



# **Church of Ireland**

Submission to the All-Party Oireachtas Committee on the  
Constitution on Articles 40.3, 41, 42.1 and 42.5 of the  
Constitution relating to the Family

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Church of Ireland,  
The General Synod,  
Church of Ireland House,  
Church Avenue,  
Rathmines,  
Dublin 6.

Tel: (+353 1) 497 8422  
Fax: (+353 1) 497 8821  
E-mail: [synod@rcbdub.org](mailto:synod@rcbdub.org)

# **Submission from the Church of Ireland on Articles 40.3, 41, 42.1 and 42.5 of the Constitution of Ireland relating to the Family to the All-Party Oireachtas Committee on the Constitution.**

## **Introduction**

The Church of Ireland welcomes the opportunity to make a submission on the Constitutional provisions relating to the Family. In January 1999 we commented on a number of recommendations made in the Report of the Constitution Review Group and this submission builds on our earlier comments. The Constitution Review Group's recommendations in relation to the Family have been a very useful reference point in formulating our response. The issues set out by the All-Party Committee provide a good structure and we have thus based our submission on this format.

Firstly, as a general comment on Articles 41 and 42, we feel that the natural law language used, albeit long valued by certain traditions within our society, is unhelpful and outdated in today's Constitutional context.

Secondly, we are of the view that there is a need for greater transparency in family law cases without the violation of privacy. Currently there is a difficulty in obtaining accurate statistics relating to the outcome of family law cases as there are held *in camera* and often anecdotal evidence is all that is available. We feel that in family law cases there should be greater availability of judgements and decisions given, whilst protecting the anonymity of the parties. If, because of a conflicting Constitutional guarantee of privacy, this can only be done by Constitutional amendment, then the Constitution ought to be amended. Indeed, we would urge the Minister to proceed accordingly.

Thirdly, equality of access to the courts in family law cases is vital. This may mean that increased expenditure on the provision of civil legal aid is necessary.

## **How should the Family be defined?**

The family protected by the Constitution is the family based on marriage. The present day understanding of the family, however, is something much broader than the traditional marriage based family. A clear distinction needs to be made between the definition of marriage and the definition of the family. We favour the inclusion in the Constitution of a broad definition of the family which will not only continue to protect the institution of marriage but will also allow the State to recognise the numerous units which are generally regarded as family units but which are not marriage based. The Church of Ireland, of course, continues to stress marriage as the optimum context, particularly for the nurture of children, but at the same time we feel that other domestic situations should be accommodated and legislative provision made for them.

As a good working definition of the family we suggest considering the UN definition namely - *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.*

## **How should one strike the balance between the rights of the family as a unit and the rights of individual members?**

The emphasis on the family as a unit under Article 41.1 has meant that at times the rights of the unit have over-ridden the rights of the individual members of the unit. This situation is unsatisfactory.

In line with the Constitution Review Group's views, we feel that, while the family unit may be entitled to special protection from the State, the individual rights and duties deriving from marriage, family, parenthood or childhood should be guaranteed to and imposed on the individuals concerned.

**Is it possible to give Constitutional protection to families other than those based on marriage?**

By amending the Constitution to provide a definition of the family wider than that based only on marriage, such constitutional protection can of course be given.

**Should gay couples be allowed to marry?**

Marriage for us is understood as the joining together of a Man and a Woman in lifelong and exclusive commitment, in a covenant which in its purpose is relational, unitative and where possible procreative. A same-sex couple does not have of itself the capacity or potential to procreate and as such cannot under any circumstances fulfil this complete definition. A same sex union can and should be given Constitutional protection under the broad definition of the family favoured above, but cannot in our view be considered a marriage, nor should the language and distinctive ceremonies of marriage be associated with it in civil law.

**Is the Constitution's reference to "woman's life within the home" an outdated one that should be changed??**

The Constitution should retain a recognition of the value of family life, but in gender neutral terms. Once again, in line with the Constitution Review Group's Report, we suggest that Article 41.2.1 and 41.2.2 should be replaced with the following –

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

**Should the rights of the natural mother have express Constitutional protection?**

At present the natural mother does enjoy Constitutional rights (as well as many statutory entitlements), albeit under Article 40.3 rather than Article 41. If, as recommended, the definition of the family in Article 41 is broadened then the natural mother's rights will be included under this article.

**What rights should a natural father have and how should they be protected?**

We feel that rights of a natural father should be established by his willingness to relate to the child or by his demonstrating that he has endeavoured to establish and maintain a relationship with his child. In the event of rape or incest, for example, such rights should not apply. While accepting in general terms that natural fathers need to establish rights, this is not to say that we lack sympathy with conscientious natural fathers frustrated by their present unequal legal position *vis a vis* natural mothers. At present by statutory provision a natural father can be appointed joint guardian of his child in which case he will have the right to be involved in decisions on the child's upbringing as well as having potential custody entitlements and rights in relation to adoption. We support this provision.

Although a natural father has no automatic constitutional right in relation to his child, we concur with the current position that on proof of paternity a child has a right to seek nurture and support from its natural father.

**Should the rights of the child be given an expanded Constitutional protection?**

Save in relation to the courts' divorce jurisdiction, there is no specific reference to the rights of the child in Article 41. The courts have however interpreted the Constitution as conferring unenumerated Constitutional rights on children arising particularly under Article 40.3. For the sake of clarity, and in line with the Constitution Review Group's report, we recommend the express guaranteeing of the rights of the child in Article 41. Furthermore, and this ties in with our response to the final issue raised, there should be included in the Constitution an express requirement, such as is already contained in legislation, that in all actions concerning children paramount consideration should be given to the best interests of the child.

**Does the Constitution need to be changed in view of the UN Convention on the Rights of the Child?**

We warmly endorse the Convention and strongly urge the inclusion in our Constitution of the list of children's rights contained therein as well as the principle that in all actions concerning children the best interest of the child should always take precedence.

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