
SUBMISSION

TO

THE ALL-PARTY OIREACHTAS COMMITTEE

ON THE CONSTITUTION

FEBRUARY 2005

The national federation of services for
unmarried parents and their children



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Founded in 1976, Treoir is the national federation of services for unmarried parents and their children. Its main aim is to promote the rights and welfare of unmarried families in Ireland. Membership of Treoir is open to professional agencies providing services to unmarried parents. They are a combination of statutory and non-statutory bodies, including specialist agencies, health boards, maternity hospitals, adoption societies and self-help groups.

The following are the **core principles** under which Treoir operates :

- *Treoir recognises the diversity of family life in Ireland*
- *Treoir recognises that all families, including unmarried families, have the same rights to respect, care, support, protection and recognition*
- *Treoir supports and promotes the rights of all children as outlined in the United Nations Convention on the Rights of the Child*
- *Treoir believes that all children have a right to know, be loved and cared for by both parents.*

Current **activities** of Treoir:

- A national, confidential, comprehensive and free information service for unmarried parents and those involved with them
- A wide range of publications including the *Information Pack for parents who are not married to each other*, *Being there for them* (a booklet for grandparents), a series of *Information leaflets* etc.
- Organising conferences, workshops and other training sessions for unmarried parents and those who work with them
- Networking with other groups/organisation
- Policy development
- Promoting research
- Providing support for workers with young parents through the National Resource Centre for those Working with Young Parents
- Co-ordinating the National Teen Parent Support Programme.

Table of Contents

Recommendations	4
Introduction	5
Changing Family Structures in Ireland.....	5
The Family and the Irish Constitution	6
The European Convention on Human Rights and the Jurisprudence of the European Court of Human Rights	8
Children’s Rights	10
Parental Rights and Responsibilities	12
The Interaction of Parental and Children’s Rights	14
Article 42 and Support for Carers within the Home.....	15
References	16

Recommendations

Treoir recommends –

1. The enumeration of children’s rights within the Irish Constitution using both the UN Convention on the Rights of the Child and the European Convention on Human Rights as a framework. Further, children’s rights should be paramount notwithstanding any other article in the Constitution.
2. The protection of family life in all of its forms based on Article 8 of the European Convention on Human Rights which reads:

‘Everyone has the right to respect for his private and family life, his home and his correspondence’

Treoir further recommends the inclusion of a protection for those rights within the Constitution.

3. That parental rights, if enumerated in the Irish Constitution, apply equally to all parents; mothers, fathers, married or unmarried, and be subject to the principle that children’s rights are paramount.
4. The retention of Article 41.2 in a revised gender-neutral form to recognise the contribution of either partner within the home. The revised article would read:

‘The State recognises that home and family life give society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home.’

Introduction

This submission places children at the centre of reform to the articles of the Irish Constitution concerned with the family. Children's rights are absent explicitly in the Constitution and this needs rectification. Further, in order for children's rights to be fully protected, there can be no discrimination between children depending on the family form into which they are born.

'It is clear that in accordance with the principle of non-discrimination, the rights of children don't change depending on the nature of their parents' relationship or the circumstances of their admission to the family' (Kilkelly: 2003: 1).

Treoir is thus also seeking to have all family forms given equal protection under the Constitution and that children's rights and best interests are paramount.

Changing Family Structures in Ireland

The dynamic sociological changes in Irish life in relation to the family and family life are well documented.¹ Change in this area has been characterised by a decline in fertility and family size, an increase in extra-marital births and cohabitation, and marital breakdown, given formal legal expression through the introduction of divorce. Marriage is no longer the primary or dominant gateway to family formation but there is evidence that extra-marital births are taking place in quasi-marital unions and that many enter into marriage subsequently, pointing to a change in the sequencing of marriage.²

Figures from the most recent census reveal that there were some 153,863 lone-parent families in 2002. There has been a significant increase in the number of cohabiting couples who now comprise one in twelve family units. Some 52,000 children now live with cohabiting couples and currently one third of births are outside marriage.

The family can take a variety of forms and these depend on a complex blend of economic and social factors. It is no longer the case that marriage forms the basis of family formation or re-formation in Ireland.

Kieran McKeown points out that:

'As in other northern European countries, there is now a trend where births precede rather than succeed marriage. This indicates a decline not in marriage per se but in the role of marriage as a gateway to family formation' (2001:7).

