



Parental Equality
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Submission to the All-Party Oireachtas Committee on Constitution

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A vision for Sustainable Society, The Family, Parenting and the Irish Constitution

This is a submission to the all party Oireachtas Committee on the Constitution on behalf of Parental Equality. Parental Equality is a Non Governmental Organisation that has been raising public consciousness in supporting the concept of shared parenting since 1992. The mission statement for Parental Equality reads as follows:-

“Our mission in Parental Equality is to seek, both through our own activities and through our involvement with the education of our future generation of parents, to play a proactive role in creating a culture of shared family responsibilities, enabling women and men equally, to realise their optimum potential, both in their family lives and careers.

In recognition of the UN convention on the rights of the Child, Parental Equality aim to achieve Parity of Esteem for all members of the Family System.

In furtherance of this goal, Parental Equality undertake to support, promote and encourage, with due respect for the freedom of the individual, increased participation for men as carers in the family system, and opportunities for women to open up their traditional domain as childcarers.”

- January 1996

This mission statement by Parental Equality fundamentally sets out the values which we would like to see enshrined in our Constitution.

We believe that the object of having a Constitution is to lay out a framework which supports and protects the necessary elements, in order to create and maintain a stable, sustainable and civilised society, particularly in areas affecting the family. We believe that it is quite clear that for more than a generation, the Constitution as it now stands, particularly as it has been interpreted by the practice of the courts, is out of kilter with the reality of modern Irish society.

The original Constitution was framed in 1937. The societal landscape which existed at the time consisted of fairly standard family models, where the normal expectation was marriage-for-life and that marriage encompassed the expectation of procreation and providing for the next generation of children in our society. The nature of work was such that men were the traditional breadwinners as husbands of the family, and that women were traditionally homemakers. The very concept of travel, infrastructure and communication as we now know it, was unforeseen at the time of the establishment of the first Irish Constitution.

Over the past 20 years we have seen the spiralling level of relationship breakdown within families and the acknowledgement of the thousands of abortions of potential Irish babies, which while not permitted in the island of Ireland are actually undertaken by the pregnant women travelling abroad. We have seen over the last 20 years the percentage of children born outside of marriage constantly increasing to the degree that the end of December 2004 for example the reported percentage of births outside of marriage in the county of Louth was almost 40% (Limerick City 54%). During the mid-nineties the repeated attempts to have the constitutional ban on divorce were finally successful and we now have a decade of experience of a divorce regime in Ireland. Whereas contraception was relatively unknown. In the late 1930s. It is now statutory policy to recommend the use of condoms in order to practise safe sex with the reasoning of protecting people against sexual transmitted diseases including the killer aids virus. The issue of in-vitro fertilisation, surrogate parenthood, homosexuals raising children, etc. are now part of the reality of our everyday discussions.

It is ironic that in the year 2005, that having failed to respond in a timely and appropriate manner to the changing needs of our society, the cumbersome process of reviewing the Constitution yet again looms as a possibility, but only that. We only have to look at the discussions that are ongoing in relation to genetic engineering and to look at the massive rate of change that has occurred in our society over the last 50 years, to envisage with any realism that cloned babies genetically modified human beings will be issues facing our society within the next generation or two.

In recognition of the fact that the Constitution has already failed to keep pace with the changes in our society it is questionable whether the topics suggested for discussion by the all party Oireachtas Committee on the Constitution reflected on these real and future possibilities. Whereas a lot of the debate and struggle has been around the issues of the rights of the child, rights of unmarried fathers, whether gay couples should be allowed to marry, the Constitution's reference to the special place of the mother in the home, we should be designing a Constitution that can take into account the inevitable eventuality of effectively, cyber children.

When one looks at **Article 40.1** of our Constitution which deals with personal rights, which on the surface suggests that **“All citizens shall, as human persons, will be held equal before the law”** before then going on in the sub-clause to dilute that equality by stating that “the state” effectively can differentiate and thus discriminate on the basis of **“social function”**, we are left to wonder what will happen in a society, when genetically-modified generated children, who are potentially more efficient according to the values of a future state, might end up creating the

possibility that the naturally generated humans might find themselves all as second class citizens to a cyborg generation.

