

“MISSING PERSONS”
A CONSULTATION BY THE DEPARTMENT OF FINANCE AND PERSONNEL ON
THE DRAFT PRESUMPTION OF DEATH BILL (NORTHERN IRELAND) 2008

RESPONSE FROM THE CHURCH OF IRELAND SOCIAL JUSTICE AND THEOLOGY (NI) WORKING GROUP

We welcome this Consultation Paper and the proposals it contains to reform the law relating to registration of the presumed deaths of missing persons, including the “disappeared” of our Troubles. We also wish to record our appreciation for a paper that sets out the issues clearly and comprehensively and, most importantly, with care and sensitivity.

Those who have experienced the loss of someone who has “gone missing”, perhaps never to return, and those who have ministered to families in that position, know the anguish caused. The consultation paper draws attention to both aspects of the situation: firstly, “the debilitating effect of a person disappearing on the family: the not knowing what has happened” and secondly “the practical day to day difficulties encountered by the family who are left behind”. New legislation cannot cure or remove the psychological impact felt by these families but it can deal with the practical problems more effectively and sympathetically than the law does at present. In doing so, it may alleviate some of the pressure on the families.

The current law offers pragmatic solutions to some of the practical problems but it does not provide a co-ordinated or supportive approach. The consultation paper rightly makes the point that a serious gap is that there is no provision for the basic need expressed by some families – that they should be able to register the presumed death and receive a certificate legally confirming this.

We recognise that the present situation is unsatisfactory and so we support the proposal for this new piece of legislation. This would create for the first time a right to apply for a High Court declaration that a missing person is presumed to be dead and then register the presumed death, with all the legal consequences that would follow an “ordinary” death. It would be a significant improvement for family members.

We address the Consultation Issues set out in the paper.

1. Do consultees agree with the formulation of the jurisdictional rules in Clause 1(2) of the draft Bill?

We agree with these proposals. We agree that the jurisdiction should lie with the High Court and that the right to apply for a declaration of presumed death should be available where there is evidence that a missing person died as a result of a particular event or has not been known to be alive for a period of more than seven years.

We note that spouses and civil partners will be able to apply without having to prove any “interest” in the matter and that they can apply if they are domiciled or habitually resident in Northern Ireland even if the missing person did not satisfy those domicile/residence tests. We are content with the special position of spouses and civil partners in clauses 1(2), 1(3) and 10(2), as compared with other potential applicants. In all cases, the

spouse or civil partner has an immediate and direct interest in making an application, or intervening in the proceedings, irrespective of the existence, location or preferences of other persons: uniquely, he or she is unable to remarry or register a new civil partnership until the position of the missing person is resolved. In our view that constitutes ample justification for these provisions treating spouses and civil partners differently from other applicants.

We do not see any inappropriate or unfair disadvantage for unmarried cohabitants as they should be able to establish a sufficient interest to satisfy the court in appropriate cases.

The proposed rules on domicile and habitual residence are sensible. In relation to section 230(c) of the Civil Partnership Act 2004, we accept the argument that there are likely to be such small numbers affected by this issue that it is unnecessary to replicate that special rule for civil partners in this context.

2. Do consultees agree the High Court should have power to make a declaration of presumed death where a person has not been known to be alive for a period of seven years or more?

We agree that seven years is the appropriate period for this purpose.

3. Do consultees agree that a declaration of presumed death should be binding on all persons and for all purposes, including the dissolution of the missing person's marriage or civil partnership?

The practical and legal effect of a declaration of presumed death is that the missing person is treated as dead for all purposes. We can foresee difficulties where a person continues to believe a missing spouse is alive but nonetheless another interested party successfully applies to the court for a declaration of presumed death. The effect is to bring the marriage to an end, against the wishes of the survivor, for example to satisfy a person who jointly owned property with the missing person. That seems undesirable. The alternative, however, is to say the person is presumed dead for some purposes and not others and that runs counter to the comprehensive approach of this legislation. We conclude on balance therefore that a declaration of presumed death should be fully binding on all persons and for all purposes.

4. Do consultees consider that the range of ancillary powers available to the High Court is appropriate?

These powers cover all eventualities we can think of. The reference to the Scottish experience is useful and we are reassured that few problems have arisen in the operation of the corresponding scheme there.

5. Do consultees agree that the payment of insurance monies by way of annuity or periodical payment should be treated in the same way as payment of a capital lump sum?

We are not expert in technical insurance issues, but we are anxious that there should not be any unnecessary burden on beneficiaries. We would be concerned if there were a risk of financial difficulty following a declaration of presumed death, perhaps if payment of an annuity or periodical sums to a beneficiary is insufficient to cover the cost of insurance. Without information about the likely cost of the insurance premiums, we cannot say if this is likely to happen. Whether that is a likely scenario or not, we are not clear why the Northern Ireland legislation should depart from the Scottish model in this respect and we would welcome further consideration of this issue.

6. Do consultees agree that a variation or revocation of a declaration of presumed death made more than five years after the death of the declaration should have no effect on the rights to or in property of others acquired as a result of the making of the declaration of presumed death in relation to the missing person?

We agree that the rules proposed deal fairly with issues arising when a declaration of presumption of death is varied or revoked. In such a situation, there may well be disputes or competing claims and the five-year cut-off period is a reasonable way of dealing with these matters. We are content for the High Court to have discretion to rule on issues where the variation/revocation is made within five years of the original declaration.

7. Do consultees consider that it would be useful to include provision requiring specified government bodies to disclose information which may be relevant to the question of whether a missing person may be presumed to be dead? If such a duty is placed on government departments should the information be disclosed directly to the court?

We accept the arguments for departing from the Scottish model on disclosure obligations. We would advocate a more focussed approach rather than a blanket disclosure obligation. We would favour disclosure where government departments or agencies have relevant information.

8. Do you agree with the Department's opinion that the provisions of the draft Bill are Convention compliant?

We recognise that the human rights of a missing person – and indeed other family members too – may be affected by implementation of these proposals. Convention rights on respect for private life and interference with property rights may be engaged. At the same time there is a balance to be struck. The rights of the person who may have acquired property must also be considered and there is clearly a need for legislation to protect and assist family members involved in these traumatic circumstances. The status quo is not satisfactory. We conclude that the balance favours proceeding with this legislation as Convention compliant.

9. Consultees are invited to comment on the Department's Equality Impact Screening exercise at Annex B and its recommendation that a full Equality Impact Assessment of the provisions of the draft Bill is not required.

We see no need for a full Equality Impact Assessment.

10. Consultees are invited to comment on the consideration of regulatory impacts at Annex C.

We have no substantive comment on this issue, beyond noting that the expectation that there will be very few cases does not lessen the need to provide a mechanism for those affected when someone goes missing and is lost to their family. Certainly the estimated financial costs or demands on resources are not of a scale that would justify doing nothing for these families.