The attempt to capture family life conceptually or statistically through conflating family with household is also highly problematic as evidenced by the finding in recent research that one

¹ Fahey and Russell, 2001, Kennedy, 2001, McKeown, Pratschke and Haas, 2003.

² Ibid.

quarter of all children (24%) do not live in a household containing both their biological parents.³

Finola Kennedy in her seminal work charting family change in Ireland notes that the family is in part a legal construct concerned with the concepts of marriage and dependency. She quotes English family law expert, John Dewar:

‘There is now less emphasis on the exclusivity of the legal status of marriage and evidence of a move towards constructing status-like relationships around new organising concepts. The primary aim, it was argued is to construct a set of legal-economic relations among family members that are demarcated from, and thereby reduce the financial burden on, the state. In this process, the legal concept of marriage is logically, and is de facto becoming redundant’. (Dewar, 1992:71, Kennedy: 2001: 13).

As a result Dewar sees parenthood rather than marriage as the significant event in relation to family rights and responsibilities and a consequent shift from parental rights to children’s rights.

The Family and the Irish Constitution

The Constitution is a dynamic document based on broad principles. From Treoir’s perspective, the discussion of constitutional reform should take place in the context of the removal of barriers to protection for unmarried families and children generally.

The 1937 Constitution was drafted with the family based on marriage in mind and Article 41 explicitly states that the family to which the special protection applies is the marital family. Article 41.3.1 states that:

‘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’.

The family has thus been interpreted by the Irish courts to be confined to families based on marriage.⁴ Although parents who are not married do not benefit from the rights enunciated in articles 41 and 42 of the Constitution, it has been held that children born outside wedlock have the same ‘natural and imprescriptible rights’ as children born within marriage. However, the courts have held that in a number of instances it is permissible to treat children born outside of marriage differently to those born to a married couple. The non-marital family is effectively outside of constitutional protection and an unmarried cohabiting couple cannot, no matter how stable or continuous their relationship bring themselves within the ambit of Article 41.3.1.

The report of the Constitution Review Group in 1996 proposed amending Article 41.3.1 to read as follows:

‘The State pledges itself to guard with special care the institution of marriage and to protect it against attack’.

³ McKeown, Pratschke and Haas, 2003: 6.

⁴ The State (Nicoloau) v. An Bord Uchtála [1966] I.R. 567, W.O’R v E.H. [1996] 2 I.R. 248

The result of the deletion from Article 41.3.1 of the words ‘on which the family is founded’ would be the removal of the definition of the family based on marriage. The protection for families based on marriage is to be retained. In addition, the Review Group recommended a new section which will give an unmarried person the right to “respect for family life” similar to that protected in Article 8 of the European Convention on Human Rights.

It is essential and imperative, particularly in regard to protecting children’s rights that the definition of the family based on marriage is removed. Mary Daly points out in the report on Families and Family Life in Ireland that:

‘If one definition of family is used and if that definition is exclusive, such as that in the Constitution, it acts to endorse and perpetuate a hierarchy among different kinds of families’ (Daly: 2004: 25)⁵.

There is a recognised need to examine ways of capturing the fabric and realities of family life in legal and other definitions, as mentioned repeatedly during the course of the family fora held around the country:

‘Another speaker emphasised the need to think of family not as structure or place or even a definition but, rather, as a set of values, activities, relationships. Such values and activities include nurturing, caring, loving, steadfastness, permanency and consistency’ (2004: 26)

The efficacy of defining the family in more expansive terms has already been demonstrated in the Irish legal framework where unmarried families have been granted equivalent status to families based on marriage. The definition of the family in Irish law has been expanded by pieces of legislation such as the Non-Fatal Offences against the Person Act 1997, Domestic Violence Act 1996, Parental Leave Act 1998, Employment Equality Act 1998, Mental Health Act 2001 and the Residential Tenancies Act 2004. This displays the need for a more expansive definition of family life in which such structures and relationships can be understood and captured.

Defining the family is a complex task as acknowledged by the Review Group in 1996. Sociological changes discussed above attest to this. International legal instruments and conventions to which Ireland is a party have attempted to capture the complex social realities of family life within a legal framework which reflects and protects those realities.

The European Convention on Human Rights takes a broad view of family and employs the notion of family life to make sense of diverse family forms. Similarly, the United Nations casts its legal net wide and has adopted a definition of the family which broadly defines the family as:

‘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).

