



**THE NATIONAL FEDERATION OF SERVICES FOR  
UNMARRIED PARENTS AND THEIR CHILDREN**

**SUBMISSION  
to**

**THE JOINT OIREACTHAS COMMITTEE  
ON THE  
CONSTITUTIONAL AMENDMENT ON  
CHILDREN**

February 2008

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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, HSE, maternity hospitals, adoption societies, 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
- Outreach information workshops to parents and those working with them
- Conferences and meetings
- Networking with other groups
- 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 Teen Parents Support Programme.

## Introduction

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Treoir welcomes the opportunity to comment on the Twenty-eighth Amendment of the Constitution Bill 2007 to the Joint Committee on the Constitutional Amendment on Children, established in November 2007. The Bill is complex and deals with very diverse issues which concern children. The issues range from a general statement on natural and imprescriptible rights of all children, extending the circumstances under which adoption is available to children, courts securing the best interest of the child in certain proceedings, provision for the exchange of information in an effort to protect children and securing legislation providing for offences of absolute or strict liability committed against children.

The proposed amendment is an attempt to increase child protection but this is only one aspect of children's rights. Treoir believes that the amendment should deal more comprehensively with children's rights. The rights of all children need to be expressed in the Constitution without ambiguity.

Children's rights to date have generally been interpreted as being located within the marital family and the rights of children of unmarried families are often not given due regard in the courts. Under the Constitution the rights of children of married and unmarried families are also treated differently.

From Treoir's perspective, any discussion of constitutional reform concerning children should take place in the context of the removal of barriers to protection of unmarried families and children within the Constitution. Treoir believes it is untenable for the State to continue to discriminate in its Constitution against one third of children born in the State each year.

In its submission to the All Party Oireachtas Committee on the Constitution<sup>1</sup> Treoir recommended the protection of family life in all of its forms based on Article 8 of the European Convention on Human Rights which reads:

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<sup>1</sup> Treoir submission to the All Party Oireachtas Committee on the Constitution 2005

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

In 1996 the Constitutional Review Group<sup>2</sup> supported giving more protection to unmarried families. It recommended a revised Article 41 should include the following elements – a pledge by the State to protect the family based on marriage in its Constitution and a guarantee to all individuals of respect for their family life whether based on marriage or not.

Despite its limitations such an amendment would go some way towards improving the position of non-traditional families without undermining the married family.

## **The Twenty-eighth Amendment of the Constitution Bill 2007**

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### **Article 42(A)1**

*The State acknowledges and affirms the natural and imprescriptible rights of all children.*

The concept of children’s natural and imprescriptible rights has already existed in the Constitution in article 42.5 but only in the context of the State supplying the place of parents where they have failed in their duty towards their children.

Reaffirming children’s natural and imprescriptible rights in a separate article is a positive development.

The Constitutional Review Group<sup>3</sup> proposed incorporating certain articles of the UN Convention on the Rights of the Child into the Constitution. It stated that there should be an express guarantee of certain rights of the child, which fall to be interpreted by the courts from the concept of ‘family life’, which might include:

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<sup>2</sup> Report of the Constitution Review Group. Stationery Office, Dublin. May 1996. p336

<sup>3</sup> Report of the Constitution Review Group, Stationery Office, Dublin 1996.

- a) the right of every child to be registered immediately after birth and to have from birth a name
- b) the right of every child, as far as practicable, to know his or her parents, subject to the proviso that such right should be subject to regulation by law in the interest of the child
- c) the right of every child, as far as practicable, to be cared for by his or her parents
- d) the right to be reared with due regard to his or her welfare

Treoir, in its submission to the All Party Oireachtas Committee on the Constitution,<sup>4</sup> recommended the enumeration of children's rights within the Constitution using both the UN Convention on the Rights of the Child and the European Convention on Human Rights as a framework.

Article 29.6 of the Irish Constitution provides that "*no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas*". Unless the UN Convention on the Rights of the Child is incorporated into our Constitution and our law children may not be able to vindicate their rights under the Convention in Irish courts. "*Given that since the UN Convention on the Rights of the Child has not been given further effect in Irish domestic law, it only has persuasive effect. This means that the judiciary can rely on the Convention only as an aid to interpretation and are free to ignore it if they so wish*<sup>5</sup>". Because of this it is still Treoir's aspiration that the UN Convention on the Rights of the Child be incorporated into the Irish Constitution and then into law.

