



# **Submission to the review of provisions relating to family in Bunreacht na hÉireann by the All Party Oireachtas Committee on the Constitution**

On behalf of:

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# Policy Position Paper Number One – Working for a Constitution which affords equal rights to all families

## Background

Progressing the work of Cherish, established in 1972, One Family provides voice, support and action for one-parent families through membership, professional services and campaigning. Our aim is to affect positive change and achieve equality and social inclusion for all one-parent families in Ireland.

We work to achieve our aims through

**Voice** we are the national membership organisation of one-parent families, supporting organisations and others concerned with the issues facing one-parent families.

**Support** we offer a comprehensive range of professional services to one-parent families, to those experiencing a crisis pregnancy and to those working with one-parent families.

**Action** we campaign with and on behalf of our members to affect positive change for one-parent families.

One Family works with all types and all members of one-parent families, respecting the realities of family life in Ireland.

During the implementation period of the One Family *Strategic Plan 2004-2006*, the organisation's campaigning work will concentrate on 8 strategic goals:

1. Working for a constitution which affords equal rights to all families
2. Recognising the realities of the diversity of family life in Ireland
3. Ensuring equality of access and opportunity in education for one-parent families
4. Working for a positive work life balance for one-parent families
5. Striving for equality for one-parent families in all housing tenures
6. Championing quality childcare for children in one-parent families
7. Campaigning for access to an adequate income for all one-parent families
8. Working for equitable services in all pregnancies

### **The changing nature of family life in Ireland**

Modern family life in Ireland is remarkably different now compared with the period in which our Constitution was first developed. With declining marriage and birth rates, higher rates of extra marital cohabitation and birth and a growing diversification of the structure of families, the typical Irish family is no longer typical.

Census 2002 indicates that there are over 153,900 one-parent families in Ireland, representing almost 12% of all households. At One Family we believe that this number, although significant, is likely to be an underestimation given the lack of accurate and adequate collection methods which may take account of the many diverse situations within which one-parent families live, including a growing level of shared parenting arrangements and continuing patterns of inter-generational households.

During the period 1996-2002 there was a 25% increase in the number of households headed by a solo parent. One-parent families are increasing for a variety of reasons and forming a significant minority of families in modern Irish society. In 1937, at the introduction of Bunreacht na hÉireann, the significant majority of one-parent families would have been headed by a widowed person, predominantly female. A dramatic increase in the extra marital birth rates together with reductions in the numbers of single women placing children for adoption, increases in marital and relationship breakdown and the introduction of divorce have changed the profile of one-parent families. Census 2002 indicates that 85% are headed by females, 15% by males, 40% by widowed persons, 32% by separated or divorced persons and 24% by a single parent (CSO, 2004; Kennedy, 2004).

However, although the profile of the family in Ireland is remarkably different, with an estimated 12% alone headed by a solo parent, 100% of the protection currently afforded to the family in Bunreacht na hÉireann is applicable only to the family based in marriage. Therefore a growing number of families are not considered equal in the eyes of Ireland's most superior domestic source of law.

### **Bunreacht na hÉireann – issues of concern regarding current provisions for the family**

Historically, Bunreacht na hÉireann is regarded as a document which was largely influenced by dominant moral teachings of the time, particularly those of the Roman Catholic church. As such it is no surprise that the provisions pertaining to the family in the Constitution, which are mainly to be found in Articles 41, 42 and 40.3, are heavily influenced by Catholic teaching regarding the role and function of the family as that based upon Catholic marriage. As Ryan (2004:2) notes "The family rights provisions of the Constitution borrow

heavily from Roman Catholic theology on the family. The centrepiece of such theology is the concern for family autonomy, the main purpose being to limit state intervention in the family, and in particular to prevent the State from dictating how children be reared, in possible contravention of the religious values of the parents”.

#### Definition and protection of the family

Bunreacht na hÉireann recognises the family as that based on marriage. Article 41.1.1 notes that “The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”. Therefore, the Constitution includes recognition for the sphere of family life and states that the family as a unit should not be subject to undue interference by law or other state mechanism. It is important to note here that it is the family as a unit rather than the individuals within the family that is offered protection under the constitution as it currently stands.

Article 41.3.1 specifically defines the type of family to which such protection will apply. “The State pledges itself to guard with special care the institution of Marriage, *on which the Family is founded*, and to protect it against attack” (Author’s emphasis).

As a result, the family unit is found to have inalienable and imprescriptible rights and that unit is deemed to exist when within marriage. As such there is no protection afforded to families which are not deemed to be within marriage. Given the increasing diversity of the structure and form of families in Ireland and the tendency for families to form outside of marriage, there is therefore a gap between the constitutional and therefore legal protection of families based on marriage on the one hand and a significant minority of families not based on marriage, or to whom the protection of marriage no longer applies following dissolution. Included here are cohabiting heterosexual and gay, lesbian, bisexual and transgender families and a diverse range of one-parent families headed by a formerly or never married parent.