Mindful of one of the insights of the leaders of the Native American Indian tradition which stated that **“when changes were being introduced into society one should think of the impact of those changes seven generations hence”**, Parental Equality have struggled when considering this submission to find some lasting and universal values which could be inserted and established in our Constitution and which could support a stable, viable and co-operative society in the present time and which could prove resilient and adaptable to the inevitable changes that will emerge over the coming generations since the original Constitution was put in place in 1937.

One of the fundamental changes in the expectation of marriage and family has been in the area of procreation. Prior to the situation where contraception was readily available and socially acceptable, when abortion (and certainly the public perception of it) was relatively unknown, it would be reasonable to submit that when a man and a woman got married the normal expectation was, that that relationship would be bearing of children. While it is true that some couples would have used various strategies to remain childless and some percentage may not have been capable of having children, the reality was that the decision to get married fundamentally included an expectation that there would be children of that relationship.

In the present day the decision to marry can be a separate decision than the decision to have children. It is quite possible to marry and not to have children by choice and it is quite possible to have children and not to marry by choice it is also possible to marry and to parent by choice.

In the event where people wish to live together as a couple and where there are no children involved, there are no trans-generational impacts or implications for society. For those adults who are in a relationship, who die childless, there is no follow-through from them to future generations. If people wish to co-habit or live together then the nature of their relationship, whether they are heterosexual, or homosexual, or whether they are ones based on friendship, or caring, without a sexual element, as long as there are no children involved then there are no implications or complications which will follow through to the next generation through their children.

On the other hand the act of parenting and procreation creates the flow and supply of citizens for future generations. It is therefore in the area of parenting that Parental Equality would like to focus the minds of the all party Oireachtas Committee on the Constitution, as the structures that support, regulate and protect the parenting function are ultimately the one vital element in ensuring continuity of the species in a sustainable society for future generations.

It appears from our reading of the report of the Constitutional review group, that the recommendations seem to suggest a move away from the concentration on “inalienable and imprescriptible rights” of the family unit itself towards the provision of rights to individuals within families. The review group also seems to suggest a desire to invest specific constitutional rights to unmarried mothers while at the same time deliberately deciding not to give specific constitutional rights to unmarried fathers. The group then seems to go on to seek to provide specific rights to the child, suggesting that giving constitutional rights to the child, to a relationship with its father in some way ensures that fathers and their relationship with their children will have their needs met.

The review group also seems to suggest that the terms “inalienable and imprescriptible” be removed from the Constitution and that the specific reference in Article 41 referring to a mother’s specific role in the home should either be modified to be gender neutral or to be broadened to include all carers in the home.

Parental Equality submit the following proposal for how we in society might address how we respond to pregnancy, birth or abortion and the raising of children following birth. Essentially, ***Parental Equality believe that where a male and female have consensual sex which results in a pregnancy, that in terms of society evaluating or adjudicating, either the behaviours that led towards this pregnancy, or whether such pregnancies, for example those outside marriage, are to be supported and promoted by society or whether there is an attempt to minimise their number and to ensure that pregnancies occur within a legally committed framework, then both the male and female concerned should be held equally accountable.***

At present Ireland has developed a culture, often extrapolated from culturally manicured myths of feckless fathers, of young men who are irresponsible in terms of their sexual behaviour, who effectively prey and take advantage of women, while at the same time women are unsuspecting victims, who become unwillingly pregnant, then they are left too often to face the task of going through with the pregnancy, having the child and raising the child alone. Based on these myths, in the year 2005, the Irish social welfare system is now weighed down by almost €800 million in lone parent payments.

The Constitutional review group, while looking at the rights of unmarried fathers for example, yet again fell into the well worn trap of concentrating unnecessarily with the very miniscule percentage of pregnancies that occur from rape. Almost invariably procreation is a result of consensual sex. It may be irresponsible sex. It may be as a result of too much alcohol. It may be as a result of extra marital affairs but almost invariably it is consensual sex between males and females which lead to pregnancy.

By supporting, or criticising, both the male and female involved on an equal basis there is a far greater probability that men and women might move from the model of blaming each other to concentrating on the job at hand, negotiating a co-operative arrangement to provide for their offspring.

Consequently, we feel that it is a constitutional imperative that while the state might choose to discriminate in a positive way to encourage a formation of a legal entity, as a couple, for parents of children, thus incentivising this legal coupling (justified by the greater goal of creating continuity and a stable society, sustainable into the future), there should be no differentiation between parents on a gender basis.