Treoir has a number of concerns regarding the current proposed amendment:

- 1) There appears to be a conflict between article 41(A)1.1 "*the State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible*

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<sup>4</sup> Treoir submission to the Joint Oireachtas Committee on the Constitution 2005.

<sup>5</sup> ICCL position on Provisions in the 28<sup>th</sup> Amendment of the constitution Bill 2007.

*rights, antecedent and superior to all positive law*” and the proposed article 42A.1 “*the State acknowledges and affirms the natural and imprescriptible rights of all children.*”

It is not clear whose rights would take precedence in the event of conflict between these two sets of rights. The fact that family rights are inalienable, imprescriptible, antecedent and superior to all positive law probably means that family rights would still take precedence. This issue needs to be addressed by the Committee and some clarity provided.

Treoir, in its submission to the All Party Oireachtas Committee on the Constitution,<sup>6</sup> stated clearly that children’s rights should be paramount notwithstanding any other article in the Constitution.

2) While 42(A).1 refers to “*all children*” if articles 41 and 42 are not amended we fear that the rights may not extend to children from non-marital families.

It could be argued that this proposal may have implications for the introduction of rights for unmarried fathers. If all children have “*natural and imprescriptible*” rights it follows that they have a right to family life and a relationship with their parents, irrespective of the marital status of the parents. Unmarried fathers currently do not have any automatic rights in respect of their children thus children may be denied the opportunity of a relationship with their fathers. Treoir believes that strengthening the rights of unmarried fathers may be a positive outcome of the proposed referendum.

#### **Article 42(A)2.1**

***In exceptional cases, where the parents of any child for physical or moral reasons fail in their duty towards such a child, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of***

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<sup>6</sup> Treoir submission to the Joint Oireachtas Committee on the Constitution 2005.

***the parents, but always with due regard to the natural and imprescriptible rights of the child.***

The main difference between this and article 42.5 is that article 42(A)2.1 applies to “*any child*”. Different standards of child welfare apply in child protection in Ireland based on the marital status of parents. In order for the State to intervene in married families there would have to be exceptional circumstances – e.g. abandonment or threat to the life of the child, while for unmarried parents the welfare of the child is the determining factor.

Treoir is concerned that the effect of the amendment might be that it will be necessary to prove exceptional circumstances in all cases in the future before children could be taken into care. If this higher threshold is extended to non-marital children it may not be in the children’s best interest. All decisions should be made in the child’s best interest and not on marital status of parents.

We support the Teen Parents Support Programme’s<sup>7</sup> view that the phrase “*physical or moral reasons*” be expanded to read “*physical, moral, emotional or psychological reasons*”. This is in line with the right of children to be protected from abuse and neglect according to Article 19 of UNCRC and would raise our threshold of child protection.

#### **Article 42(A)2.2**

***Provision may be made by law for the adoption of a child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child, and where the best interest of the child so required.***

Treoir recommends changing “*provision may be made*” to “*provision shall be made*” to ensure that legislation is enacted rather than just permitting the legislature to enact legislation.

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<sup>7</sup> Teen Parent Support Programme submission to the Oireachtas Committee on the Constitution Amendment on Children. January 2007.

Kilkelly<sup>8</sup> questioned what exactly is meant by “*provision may be made by law*” and is any legislation passed under such a provision immune from constitutional challenge? Or does such legislation become part of the Constitution? Treoir supports her view that the answer to this is of crucial importance in determining the impact of the proposed amendment. It is used in a number of the sections throughout the amendment and it is incumbent on the Committee to clarify this.

Unmarried parents are permitted to place their children for adoption whereas married parents are not and a marital child can only be adopted if the State has established parental failure. It is not clear if this amendment will result in it being necessary to prove failure or neglect on the part of non-marital parents in order to place their children for adoption. However, perhaps taken with article 42(A)3 it may be that all parents, married and unmarried, will be permitted to place their children for adoption if it is in the children’s best interest.