⁵ This report was on foot of public consultations on families and family life in today’s Ireland held around the country hosted by the Department of Social and Family Affairs

The European Convention on Human Rights and the Jurisprudence of the European Court of Human Rights

Article 8 of the European Convention on Human Rights states the following:

‘Everyone has the right to respect for his private and family life, his home and his correspondence’

On several occasions the European Court of Human Rights has required states to treat non-marital families with the same degree of respect as traditional families. The court will give substantial weight to the functional realities underpinning family life as they appear in ‘present day conditions’. In *K&T v Finland*⁶ the Court held “that the non-existence of ‘family life’ is essentially a matter depending upon the real existence of close personal ties”.

The ECHR was incorporated into Irish law by the European Convention on Human Rights Act, 2003. Although the Convention ranks above legislation it has been incorporated at sub-constitutional level. The ECHR Act of 2003 requires the Irish courts to take cognisance of the jurisprudence of the European Court of Human Rights.

Article 8.1 of the European Convention on Human Rights protects, among other things, the individual’s right to respect for her private and family life. The article is to be interpreted in the light of present day conditions⁷. It is generally the case that the state enjoys ‘a wide margin of appreciation’⁸ when balancing the rights of the individual against the interests of the state. There are cases, however, where a higher standard of judicial scrutiny will be applied by the European Court of Human Rights. In *Inze v Austria*⁹, the Court required that “very weighty reasons would...have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention”.

Where the existence of a family tie with a child has been established, the state must act in a manner calculated to enable that tie to be developed; legal safeguards must be established that render possible – as from the moment of birth or as soon as practicable thereafter – the child’s integration in her family.¹⁰

The issue of what constitutes family life was first addressed directly in *Barrehab v. The Netherlands*¹¹. There, the Court held that a parent has family life with a child from the moment

⁶ 12 July 2001, Application No 2570/94, Para 150.

⁷ *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser A.)(1979)

⁸ See *Lawless Case*, 1 Eur. Ct. H.R. (ser B) at 408 (1960-61) (The concept of the margin of appreciation is that a government’s discharge of its responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that once, the Commission or the Court is satisfied that the Government’s appreciation is at least on the margin of its powers..., then the interest which the government itself has in effective government and in the maintenance of order justifies and requires a decision in favour of the Government’s appreciation)

⁹ 126 Eur. Ct. H.R. (Ser A) at 18-19 (1979)

¹⁰ Eur. Ct. HR. (ser A) at 18-19 (1979)

¹¹ *Berrehab v. The Netherlands* 138 Eur. Ct. H.R (Ser. A) (1998).

a child is born; this tie remains in place unless broken by later events. In *Kroon and Others v. The Netherlands*,¹² the Court held that family life existed and that Article 8 was therefore applicable, even in the absence of marriage or cohabitation. The Court stated that:

‘The notion of “family life” in Article 8 is not confined solely to marriage-based relationships and may encompass other de-facto “family ties” where parties are living together outside marriage. Although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto “family ties”’.

The *Kroon* decision focused on the relationship between the child’s biological parents. Although not married to each other the fact that they had four other children and had been in a relationship for a number of years was sufficient for the court to hold that family life existed between the father and the child. A child born to such a relationship was “*ipso jure*” part of that family unit irrespective of the contribution that the father had made to the child’s life. Similarly in *Keegan v Ireland*¹³ the court held that family life existed between an unmarried father and his biological child even where the child’s parents were not cohabiting at the time the child was born. The court instead looked to the “de facto” family ties that existed in the parent’s relationship prior to the child’s birth.

As pointed out by Ursula Kilkelly, “the concept of family life, protected by Article 8 of the ECHR, stands in almost complete contrast to the constitutional definition of the family”. The court has found family life to exist between parents and their children, regardless of their marital status,¹⁴ the family’s living arrangements,¹⁵ or their apparent lack of commitment to their children.¹⁶ As Dr Kilkelly points out, family life has also been found to exist between children and their grandparents¹⁷, between siblings,¹⁸ between an uncle and his nephew,¹⁹ and between parents and children born into second relationship.²⁰ So, family life is a broad concept which clearly covers the relationship between all children and their biological parents, whether in a committed relationship or not.²¹

In her comprehensive discussion of case-law in this area including the decision in the case of *X, Y & Z v UK*²², in which the Court recognised for the first time that family life existed between a child and her social rather than biological father, Dr Kilkelly makes the crucial point that:

‘For those who hesitate at this, out of concern that it may not be in the best interests of the child, it is important to remember that the application of Article 8 – finding family life to exist is only the first step in the process and that all interferences with or failures to respect family

¹² *Kroon and Others v. The Netherlands*, (1995).

