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**Submission**

**to the**

**Oireachtas Committee on  
Justice, Defence and Equality**

**on the**

**General Scheme of a Children and Family  
Relationships Bill 2014**



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Founded in 1976, Treoir is the national federation of agencies which provide services to unmarried parents and their children. 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, the HSE, maternity hospitals, adoption agencies and self-help groups.

Treoir, in partnership with its member agencies, promotes the rights and best interests of unmarried parents and their children through providing specialist information and advocating for their rights.

Treoir works to achieve this aim by -

- providing a National Information Service to unmarried parents, their extended families and those working with them through answering queries, information website, publications, outreach workshops etc.
- promoting change at every level to achieve constitutional and legal equality for unmarried parents, and to improve services and attitudes to unmarried parents
- promoting/undertaking research to better understand the situation of unmarried parents and their children in Ireland
- Collaborating with other agencies to promote our aim through the federation of Treoir and agencies outside Treoir
- Co-ordinating the Teen Parents Support programme

## **Principles**

Treoir:

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

## 1. INTRODUCTION AND WELCOME

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1.1 Treoir warmly welcomes the General Scheme of a Children and Family Relationships Bill 2014 which is proposed as the legislative response to many of the issues raised by the changing composition of Irish families. The proposals put the child's best interests at the heart of decisions on parentage, guardianship, custody and access and caters for the needs of families not addressed in current law.

1.2 While there are some omissions and areas of concern for Treoir in the Bill there are many provisions which we welcome, including

- The extension of presumptions of paternity to include cohabiting fathers of 12 months (Head 6) (3)
- The presumption that a husband is not the father where a married woman gives birth more than 10 months after their last contact (Head 6) (5)
- The extension of automatic guardianship rights to cohabiting fathers (Head 31) (3)
- That the best interests of the child are paramount (Head 32) (1)
- The general principle of avoidance of unreasonable delay (Head 32) (2)
- The definition of the child's best interest (Head 32) (3)
- The obligation for guardians to act jointly, cooperate and share information (Head 36) (1) (3)
- Allow step-parents, grandparents and others to apply for guardianship and custody (Head 39) (3), (Head 46)
- The power of a guardian parent to appoint a substitute guardian (Head 41)
- The removal of the first tier in the current two tier application process for access by relatives of a child or persons who have acted in loco parentis (Head 48)
- The power of court to make interim custody or access orders
- Further the promotion of alternative dispute resolutions in family issues (Head 53)
- Provisions concerning guardians *ad litem* (Head 60)
- The enforcing of orders relating to parenting, particularly custody and access orders (Heads 62 – 67).

1.3 These provisions will make substantial improvements in the lives of many families who are currently living in a legal vacuum. However, Treoir believes that there are some serious issues which have not been thought through sufficiently and in addition some serious omissions from the Bill, which are detailed below.

## 2. SPECIFIC CONCERNS

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### 2.1 Rights of unmarried fathers who are not cohabiting (Head 37)

2.1.1 We understand the difficulty of giving automatic guardianship rights to parents where there is no long-term relationship between the parents and where there is no evidence of intention or commitment to the child. However, many couples begin to cohabit once they find out that they are becoming parents. Some cannot afford to live together and many individuals become committed parents without ever having had a relationship. Unmarried fathers in these circumstances can only become guardians of their children by agreement with the mother and swearing a statutory declaration (S.I. No 5 of 1998 - Statutory Declaration of Father and Mother in Relation to Joint Guardianship of Child/Children) or by applying to the local district court for a guardianship order.

2.1.2 The Bill addresses the practical implications of children living in 'blended' families with civil partners or with cohabiting parents but fails to address the issue of unmarried non-cohabitant fathers and their children.

2.1.3 From our experience in our National Specialist Information Service for unmarried parents, very many parents (and others) believe that having fathers' names entered in the Register of Births gives them guardianship rights to their child. They are completely unaware that fathers must take action to acquire guardianship rights in respect of their children.