Every possible support should be given to parents to assist them to parent their children. If it is in a child’s best interest to be placed in alternative care then parents must be supported to maintain contact where appropriate. In circumstances where it is not possible for parents to care for their children for a period of time, specified in law, children should have the opportunity of benefiting from a stable family through adoption. Severing links between parents and children is a very serious step and should not be lightly entered into, however if it is in a child’s best interest to be placed with an alternative family then this should be facilitated. In order to allay fears it is essential that the legislation be published in advance of the referendum.

### **Article 42(A)3**

***Provision may be made by law for the voluntary placement for adoption and the adoption of any child.***

At present married parents cannot place their children for adoption even if they believe it is in the children’s best interest. Since its foundation thirty

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<sup>8</sup> The Proposed Children’s Rights Amendment: running to stand still? Dr. Ursula Kilkelly and Dr. Conor O Mahony. Irish Journal of Family Law Number 2. Summer 2007. Tomas Round Hall.



years ago Treoir has proposed to successive Ministers that the option of adoption should be extended to marital children. We believe the insertion of Article 42(A)3 in the Constitution would permit the Oireachtas to enact legislation to enable married parents to place their children for adoption voluntarily as unmarried parents can do at present.

While the proposed amendment is welcome, we question its impact if Article 41 which 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*” is not amended. It is not clear if Article 41 of the Constitution would be superior to legislation which might be enacted to facilitate parents to place their children for adoption. Clarification is needed on this.

Treoir also believes it would be wise in the context of the legislation to introduce a provision for attaching conditions to adoption orders e.g. legislating for regulated ongoing contact. This might make it more acceptable to parents who cannot parent their children but who cannot accept severing all links.

#### **Article 42(A)4**

***Provision may be made by law that in proceedings before any court concerning the adoption, guardianship or custody of, or access to any child, the court shall endeavour to secure the best interest of the child.***

Treoir questions why the “*best interest*” applies only in access, custody, guardianship and adoption cases and not in all actions concerning children? Treoir favours the proposal of the Constitutional Review Group<sup>9</sup> which states: “*an express requirement that in all actions concerning children, whether by legislative, judicial or administrative authorities the best interest of the child shall be the paramount consideration*”.

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<sup>9</sup> Report of the Constitutional Review Group. Stationery Office, Dublin 1996.

Shatter<sup>10</sup> pointed to the need to give detailed consideration to what is meant by the “*best interest*” obligation imposed on the courts and how it will interact in practice with the provision contained in the new Article 42(A)2.1.” The “*best interest*” is a subjective concept and open to differing interpretations. This is something the Committee needs to take into account in its deliberations.

#### **Article 42(A)5.1**

***Provision may be made by law for the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law .***

This is a significant amendment intended to protect children from sexual abuse and exploitation. However the use of “soft information” can be very problematic. It involves allegations and not convictions. Finding a balance between protecting children while not violating the rights of persons working with children (by allowing their reputations to be damaged on the basis of unfounded allegations) is a huge challenge.

Treoir fully supports the view of Shannon, Rapporteur on Child Protection,<sup>11</sup> that proposed legislation be drafted in advance of a referendum and presented to the people so as to allow for a fully informed and transparent debate. He suggested that any legislation drafted must be clear, concise, limited in application, provide for procedural safeguards and take account of the constitutional doctrine of proportionality.

#### **Article 42(A)5.2**

***No provision in the Constitution invalidates any law providing for offences of absolute or strict liability***

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<sup>10</sup> Opening statement by Alan Shatter TD, Fine Gael Spokesperson on Children and Leader of Fine Gael Group on Joint Oireachtas Committee on Constitutional Amendment on Children, delivered at first meeting on 6<sup>th</sup> December 2007. (press statement).

<sup>11</sup> Geoffrey Shannon: Report of the Special Rapporteur on Child Protection, submitted to the Oireachtas, November 2007

***committed against or in connection with a child under 18 years of age.***

Children should be protected from sexual exploitation and sexual abuse. However, it is important not to solve one problem by creating a series of other problems. Not having a right to a defence is a violation of human rights.

If this amendment, which aims to protect children, is progressed there is a danger of violating the human rights of individuals, some of whom will also be children.