Although Article 41 has been interpreted as protecting the rights of the family as a unit, (and not those of its individual members), Article 40.3 has been construed as conferring personal rights on selected members of a family unit resulting from a family relationship. Again, these may not be deemed to extend to some members of non-marital families, especially fathers, under the terms of Article 40.3 “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”. While non-marital mothers and their children have been deemed to benefit from this clause, non-marital fathers have to date been excluded from the remit of Article 40.3. Also, rights under Article 40.3 are not

imprescriptible or inalienable and thus are weaker than family rights under Article 41.

It is evident therefore that it would be plausible to review the current definition of the family unit in light of the radical changes in the pattern and trends of family formation and change since the enactment of the constitution. Also of consideration here is whether or not to continue to give special protection to the institution of marriage within the constitution. These will be considered further in discussing possible recommendations for change.

### **Individual rights vs family rights**

Currently, the Constitution affords protection only to the family unit and not to the individual members. As noted above in relation to Article 40.3, personal rights are often deemed applicable to members of the family unit. It is however a considered view (Constitution Review Group: 1996; Ryan: 2002, 2004; Shannon: 2005) that the focus of Articles 41 and 42 overemphasise the rights of the family unit which could possibly be detrimental to the rights of individual members. This is found within the reference to rights of the family as “inalienable” and “imprescriptible” which may place overemphasis on the importance of the rights of the family as a unit over the rights of the individuals within it.

A case in point is the overall lack of access to adoption of children born within marriage. Except in limited circumstances, due to being born within what is considered a family unit, (with inalienable rights and duties) children born within marriage cannot be adopted. Therefore, their rights to family life, which could be provided in an adoptive family, are curtailed by the inalienable right of the family unit to be protected.

In relation to other European jurisdictions, Ireland would be unique, with the exception of Luxembourg, in that none of the other Constitutions expressly guarantee the rights of the family unit in this way. Although they may, as Bunreacht na hÉireann does, recognise that the family unit is the fundamental unit of society and afford it certain protections, they also guarantee rights deriving from family membership to apply directly to the individual members.

### **Rights of non-marital parents**

Given the preceding discussion regarding the prescription of rights to marital rather than other family types and rights flowing to the family unit rather than individuals, it is also evident that in relation to non-marital parents there is a lack of protection of their relationship with their children under the constitution as it currently stands. Although the law has been interpreted as recognising a relationship between a non-marital mother and her child there is no such recognition awarded to non-marital fathers.

One Family firmly believes that it is generally in the best interests of children to maintain a relationship with both parents and as such the current inequalities in the application of constitutional law to parents based on their marital status undermines children's access to relationships with their parents if they are unmarried.

### **Rights of the child within the Constitution**

Bunreacht na hÉireann makes little reference currently to children. Children could be said to be invisible in the current Constitution and without prescribed and specific rights. Instead their rights are inferred from those of their family unit, if their family unit is constructed within the realm of marriage.

Given the increasing body of law and discourse relating to the need for the protection of the express rights of children, it is currently an anomaly that although we have a body of legislation and legal provision in Ireland for children's rights, albeit in limited form, our superior source of domestic law currently regards children as invisible. As Shannon (2005:4) states "it could therefore be argued that the current constitutional position in Ireland embodies a 'seen but not heard' approach to children's rights".

Not only are children regarded as invisible, but in relation to reference to their welfare, rights are deemed to flow to their parents as the guardians of that welfare. This parent-focussed perspective would not be considered in keeping with the international body of law on the rights of the child. "It is almost universally recognised, and copper-fastened in the United Nations Convention on the Rights of the Child 1989, that in any legal matter concerning children, it is the child's best interests that are of paramount weight" (Ryan, 2004:2). Judge Catherine McGuinness in the *Report of the Kilkenny Incest Investigation* noted that one could derive from the high emphasis on the rights of the family in the Constitution that parents' rights were of higher value than those of children.

### **Working for a Constitution which affords equal rights to all families - recommendations for change**

Principally, One Family recommends a rank a file review of the constitutional provisions regarding the family in order to achieve the following objectives:

1. *To displace the privileged position of the marital family by the recognition of alternative family forms.*

The current constitutional position of the marital family can be argued to discriminate against alternative family forms. This is particularly true of the inclusion in Article 41.3 of the phrase "*on which the family is founded*". Given

the significant changes in family type and structure since the Constitution was enacted, this phrase now, rather than simply describing the majority of families, in fact acts to exclude a significant and increasing minority of valid family forms, including many one-parent families, from legal protection and recognition.

