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Convenor
Public Petitions Committee
Room T3.40
The Scottish Parliament
EDINBURGH
EH99 1SP

In 2014 Scotland Welcomes the World



By email: petitions@scottish.parliament.uk

21 August 2014

Dear Dave,

PUBLIC PETITION PE1513 ON EQUAL RIGHTS FOR UNMARRIED FATHERS

Introduction

1. Thank you for your letter of 7 August. You asked me to consider a number of points which have arisen from the evidence that the Committee has received.

Mothers giving a reason when registering a birth without providing the father's name

2. I have looked at the evidence provided to the Committee. Families need Fathers¹ note that:

“ refusal to name the father on the birth certificate may sometimes be for one of the reasons cited by the Minister [mother may not know who father is; father may have been violent or abusive]. However, it is often a deliberate act of exclusion. We are aware of situations where a mother has made the decision under pressure from her own family for racial, religious, class or other reasons. Exclusion in these cases is not attributable to the behaviour or character of the father and takes no apparent account of the rights of the child or the benefits that generally come from the involvement of the father – and, by extension, paternal grandparents, aunts and uncles.”

3. Dr Kirsteen M Mackay² notes that:

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http://www.scottish.parliament.uk/S4_PublicPetitionsCommittee/General%20Documents/PE1513_J_Families_Need_Fathers_Scotland_27.06.14.pdf

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http://www.scottish.parliament.uk/S4_PublicPetitionsCommittee/General%20Documents/PE1513_I_Dr_Kirsteen_Mackay_26.06.14.pdf

“ There are a number of lucid reasons that a woman may not wish the name of the father of her child to appear on the birth certificate. Among these are:

- The child is a product of rape.
- The child is a product of incest.
- The child was conceived by a mother before her 16th birthday and is therefore the result of unlawful sexual activity
- The father of the child is a married man but the mother of the child is not his wife.
- The mother is a sex worker and does not know who the father of her child is.
- The mother was affected by substances – whether self-administered or administered by another person – and may not recall who the father of her child is.
- The father of the child did not wish the mother to proceed with the pregnancy and may have pressurised her to have an abortion. She may even have told him that she did have an abortion.
- The father of the child is or has been violent towards the mother (possibly during her pregnancy – when domestic abuse is known to increase) and the mother fears for the safety of herself and infant. She may also be fearful that the father will found on any known connection with the child as a means of continuing to exert dominance and control over the life of the mother.”

4. If we followed the suggestion from Families need Fathers, it is likely that we would have better information on **why** the father’s name does not appear on the birth certificate. However, I would be concerned about asking women a question which might have a deeply personal answer. On balance, therefore, I do not consider that the suggestion should be pursued.

Giving courts the power and discretion to order DNA tests when seeking to determine paternity

5. Again, I have considered the evidence received by the Committee on this point. It is not clear exactly what would happen if the child refused to take part in DNA testing. The response from Scotland’s Commissioner for Children and Young People³ notes that there will be cases where the child is capable of giving or refusing consent and says that if a child refused consent “would the suggestion be that child should be held in contempt of court?”

6. The Commissioner also notes concerns about possible criminal sanctions against the mother if she refused to comply.

7 Dr Mackay notes that the Scottish Law Commission previously considered whether a refusal to give a DNA sample should bear the consequences of a civil contempt of court. After the Discussion Paper referred to by Dr Mackay, the Commission issued a report, in line with its usual practice⁴. Paragraph 3.12 of the Commission’s report said:

“ 3.12 The most important question in relation to an order for the obtaining of bodily samples for use in civil cases is the sanction for refusing to provide a sample under the order. In the discussion paper we reached the provisional conclusion that in a civil case the use of reasonable force to obtain a sample would be unjustifiable and possibly impracticable. We thought that there was a clear distinction to be drawn between civil and criminal cases in

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http://www.scottish.parliament.uk/S4_PublicPetitionsCommittee/General%20Documents/PE1513_N_SCCYP_28.07.14.pdf

⁴ The Scottish Law Commission report is at http://www.scotlawcom.gov.uk/download_file/view/329/

this respect, and that in civil cases physical compulsion should not be used. We also thought that the sanction of contempt of court would be unlikely to provide a satisfactory solution, particularly if directed against a parent with custody of a child who was refusing to consent on behalf of the child. Almost all of those who commented agreed with these views”.