**2.1.4 Recommendation:** *Treoir recommends that unmarried parents should, at the time of birth registration, be presented with information on the lack of legal rights of unmarried fathers who are not cohabiting. This could also include information on the Statutory Declaration for Joint Guardianship Agreements.*

### 2.2 The Cohabitation Condition (Head 37)

2.2.1 Treoir welcomes the provision that many more unmarried fathers can acquire guardianship rights by virtue of cohabiting with the child's mother for a minimum period of 12 months. However, it does not include any procedure to verify whether in fact a couple has been cohabiting.

2.2.2 If subsequently the relationship ends the parents who are guardians may not be in agreement about how long they cohabited. This could result in an increase in court cases to determine whether the natural father is a guardian under this provision of the Bill. This will not be in the best interest of the child because, until the case is filed in the courts for determination, it will be unclear whether the father as a guardian can take part in key decisions related to the child (such as medical consent or whether the child can leave the jurisdiction). Moreover, it will be unclear whether the father, as a guardian, enjoys automatic custodial rights.

**2.2.3. Recommendation:** *Treoir recommends that there should be a mechanism in place for noting, affirming or registering an agreement by both parents that the cohabitation requisite time has been complied with. Treoir has considered a number of options which we will be happy to discuss in detail.*

### 2.3. Definition of Guardianship (Head 34, Head 36 and Head 43)

2.3.1 Head 34 of the Bill provides a statutory interpretation of “guardianship”. However, Head 36 effectively introduces a detailed definition of the duties, rights, responsibilities and powers of guardians in circumstances where a child has more than one guardian. In addition, Head 43 provides for the power and duties of guardians. Head 34 and Head 36 focus on the physical, emotional, social and intellectual needs of the child while Head 43 refers to the guardian’s entitlement to the custody of the child and the power of a guardian to act for a child in a legal capacity as manager of the child’s property. Treoir considers that there is a significant cross-over between the three Heads which can result in substantial confusion.

**2.3.2 Recommendation:** *Treoir recommends a consolidated definition of guardianship to be applied whether there is a single guardian or several guardians acting jointly for a child.*

2.3.3. Head 36 (6) (a) provides that guardians acting jointly may “*make day-to-day decisions affecting the child including having custody and the day-to-day care and control of the child and supervising the child’s daily activities*”. Clearly this provision is mixing the concept of guardianship (the right to take part in major decisions relevant to the child such as medical consent, choice of school or religion, etc) with the concept of custody and decisions flowing from the day-to-day care of the child. This is of considerable concern as a guardian will not always have custody of a child.

**2.3.4 Recommendation:** *Treoir recommends the deletion of Head 36 (6) (a) remove day-to-day care from the definition of guardianship.*

### 2.4. An Unlimited Number of Guardians (Head 39)

2.4.1 Generally only parents can be guardians of a child in Ireland under current legislation. Head 39 extends the categories of persons who may apply to court to be appointed a guardian of a child. This could result in a child having multiple guardians as the appointing of a guardian will not affect the previous appointment of existing guardians.

2.4.2 This provision effectively means there may be situations where several guardians with conflicting ideas or principles must act jointly. Treoir, through its specialist information service for unmarried parents, hears from parents on a regular basis of the difficulties arising from just two guardians trying to act jointly. We therefore envisage that the existence of several guardians could result in conflictive situations. In modern day Ireland, relationships between parents can be transitory and numerous.