The family based on marriage in the tradition where a man and woman have a legally binding contract, to maintain and look after each other, is part of a subset of a much larger community of extended family and has served civilisation well over the millennia. Married parents with their children and their extended relations help form sustainable support for communities. By entering these contractual relationships it increases the probability that the stable and continuous environment for children during their formative years. Over the last decade or so, emerging research continues to re-state the fact that a stable co-habiting parental relationship is the best environment for children to be raised in. Therefore it is reasonable that social policy should incentivise this structuring of parental relationships through marriage.

One of the questions asked by the all party Oireachtas Committee on the Constitution is how should one strike a balance between the rights of a family as a unit and the rights of individual members? It appears that the Constitution review group seeks to enumerate the rights of the individual members. However, in this case it seems to lean towards giving rights to mothers and the children, in some way hoping that fathers will continue to have some identity but only through their children's needs.

It seems to us that the unit which is formed by bio-logical parents and their children is a fundamental system and that for the system to be functional and healthy it is necessary that every element of the system, in a balanced and holistic way, must also be healthy and functional. If any element of the family system, whether it be the mother, father, or children who are out of balance or dysfunctional, the whole system is out of balance and dysfunctional. There is a fundamental flaw in the reductionist thinking that if one separates out the individual rights of a system as a whole that a Constitution can protect an individual and not damage the family system.

Looking again at our belief that the object of a Constitution is to provide a framework to support and protect a stable and sustainable society into the future and given the fact that the model of families and communities (made up of extended families) has been a fundamental element in sustaining society for thousands of years, Parental Equality would not like to see a watering down of the emphasis placed on the family as a system.

We do not see any contradiction between that and the enumeration of the rights of individual members within that family. There is another element here which involves the relationship between rights and responsibilities. In some way the Constitution review group seems to suggest that for example, unmarried fathers should have responsibilities to look after their children, but should not be given the commensurate rights to a relationship with those children.

It seems to us that the issue of rights and responsibilities are two sides of the one coin. If a society attaches a responsibility, for example to fathers, without providing them with the commensurate authority of rights to carry out their responsibilities, then the outcome will be destructive. It seems to us that ***the only people who have responsibilities with no rights are second class citizens and effectively slaves.***

All rights go hand in hand with responsibilities. In fact it is only children and individuals within families, who, because of certain disabilities are incapable of looking after themselves, are the only group of people who should have rights without responsibilities for a period of time. Inevitably, as children grow up they should gradually learn to take on responsibility, so that as adults the issue of rights and responsibilities should go hand in hand for them. It seems obvious to us that to provide for a sustainable society, men and women, fathers and mothers should be given rights and responsibilities in equal measure. **Article 42.1** of our Constitution, under the heading of education states, that:

“the state acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right of duty of parents to provide, according to their means for the religious and moral, intellectual, physical and social education of their children.”

In what we believe to be a much stronger version the same sentiment the Irish version of the same Article states that:-

“... agus ráthaíonn (an Stát) gan cur isteach ar chearta doshánnta ná ar dhualgas doshánnta tuistí chun oideachas”

The use of the words ***“gan cur isteach”*** as we understand them actually means ***not to interfere with*** and our interpretation of this is that the sentiment as expressed by the forefathers of our original Constitution was that the state should not interfere with the role of guardians in providing for religious, moral, intellectual, physical and social education of their children.

It would seem that the review group looked at elements of this section which could be extended to the welfare of children as beyond that of pure education. Parental Equality feel that this Article has universal and lasting value. The obvious normality is that a child is more likely to be loved and cared for by the same parents who created that child than by any other elements of society.

In the minority of situations where parents for whatever reason fail to do best for their children to live up to their requirements of Article 42.1, then **Article 42.5** which states that:-

“in exceptional cases where the parents for physical or moral reasons fail in their duty towards their children, the state as guardians of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.”

Surely Article 42.5 which addresses the exceptional cases could be extended to include providing for situations where pregnancy has occurred as a result of rape. This protection, in the minority of situations where parents fail to do their duty taken together with Article 42.1 should make a very powerful core message in terms of the role of parenting.