8. In their response to the Committee, Families need Fathers said:

“ we tend to agree that the existing law in which “an inference can be drawn” from a refusal to supply a DNA sample is probably sufficiently flexible. In a recent interview Lady Elizabeth Butler-Sloss, former president of the family law division in England and Wales, commented about contempt actions: “To send her to prison is counter productive, because the child will not want to know the man who sent his mother to prison, particularly when she comes back and tells him about it.””

9. The Government’s conclusion is that it would not be appropriate for the courts to order DNA tests when seeking to determine paternity. As indicated above, it is not clear what sanctions could be applied if the child or a parent refused to comply.

Refer the question of whether all fathers should automatically have PRRs to the Scottish Law Commission

10. As cl@n childlaw⁵ indicate, the Scottish Law Commission recommended in report 135⁶ in 1992 that “In the absence of any court order regulating the position, both parents of the child should have parental responsibilities and rights whether or not they are or have been married to each other”.

11. The recommendation by the Commission was not ignored by the Governments of the day. There was considerable consultation leading up to the Family Law (Scotland) Act 2006, which extended parental responsibilities and rights (PRRs) to unmarried fathers who jointly register the birth with the mother⁷. We do not consider that it would be helpful to ask the Commission to look again at an issue which has already been subject to a number of Government consultations and scrutiny by Parliament. Therefore, we do not propose to ask the Commission to include this in their next programme of work.

Terminology

12. You raised an issue about the terminology I used in paragraph 13.1 of my letter of 19 June 2014. Paragraph 13 of my letter of 19 June is outlining the reasons put forward by the Governments of the day in the consultations leading up to the 2006 Act. Please see, for example, paragraph 47 of the Policy Memorandum for the Bill which led to the 2006 Act.⁸

13. In any event, I agree that the issues on PRRs for rapists are different to the issues in respect of PRRs for persons who have become fathers following a brief relationship.

14. I welcome the comment by Families need Fathers that “we would not expect women who have conceived after rape to be required to name the father.”

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http://www.scottish.parliament.uk/S4_PublicPetitionsCommittee/General%20Documents/PE1513_E_Clan_Childlaw_16.06.14.pdf

⁶ Paragraph 2.50 of report 135: http://www.scotlawcom.gov.uk/download_file/view/446/

⁷ Details of the consultations are at <http://www.scotland.gov.uk/Topics/Justice/law/17867/FLSA2006/13804>

⁸ The Policy Memorandum is at

[http://www.scottish.parliament.uk/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd-pm.pdf](http://www.scottish.parliament.uk/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf)

15. Where a child has been born after a brief relationship, it is, of course, possible for a father to obtain PRRs: for example, if the birth is jointly registered. As the evidence to the Committee outlines, sole birth registrations are now just over 5% of all birth registrations.

16. The Government recognises the arguments on both sides about whether PRRs should be granted to fathers in sole registration cases.

17. Families need Fathers make the point that “In equalities terms, it is difficult to see how it can be “fair” for a father to be denied involvement or even knowledge of his child even if it is the result of a brief relationship”.

18. Scottish Women’s Aid⁹ in their evidence to Committee argue that “giving all unmarried fathers automatic PRRs may have unintended consequences detrimental to children”. Scottish Women’s Aid go on to refer to domestic abuse.

19. The Government considers that the current law strikes a reasonable balance. It provides PRRs for the vast majority of fathers but provides some protection for women where there may be concerns about the behaviour of the father.

Why a mother raising proceedings from a man with whom she had had a brief (consensual) relationship would be unfair

20. As indicated above, there are ways in which a father can obtain PRRs when a child is born following a brief relationship, such as jointly registering the birth.

21. As also indicated above, where a mother chooses not to register the birth jointly, this could be for a variety of reasons. These reasons could include a fear of violence or abuse or that a father has expressed no interest in the child. In such cases, it would seem inappropriate for the mother to have to raise a court action to remove PRRs from the father. Such actions would take up court time and would give rise to expense to either the mother or the legal aid budget or both.

Conclusion

22. I hope this letter is helpful in outlining the Government’s position.

Roseanna Cunningham