**2.4.3 Recommendation:** *Treoir recommends that the Court will have regard, in the best interest of the child, to the practical difficulties arising from having multiple guardians.*

## 2.5 Parentage and Guardianship (Heads 37, 36, 39)

2.5.1 As stated above, generally in Ireland, only parents can be guardians of children, which is simple and straightforward. The proposed legislation creates a complex web of possible guardians for children. Children may potentially be involved with parents, guardians and individuals in the following different sets of circumstances:

- a) parents who are guardians - Head 37 (1): parents who are automatically guardians of their children with custody entitlements (i.e. married parents and unmarried mothers, cohabiting unmarried fathers)
- b) parents who are not guardians – Head 37 (2): biological parents who are not guardians of their children (i.e. unmarried fathers who have not been cohabiting for the required time)
- c) guardians who are not parents – Head 39 (3): this category includes individuals who are not parents of a child but are acting in loco parentis (i.e. step-parents, grandparents)
- d) guardians who are not parents or acting in loco parentis – Head 36 (8): (e.g. following the ending of a relationship)

2.5.2 The provisions of the Bill aim to promote the stability of families caring for children. Head 32 of the Act states that the best interest of the child is the paramount consideration in specified types of proceedings. It is a real prospect that the outlined scenarios can occur simultaneously and even overlap which could result in situations that are not in the best interest of the child.

**2.5.3 Recommendation:** *Treoir recommends that there is clarity throughout the Bill when referring to parents as to whether or not they are guardians and when referring to guardians as to whether or not they are parents.*

### 3. OVER-ARCHING CONCERNS

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#### 3.1 The establishment of a Central Register for Statutory Declarations of Joint Guardianship

3.1.1 Under the Children Act 1997 unmarried parents can, if both are in agreement, complete a sworn statutory declaration for joint guardianship (S.I. No 5 of 1998 - Statutory Declaration of Father and Mother in Relation to Joint Guardianship of Child/Children). Significant numbers of statutory declarations are requested by post from Treoir and also downloaded from our website. Where a declaration is signed and subsequently becomes lost or destroyed there is no evidence of the fact that the father has guardianship rights to his child/ren. In contrast, it would be unthinkable if a marriage certificate, which is evidence that a married man is a guardian of his children, could not be replaced, if lost.

3.1.2 It is essential that this out-of-court legal guardianship document for unmarried parents is recorded in a central register. This is particularly significant in light of the new Bill expanding the categories of persons who can apply and become guardians of the same child. It is also important where consent issues in relation to the child arise that public bodies have access to this central register. For instance, when a passport is being applied for, how will the Passport Office know how many guardians a child has?

**3.1.3 Recommendation:** *Whether or not the Bill is enacted Treoir urgently requests the establishment of A Central Register for Statutory Declarations for Joint Guardianship. Other jurisdictions have this type of procedure in place as a legal requirement. We would be happy to discuss this in more detail.*

#### 3.2. The Right to Identity

3.2.1 Under head 32 there is a list of the issues to be taken into account when considering the child's best interest. Treoir believes children's right to identity should be preserved regardless of the circumstances of conception, birth or with whom they grow up. Currently significant numbers of children in Ireland are denied information on their identity e.g. adopted children, children of unmarried parents who are registered without the father's name and children born through assisted human reproduction. Denying information on identity can cause pain, anguish and indeed genealogical bewilderment. Access to medical history is essential in the Ireland of today. Legislation on compulsory birth registration and access to birth records for adoptees is promised. There is no legislation in place to protect children's rights to identity, for example those born through assisted human reproduction or surrogacy.

**3.2.2 Recommendation:** *Treoir recommends that provision be made in the Bill for children born through assisted human reproduction to have their identity preserved. It may be necessary to implement a system of dual birth registration – one showing the social parents and a second register showing the details of the child's full genetic parental lineage.*

### 3.3 Change of Terminology

3.3.1 The Law Reform Commission recommended in its Legal Aspects of Family Relationships Report<sup>1</sup> the terms “guardianship”, “custody” and “access” should be replaced with the terms “parental responsibility”, “day-to-day care” and “contact”. However, the Bill retains the terms “guardianship”, “custody” and “access” as these terms are used in the recent Constitutional Amendment on children. Treoir insists that the change of terminology is essential because the proposed terms are more appropriate and consistent with other existing legislation such as EU Regulation *Brussels II bis*. As noted by the Law Reform Commission, the use of the term parental responsibility in *Brussels II bis* has the effect of introducing the concept directly into Irish Family Law<sup>2</sup>.