Instead of being distracted as the review group seem to have been when considering the rights of unmarried fathers, **it is Parental Equality's firm view that fathers and mothers, married and unmarried should, by default, be automatic guardians of their children and should both be invested with equal legal guardianship rights.**

Discrimination against fathers

As mentioned earlier in relation to Article 40.1 which on the face of it purports to treat all citizens equally, but in its sub-clause actually allows the state to discriminate against certain citizens based on their social function. Parental Equality have a major concern in relation to how this Article has and could be utilised to discriminate against fathers as mentioned by the Constitution review group in the case *Dennehy Vs the Minister for Social Welfare 1984*, where Barron J., used Article 41.2 to support his conclusion that failure of the state to treat deserted husbands in the same way as deserted wives, for the purposes of social welfare, was justified by the proviso of Article 40.1 in terms of the recognition of a difference in capacity and social function.

Given the changes since the European Union directive on Equality in 1975 and how the issue of Gender Equality has been mainstreamed, legislated for under equal status acts etc, ***Parental Equality submit that Article 40.1 should be further modified to ensure that the state has no right to discriminate between men and women, in terms of them playing their role as parents of their children.***

Shared Parenting and Joint Custody

Since 1992 Parental Equality have been espousing and promoting the concept of shared parenting and joint custody were relationships break down. Almost every act of social policy over the last twenty years has promoted a culture, where relationships breakdown, of driving divisions between mothers and fathers, of promoting (both culturally and statutorily through social welfare payments etc. on a discriminatory basis) a model of sole custody to the mother and limited access

to the father. The irrefutable and consistently emerging evidence about the outcome of this model is moving towards the American and English experience, of 50% of children losing contact with their fathers within two years of relationship breakdown, of ever spiralling costs to the exchequer of supporting one parent families and in so many other areas of provision of state resources, whether through education, mental health, criminal justice system, etc. The fallout from the experience of children growing up in homes without fathers must surely challenge the total strategy, trajectory and direction of our social policies.

On the face of it, this would seem that Article 42.1 (which recognises fathers as inalienable joint guardians of their children), would provide a safe environment for fathers and ensure that in the family courts their role as equal parents of their children would be respected. However the reality of the experience of fathers in the family law courts is invariably different. Parental Equality do not feel there is a requirement for anything other than a strengthening of **Article 42.1** to cover welfare as well as education and then ensuring that unmarried fathers are given the same rights as unmarried mothers.

However all of these rights are meaningless within the context of the abuse of **Article 34.1** mainly in the area of the abuse of the In Camera secret Family Law System. Article 34.1 states that:-

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

When the constitution was originally established in 1937 the level of marital breakdown in Ireland was almost non existent. The level of activity in the Family Law Court was almost unheard of. Quite apart from anything else, the sums of money involved made it almost inaccessible to the vast majority of the population. From our understanding of the Denham review of the courts system a few years ago it was then established that over 20% of all civil law cases were made up of family law. **How anybody can continue to suggest that this massive amount of activity in the courts system constitutes ‘special and limited cases’ seems astounding!** Parental Equality have for over a decade campaigned for the revocation of the In Camera rule as implemented in the Irish Courts system.

While some elements of change were due to come into force at the end of March 2005 in relation to the supposed relaxation of the In Camera court rules, a closer reading by interested lay litigants and members of the public actually show a completely different view. Far from creating a transparent accountable legal system, the modifications are carefully worded to ensure even greater protection for the professional classes who operate within the courts system.

We note that the modifications to the In Camera rule were voted on by the Oireachtas and we question the technical “competence” of the elected Dail representatives to make informed decisions about any aspect of the Family Court System, given that due to the In Camera rule, even elected members of the Dail and Seanad are not entitled to know anything about the details of what goes on within the Family Courts System.

So all of the modifications on which they were voting, they were voting on in total ignorance, or else they were secretly breaking the In Camera rule, by discussing the contents of family law cases with participants in these cases.

As a result of the black hole of information about what actually goes on in the regulation of Family Law in our courts, there is, by definition, no quality control system in place. The consistent

discrimination against fathers in terms of child custody and access, whether they be married and separated fathers or unmarried fathers is propagated and protected by secrecy.