We question if the introduction of this proposed amendment is the best solution to a very real problem. The Joint Committee on Child Protection in November 2006<sup>12</sup> proposed in excess of 60 recommendations, McAuley<sup>13</sup> and Shannon<sup>14</sup> undertook very comprehensive reports on protection of children. We believe it is premature to consider introducing a referendum when these key reports and their recommendations have not been properly analysed, explored or debated.

Treoir believes that there is a need for a major debate and dialogue on the best way to secure the protection of children without violating basic human rights of others, some whom may be children. This dialogue needs to take place with young people themselves, those working with them, policy makers, legal experts etc. The general public should also have the opportunity of contributing to the debate. Treoir therefore recommends the publication of a Green Paper on the issue of child protection. All of the options to protect children from exploitation and sexual abuse need to be explored. It is likely that children can be very well protected without (re)introducing the strict liability clause which could result in further abuse.

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<sup>12</sup> Houses of the Oireachtas Joint Committee on Child Protection: Report on child Protection November 2006

<sup>13</sup> McAuley, F: Report of the Criminal Law Rapporteur for the Legal Protection of Children. Office of the Minister for Children – Department of Health and Children. 2007

<sup>14</sup> Geoffrey Shannon: Report of the Special Rapporteur on Child Protection, submitted to the Oireachtas, November 2007

### Article 42(A)5.3

*The provisions of this section of this Article do not, in any way, limit the powers of the Oireachtas to provide by law for other offences of absolute or strict liability.*

Treoir has no comment on this article.

## Conclusion

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The proposed Twenty-eighth Amendment of the Constitution Bill 2007 as a child protection measure appears to be significant when in fact it is very limited. It does not sufficiently address

- the imbalance between the constitutional rights of children and those of parents/families
- the rights of children of married and unmarried parents.

Neither does it provide for the broader rights contained in the UN Convention on the Rights of the Child, which is regrettable.

The Committee has very challenging work to do in preparing and refining the amendment before putting it to the people. It is clear that there is a great deal of mis-information and confusion on the various articles. Consideration will have to be given by the Committee as to how to raise awareness of the broad range of issues contained in the amendment among the general public and how best to present such a complex amendment to the people.

This is a unique opportunity to do the best we can for children. Putting an inadequate and ill-thought through referendum to the people serves no good purpose. The Committee needs to take the time to ensure the all the proposals and their implications are thought through and it is imperative that the final wording is clear, unambiguous and well discussed before being put to the people.

## Summary of Recommendations

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Articles 41 (and indeed 42) of the Constitution need to be amended in order to remove the discrimination against children born outside of marriage and to ensure that the rights of families do not take precedence over the rights and best interest of children.

The UN Convention on the rights of the child should be incorporated into the Irish Constitution and law. At a minimum the articles guaranteeing a right to be registered, the right to identity, to be cared for by both parents and to be reared with due regard to his or her welfare should be incorporated into the Constitution.

In order to uphold the 'natural and imprescriptible' rights of all children, particularly in relation 'a right to family life and the society of their parents' it will be necessary to legislate to strengthen the rights of unmarried fathers.

The potential conflict between articles 41 and 42(A)2.1 needs to be addressed.

All decisions concerning children should be made in their best interest. Marital status should not be a determining factor when making decisions on behalf of children.

Failure of parents for physical or moral reasons should be expanded to read 'physical, moral, emotional or psychological reasons'.

Treoir supports the proposal that legislation be enacted to permit adoption of children where parents, who have been given every support to parent, have failed for such a period of time as may be prescribed by law in their duty towards the child. The legislation would need to be published prior to the referendum.

Treoir welcomes the proposals to allow for voluntary placement of children for adoption and recommends that the legislation should allow for conditions to be attached to adoption orders e.g. ongoing contact between birth parents and child.

The 'best interest' clause should apply in all actions concerning children and not just actions concerning access, custody, guardianship and adoption.

Legislation should be enacted for the exchange of "soft information" in order to protect children from abuse or exploitation. However all of the options to protect children from exploitation and sexual abuse need to be explored. A balance must be struck between protecting children while not violating the rights of persons working with children. Treoir recommends that a Green Paper be published to allow further discussion on this difficult issue.

**Treoir**  
**February 2008**