The question is whether to replace the current “definition” of the family, as could be said to be intrinsic in that phrase in Article 41.3, with another definition, or to leave the Constitution without any definition as to what constitutes families. Although the latter may be preferable from an equality and diversity perspective it may be impractical in enabling the judiciary to interpret the extent to which constitutional protection applies to varying family forms. However, in proffering a definition of the family we also run the risk of recreating the past and allowing for the future exclusion of alternative family forms which may not currently be evident in Irish society.

The alternative may be to proffer a definition which focuses not on the structure of family but on the nature of the relationship between family members, to move from the position that family is viewed in terms of a prescribed form to one where family and family ties are evident in the substance of relationships between members. This alternative stance has been used in the interpretation of Article 8 of the European Convention on Human Rights and Fundamental Freedoms in determining where family life exists in the absence often of formal traditional family structures (Ryan:2004, Shannon:2005).

One Family would recommend that in order to fully allow for equality for all families before the law, the phrase “on which the family is founded” be removed from the Constitution to end the preferential treatment of marital family forms over any other form (Constitutional Review Group:1996). Instead the definition of family, if needed, could be drawn from the United Nations definition: “any combination of two or more persons who are bound together by ties of mutual consent, birth and/or adoption or placement and who, together assume responsibility for, *inter alia*, the care and maintenance of group members, the addition of new members through procreation or adoption, the socialisation of children and the social control of members”. (Daly,2004:23)

*2. To place the child and his or her interests at the heart of our family law policy and to make practical efforts to realise this aim.*

The current constitutional provision regarding the family has often been interpreted as giving greater protection to the family as a unit than to individual members. This has led to a policy framework, particularly evident

in child placement and protection, of non-interference with certain family types which may not always be in keeping with the best interests of the child.

One Family recommends that the Constitution be reviewed to include express and specific rights for children. These rights could be derived from the UN Convention on the Rights of the Child (UNCRC) which Ireland has ratified. In doing so, not only would the position of individual family members' rights, in the case of children, be strengthened in position to those of the family unit but also, the current difficulties regarding differing rights for marital and non-marital parents regarding their children could be circumvented by focussing on a children's rights perspective. Let us consider for example Article 9.3 of the UNCRC "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". If this was expressly provided for in the Constitution as applicable to all children then the current difficulties and debate surrounding the best ways to provide for express rights for non-marital parents, particularly fathers, could be avoided using a "best interests" principle, as rights would naturally flow from child to parent in this case.

In providing for the inclusion of express rights for children it is also essential that those rights reflect the best interests principle, in which case One Family would strongly recommend that express rights to be included in the Constitution reflect those in the UNCRC. As Ryan notes: "While the temptation may be to increase the scope for the State to intervene in favour of children's rights, one should not too readily assume that the State is better equipped or inclined to promote the child's well-being. The State has often proved itself to be a particularly lousy parent, either in its own right or in respect of the sometimes ill-suited characters it chooses to act in place of the parents" (2004:5).

3. *To bring Irish law into line with the ECHR by placing an obligation on the state to respect and support family life in all its manifestations and to create laws which reflect the realities of the diversity of family life in modern Ireland.*

This point is linked also to point 1 above whereby it is essential that any review of the constitutional provisions regarding family life embraces an approach which respects the validity of the diversity of family forms, structures and relationships and treats all equally. In doing so it is also essential that any resultant or existing legislation be proofed to ensure that it does not discriminate against diverse or non-marital family forms, not currently enjoying privilege or protection in the Constitution. This may require a review

of legislation for example regarding adoption, guardianship of infants, child protection and indeed a substantial element of the body of family law.

### **Conclusion**

In order to proffer a way forward in reforming the Constitution to take into consideration the variety and diversity of families and the needs for equality of treatment under the law and to increase the visibility of the protection of the rights of children, regardless of their family situation, One Family suggests the following addendum to Article 42:

#### Article 42A

1. Notwithstanding any other provision of this Constitution, the State guarantees to respect and shall endeavour to support all families in the State, regardless of the form that such families may take, and to protect and defend the rights of all individuals who are members of those families.
2. Notwithstanding any other provision of this Constitution, the State guarantees in particular, and as far as practicable, to assist and support all parents and guardians in promoting the best interests of the child. In so doing, the State shall promote the welfare of the child as the paramount consideration in all proceedings concerning the child's best interests.
3. The State shall in particular, endeavour to assist and support parents and guardians, as far as practicable, in securing for all children a basic quality of life and in particular food, clothing, education and accommodation sufficient to his or her needs.

It is hoped that these suggestions mark the beginning of a root and branch investigation of how we might frame laws that genuinely place the child at the heart of our family law, regardless of the form their family might take.

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