It is Parental Equality's belief that with proper accountability and transparency in place, of what goes on in the Family Courts, then the rich and lasting values that are invested in Articles 42.1 of the constitution would inevitably win out, as the moral pressure from the public at large, who we believe are fundamentally fair minded, would bring about a holistic and natural balancing in terms of the treatment of fathers and mothers in the courts.

Therefore it is imperative that in order for any successful and sustainable regulation of family, marital and parenting matters that there is a fundamental shift in the wording and application of Article 34. A good starting position would be:-

- a) to write into the constitution the clear and fundamental requirement that the contents, evidence and decisions of all courts and hearings are accurately and properly recorded;
- b) that all judgments are made public;
- c) that rationales for making such judgments must be recorded and stated on the public record and that all such judgments are traceable back to the original evidence given in the courts.

The technology for implementing this requirement is readily available and, with advances in technology, will become much easier and cheaper to implement at a very secure level.

For over a decade now the Irish constitution has been modified such that courts can now grant a dissolution of marriage through divorce. In **Article 41.3.2** a divorce may only be granted where:-

“the court is satisfied that... such provision as the court considers proper having regard to the circumstances which exist or will be made for the spouses, any children of either or both of them and any other person prescribed by law”

and that this requirement is met before a divorce is granted.

The existence of divorce fundamentally changes the concept of marriage. From the period of 1937 when the first constitution was enacted up to the introduction of divorce, a man and women who were getting married were giving a life long undertaking, a contract which is indissoluble and would only terminate on the death of one or the other of the parties. Since the introduction of divorce the marriage contract has fundamentally changed, in that now when a man and women get married, they are only committing to remain married to the other person for effectively as long as it suits both parties. If either one or both of the parties are unhappy with that relationship and wish to terminate the marriage through divorce, they can do so, providing they meet certain achievable criteria (and we understand that Brussels 2 shortens the time required even further)

Whereas in the years of marriage-before-divorce there was much more security for both parents, in terms of the expectation for a continued relationship with their children, even in a situation where they were separated. Compare that to a situation now where a couple have been married for a few years or they have had children, providing they have satisfied the four year requirement prior to divorce, they can divorce and either or both members of that marriage can remarry other people.

It is perfectly possible that over a normal sexually reproductive lifecycle a man or a woman could be married 3 or 4 times and have a multiplicity of children in different situations. Under these circumstances the security of the continuity of the relationship particularly between fathers and their children, (in scenarios where the state continues to discriminate against shared parenting and provide statutory and welfare models which force parents down the sole custody / access route) is increasingly under threat.

In order to rebuild the sense of security and confidence which both mothers and fathers would have had in the pre-divorce era, in terms of their expectation of both continuing to be involved with their children for their lifetime and expecting the other partner to also be continually involved with their children, Parental Equality believe that the All-party Oireachtas Committee on the Constitution should seek ways in which to further enhance and strengthen the ethos of Joint Guardianship and Shared Parenting through an expansion of **Article 42.1**.

The wording should be included to explicitly require the state to invoke policies and legislation which would incentivise the sharing of parental care between mothers and fathers and to invoke legislation and policies which are geared to achieving the aspiration of a shared parenting culture within the richness of an extended family.

The rationale for inserting these requirements into the constitution, once again is fundamentally based on the best interests of the children, to ensure their optimum possibility to realize their potential to become viable functional adults, capable of sharing in a community and participating in a sustainable society for generations to come.

It has been the experience of tens of thousands of fathers who have communicated with Parental Equality over the last twelve years, that despite the apparent protections, in terms of justice and equality, in our constitution, that when it came to the practice of the family Law Courts that this expectation of being treated equally, was in fact a joke.

It is therefore imperative that in recognition of the need for the whole family system to be in balance and for every individual's needs in that system to be met, **the constitution needs to be much stronger in its affirmation of the concept of equality of parenting** and of the clarification of the desire and aspiration, that cooperation between mothers and fathers and the support of the state in enabling both of those parents to care for their children in a real and meaningful sense becomes a core value within our constitution.

Conclusion

Finally I would like to thank the All-Party Oireachtas Committee on the Constitution for inviting our submission and on behalf of Parental Equality I would ask that we be given the opportunity to make face to face representations to the All-Party Oireachtas Committee and to reflect with them on various aspects of our submission

Yours sincerely

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