¹³ *Keegan v. Ireland* Eur. Ct. H.R. (Ser. A.) (1998).

¹⁴ *Marcyx v. Belgium* no 6833/74, *Johnston v. Ireland*, no 9697/92.

¹⁵ *Barrehab v. The Netherlands*, no 10730/84.

¹⁶ *C v. Belgium*, no 21794/93.

¹⁷ *Marcyx Judgment*, op cit, para. 45.

¹⁸ *Olsson v. Sweden*, no 10465/93

¹⁹ *Boyle v. UK*, No 16580/90.

²⁰ *Jolie & Lebrun v. Belgium*, No 11418/85.

²¹ Kilkelly, 2003: 3.

²² *X, Y & Z v UK*, no 21830/93.

life must also be compliant with the second paragraph of the provision. In other words, the safeguard of proportionality is available here²³

It would be possible to remove entirely the protection for families based on marriage which would lead to a situation where neither marital nor non-marital families would be favoured. It would still be possible to enter a clause to respect family life in all of its forms.

The preferred option of the Review Group on the Constitution (1996)²⁴ is to retain a pledge to protect the family based on marriage but also to guarantee to all individuals a right to respect for their family life whether or not the family is based on marriage. One of the reasons which they cited for this was the practical difficulty associated with defining the family. It is our submission that the fact of difficulty in legislating in a particular area is not a sufficient reason for declining to do so where considered necessary. The mere fact that there is difficulty with a definition is not sufficient to deny equal constitutional protection to all families.

The protection of family life in all of its forms based on Article 8 of the European Convention on Human Rights which reads:

‘Everyone has the right to respect for his private and family life, his home and his correspondence’

Treoir further recommends the inclusion of a protection for those rights within the Constitution.

Children’s Rights

In modern social and legal discourse children are no longer viewed simply as chattels, their rights adjunctive to those of their parents. Marital children’s rights have been privileged over those of the non-marital child. Children’s personal rights are not expressly provided for in Article 41. Certain unenumerated rights have been found to exist in relation to children including the right to an opportunity to be reared with due regard to religious, moral, intellectual and physical welfare. The Review Group recommended enumerating these rights.

It has been argued that:

*‘The absence of an express provision in the Irish Constitution privileging children’s rights over those of other interested parties leaves a gaping hole in the constitutional protection that should be afforded to these most vulnerable of subjects’.*²⁵

Judge Catherine McGuinness, in the Report on the Kilkenny Incest Investigation observed that:

²³ Kil Kelly, 2004: 2. Under Article 8 it must first be established that family life exists and secondly that there has been an interference with family life which is disproportionate with an aim such as, the rights of the child.

²⁴ The Report of the Constitution Review Group 1996.

²⁵ ‘Ryan, 2004

Treoir – Submission to the Oireachtas Committee - February 2005.

‘The very high emphasis placed on rights of family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the right of parents than to the rights of children and recommended the amending of the Constitution to give a specific and overt declaration of the rights of born children’.²⁶

Dr Fergus Ryan suggests that root and branch constitutional reform is required along the following lines:

1. 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.
2. To displace the privileged position of the marital family by the recognition of alternative family forms.
3. To bring Irish law into line with the European Convention on Human Rights by placing an obligation on the State to respect and support family life in all its manifestations.

Treoir is in agreement with this analysis. We favour giving children rights such as those outlined in the UN Convention on the Rights of the Child. The Convention contains many child specific rights.

For our purposes, Articles 3 and 7 provide particular protection. Article 3.1 of the Convention states:

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be of paramount consideration’

This could be expressly inserted into the Constitution in order to give children a constitutional right to have their best interests respected particularly in light of the conflict which can arise between their rights as individuals and the right of the family as currently conceived under Irish law. The issue of giving children a voice particularly in family law proceedings also needs to be addressed. Articles 6 and 8 of the European Convention on Human Rights provides for a child’s right to participate in legal proceedings.

