to the Court on contact, having interviewed both parents and come to a conclusion on the best interests of the child.

It is essential however that there is no filter placed on the child’s views and the Judge can then balance this along with the other evidence in the case. NICCY recently met with the Judiciary and they indicated that they were happy, in appropriate cases, to hear from children directly and increasingly do so. This process involves the child meeting with the Judge in chambers where the child can give their views directly. The meeting is minuted and the child is made aware from the outset that anything they tell the Judge will be passed on to both parents.

The second issue is already provided for in the Children (NI) Order 1995 under Article 3 where in the assessment by the Court of the best interests of the child, the child’s views are assessed against the welfare checklist which has the “ascertainable wishes and feelings of the child” as the first consideration.

**Q 16. Do you agree that there are continuing difficulties with regard to the enforcement of contact orders? Please provide reasons for your answer.**

While matters of contact fall outside NICCY’s legal remit we continue to be contacted by parents who wish to raise issues with us. This often relates to issues regarding the enforcement of contact orders.

The legal department in NICCY have been informed by parents that they have experienced difficulties with enforcement and noted that often the police have been reluctant to become involved stating that it was a civil matter. Greater clarity therefore would be welcome, particularly amongst the police and social services.

Parents have informed us about having their opportunity to have contact frustrated by hostile ex-partners as well as where the holder of a contact order is not exercising same and this is causing upset to the children of the family.

In all of this, the focus should remain on ensuring that the best interests of children.

**Q17. Do you think we should allow a court to direct a parent to undertake unpaid work or to pay compensation for financial loss if s/he has breached a contact order? Please give reasons for your answers.**

It would be of concern that either of these suggestions could have a negative impact on the children of the family either through limiting the family's financial resources or by creating difficulties with childcare. Neither of these sanctions would be in the interests of children. If any additional sanctions are being contemplated the Department should assess these in light of any potentially detrimental impact they may have on the children of the family.

**Question 18: Are there any other enforcement measures which could be called in aid?**

The issue of compliance and enforcement is difficult, both from the perspective of contact which is frustrated by a hostile parent and from the perspective of a holder of a contact order who does not avail of it. In both situations, it is the child who is detrimentally impacted.

Criminalising a parent or sanctioning them with a financial penalty could also have an adverse impact on the children of the family.

If a contact order is not adhered to, at a certain (early) point, the matter should be automatically referred back to the Court for a determination.

**Q 19. Should grandparents be able to apply for contact orders without first having to seek the leave of the court? Please provide reasons for your answer.**

Applications from grandparents should follow the format of parental applications i.e. assessed against the welfare checklist in Article 3 of the Children (NI) Order 1995. This builds in a sufficient safeguard for the children and young people impacted. The Court are alert to grandparent applicants whose motivation may be 'questionable' and can put in place sufficient safeguards to avoid any detriment to the child in these situations.

**Q 20. Do you have any information relating to parental responsibility or contact with children which might assist in the preparation of an impact assessment?**

NICCY do not hold any additional research or data in this area.

NICCY's position is that all legislative and policy should be assessed against the potential impact it would have on children. NICCY has developed a step by step guide<sup>1</sup> on how to conduct a children's rights impact assessment. It begins by outlining what is meant by a children's rights impact assessment, why this type of assessment is necessary and how, given the specific focus on the issue of rights, this process can provide a more robust, transparent and evidence-based approach to policy development and law making in Northern Ireland.

Clearly there is the need to ensure that all categories of Section 75 are carefully considered in relation to assessing the impact of any changes to the existing legislative provision. The Department should ensure it has collated accurate, recent and robust research evidence to substantiate any claims made in the EQIA.

## **Conclusions**

NICCY welcome the opportunity to give advice. As can be seen above, the UNCRC offers a very pertinent guide for the Department when considering this important issue. Requests for further assistance/advice can be considered.

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<sup>1</sup> The step by step guide can be accessed on:  
[http://www.niccy.org/uploaded\\_docs/NICCY%20CRIA%20-%20web%20version%20May%202008.pdf](http://www.niccy.org/uploaded_docs/NICCY%20CRIA%20-%20web%20version%20May%202008.pdf)