3.3.2 The Bill already refers to “parental responsibility” acquired by operation of the law of another State (Head 31 (e) and “Parental Rights and Duties” for a child who is adopted (Head 84). In addition, “day-to-day care” is included in the definition of custody (Head 31 (1)) and is specifically referred to in Head 36 (6) (a), Head 39 (3) and Head 47 (2). While Treoir welcomes the effort to align the terms, it is concerned about the intermittent use resulting in further confusion.

**3.3.3 Recommendation:** *Treoir recommends that for clarity and consistency the terms “guardianship”, “custody” and “access” are replaced with “parental responsibility”, “day-to-day care”, and “contact”.*

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<sup>1</sup> Report on [Legal Aspects of Family Relationships](#) (LRC 101-2010) Chapter 1, Page 7

<sup>2</sup> As Ireland is a member of the European Union, the obligations of Community membership entail that the Constitution and other national laws are subordinate to Community law whenever the Community has competence. Under Article 29.4.6° EU law takes precedence over the Constitution if there is a conflict between the two, but only to the extent that such EU law is “necessitated” by Ireland’s membership. Arguably the change in terminology would fit this category in the interest of consistency and clarity.



## 4 CONCLUSION

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4.1 The proposed legislation represents a significant change in family legislation in Ireland and overall Treoir welcomes the provisions contained therein. However, the bill is extraordinarily complex and will require much thought, consideration and consultation. Treoir is keen to continue to be part of this consultation.

4.1.1 Treoir anticipates that the provisions of the Bill, if enacted, will result in a considerable increase in the use of the courts in family matters and believes the establishment of a Family Court system is essential to success of the proposed legislation. Alongside this is the necessity to have a judiciary which is appropriately trained to deal with family matters.

4.1.2 Treoir also anticipates that there will be serious administrative issues arising from the Bill. As there will be the possibility of people other than parents becoming guardians, the issue of parenthood and proof of guardianship could require several documents – birth certificates, statutory declarations, declarations of parenthood and court orders. For example, schools and the Passport Office may have difficulty checking these matters.

4.1.3 We wish the Minister well in progressing this Bill which will be of great benefit to many families in Ireland.

February 2014

## SUMMARY OF RECOMMENDATIONS

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### *Treoir recommends*

- *that unmarried parents should, at the time of birth registration, be presented with information on the lack of legal rights of unmarried fathers who are not cohabiting. This could also include information on the Statutory Declaration for Joint Guardianship Agreements. (2.1.4)*
- *that there should be a mechanism in place for noting, affirming or registering an agreement by both parents that the cohabitation requisite time has been complied with (2.2.3)*
- *a consolidated definition of guardianship to be applied whether there is a single guardian or several guardians acting jointly for a child (2.3.2)*
- *the deletion of Head 36 (6) (a) remove day-to-day care from the definition of guardianship (2.3.4)*
- *that the Court will have regard, in the best interest of the child, to the practical difficulties arising from having multiple guardians (2.4.3)*
- *that there is clarity in the Bill when referring to parents as to whether or not they are guardians and when referring to guardians as to whether or not they are parents (2.5.3)*
- *that whether or not the Bill is enacted Treoir urgently requests the establishment of A Central Register for Statutory Declarations for Joint Guardianship (3.1.3)*
- *that provision be made in the Bill for children born through assisted human reproduction to have their identity preserved. It may be necessary to implement a system of dual birth registration – one showing the social parents and a second register showing the details of the child’s full genetic parental lineage (3.2.2)*
- *that for clarity and consistency the terms “guardianship”, “custody” and “access” are replaced with “parental responsibility”, “day-to-day care”, and “contact” (3.3.3)*