Article 7.1 of the UN Convention states:

‘The child shall be registered immediately after the birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents’

Article 9.3 states:

‘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’

²⁶ Report of the Kilkenny Incest Investigation

One of the advantages of the Convention, as highlighted by Dr Ursula Kilkelly, is that it does not define a parent in either biological or social terms and Article 2 protects the child from discrimination on the basis of their parents activities or status (Kilkelly, 2004).

Treoir recommends the enumeration of children’s rights within the Irish Constitution using both the UN Convention on the Rights of the Child and the European Convention on Human Rights as a framework. Further, children’s rights should be paramount notwithstanding any other article in the Constitution.

Parental Rights and Responsibilities

At present a natural mother is considered to have rights in relation to her child which are personal rights protected by Article 40.3²⁷ The Review Group recommended in 1996 that these rights should be enumerated, that is made explicit, in the Constitution. However, the Review Group has also pointed out that a general protection to family life, akin to that in Article 8 of the ECHR, gives a natural mother those rights in any event.

Viewed through the prism of children’s rights it is impermissible to allow a specific protection to mothers within the constitution without a corresponding one for fathers. The potential implications of this are far reaching. As it stands a natural father who is not married to the mother of his child does not have any constitutionally protected rights to his child. The Supreme Court has held:

- i. a natural father is not a member of a family within Article 41,
- ii. is not a ‘parent’ within Article 42, and
- iii. has no personal right in relation to his child which the State is bound to protect under Article 40.3²⁸

Since this pronouncement the Status of Children Act 1987 has amended the Guardianship of Infants Act 1964 in order to give the non-marital father the right to apply to the court to be appointed a guardian. This right has been held by the Supreme Court to be distinct from having the right to be a guardian. The European Court of Human Rights has found Ireland to be in breach of Article 8 of the European Convention on Human Rights in this regard. It would be possible to extend to the non-marital father guardianship rights by legislation or by constitutional change.

The Review Group on the Constitution suggests that there does not appear to be justification to giving constitutional rights to every natural father simply by reason of biological links. They feel rather that the solution lies in following the approach of Article 8 of the ECHR in guaranteeing to every person respect for ‘family life’ which has been interpreted by the European Court of Human Rights to include non-marital family life but yet requiring the existence of family ties between the mother and father. The Review Group suggested that this may be a way of granting constitutional rights to those fathers who have, or had, a stable relationship with the mother prior to the birth, or subsequent to the birth with the child, while

²⁷ G. v. An Bord Uchtála [1980] I.R. 32

²⁸ The State (Nicolaou) v. An Bord Uchtála [1966] I.R. 567

excluding persons from having rights who are only biological fathers without any such relationship. They also point out that it would have to be made clear in the Constitution that the reference to family life is not based on marriage. Treoir is in full agreement with this latter point.

However, Treoir does not support explicitly differentiating between the rights of fathers and mothers in the Constitution, or indeed between those of married and unmarried fathers. In *Nguyen v. US*, the son of an American citizen father and a non US-citizen mother was seeking to argue that a statute establishing citizen requirements for individuals born out of wedlock to a citizen father and non-citizen mother violated the Equal Protection Clause of the Constitution because it provided different rules for citizenship depending on the gender of the person with citizenship.²⁹ The Supreme Court ruled 5-4 that there was no violation of the Equal Protection clause as ‘the classification served important government objectives and the discriminatory means employed were substantially related to the achievement of those objectives’.³⁰

Justice Day O’Connor, dissenting pointed out that gender-based generalisations ‘both reflect and reinforce fixed notions concerning the roles and abilities of males and females’³¹ ‘Thus, according to O’Connor in upholding the use of a gender based generalisations to justify differential treatment:

‘the majority’s opinion not only perpetuates the myth that men are not as available to establish relationships with their children as women are, but also does a disservice to women and societal perceptions of their roles as well’.³²

The dangers of elevating parental rights to the level of constitutional protection have been well discussed³³ and need to be placed at the heart of a discussion of how those rights interact with those of children, particularly in cases of conflict between the two. Whether elevated to constitutional status or introduced by legislation, Treoir favours an end to the current situation where fathers have no automatic rights to their children, and the rights of marital children to their father are privileged vis a vis those of non-marital children. There is no reason to make a distinction based on gender or marital status in relation to the rights of fathers vis a vis mothers in the Constitution. Rights to fathers should flow on the establishment of paternity subject to the discretion of the court to remove them in circumstances where this is warranted. As noted above, this could be achieved through legislation. However, the Review Group have pointed out that this should be dependant on the nature and quality of the family tie, which as we have seen with the jurisprudence of the European Court of Human Rights, allows the court to employ necessary interpretive aids such as that of proportionality and within the context of the principle that children’s rights are paramount. In any event, the situation needs to be addressed.

Article 41.1 confers rights on the family unit as distinct from the rights of individual members of the family and are therefore distinct from personal rights protected by the Constitution. The

²⁹ U.S.C. § 1409(a).

³⁰ *Nguyen*, 533 U.S. at 60 quoting *United States v Virginia*, 518 (1996).

³¹ 533 U.S. at 74 (quoting *Hogan*, 458 U.S. at 725).

³² *Rogus*, 2003: 808.

³³ *Duncan*, 1993, *Ryan* 2004.

Review Group itself considers that the present focus of Article 41 emphasises the rights of the family as unit to the possible detriment of individual members. This is because of the fact that such emphasis may prevent the state from intervening in the interests of an individual within the family unit where necessary or appropriate. This is brought into sharp focus where it is necessary to protect the interests of the child and has been illustrated in Irish law by the Supreme Court's upholding of the constitutionality of the Adoption (No2) Bill 1987 regarding the circumstances in which the adoption of children of marriage may be permissible having regard to family rights under Article 41 and the child's personal rights.

Treoir recommends that parental rights, if enumerated in the Irish Constitution, apply equally to all parents, mothers, fathers, married or unmarried and be subject to the principle that children's rights are paramount.

The Interaction of Parental and Children's Rights

The principle of upholding children's rights as paramount has been enshrined in various pieces of Irish legislation pertaining to them. For instance, section 3 of the Guardianship of Infants Act 1964 and section 24 of the Childcare Act, 1991 stipulate that the court must have regard to the welfare of the child as the first and paramount consideration. The wording of these sections is derived from Article 42.1 and the term 'welfare' is defined in section 2 of the 1964 act.³⁴

William Duncan has pointed to the fact that:

'In the context of balancing the claims of different sets of parents, the constitutional provisions have tended to introduce rigidity where flexibility and nuance are called for. Only in one area, that of custody disputes between married parents, has the welfare principle been able to operate without condition, because the constitutional rights of the two parents are of equal standing' (1993, 1996: 625).

The issues identified in relation to the subordination of children's rights to those of others relate to the complex interplay between their rights, those of their parents vis a vis each other and the state, and parental and family autonomy as guaranteed in the Irish Constitution. The problems have been exacerbated by the definition of the family as that based on marriage and the exclusion of non-marital families from constitutional protection.

Commentators have also warned of the dangers of giving excessive power to the state which has proved itself to be "a lousy parent"³⁵ in this regard. However, it is imperative that children's rights and welfare be paramount in all decisions affecting them. For this reason, Treoir is recommending that this be explicitly stated in the enumeration of their rights within the Constitution ie that children's rights as enumerated exist notwithstanding any other article in the Constitution which may grant rights to parents or the family as a unit.

³⁴Section 2 of the 1964 act defines 'welfare' as comprising 'the religious, moral, intellectual, physical and social welfare of the infant'.

³⁵ Ryan, 2004: 5.

Article 42 and Support for Carers within the Home

The Review Group recommended the retention of Article 41.2 in a revised gender-neutral form to recognise the contribution of either partner within the home.

In a speech by the Honourable Mrs. Justice Susan Denham to a Law Society/Human Rights Commission conference³⁶ she stated that:

‘We must bear in mind that the constitution is a living document. It falls to be construed in our times..in our time a matter of current debate is life balance..the aspiration for quality home life (shorn of its inequality) could be found in many Irish homes’. (2004: 7).

Treoir does not find the retention of this article problematic as long as the amendment to ensure gender neutrality takes place. The Review Group also suggested a revised form of Article 41.2 in order in order to recognise constitutionally the role of carers and care work within the home. The Review Group suggested that the revised form of Article 41.2 might read;

‘The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The state shall endeavour to support persons caring for others within the home’.

Treoir recommends the retention of Article 41.2 in a revised gender-neutral form to recognise the contribution of either partner within the home.

³⁶ Denham, 2004: 7.

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