



## **Pre-legislative scrutiny of the general scheme of the 38<sup>th</sup> Amendment of the Constitution Bill**

Thank you for the opportunity to present to you today on this important topic.

Family Carers Ireland (FCI) is a national charity that for 26 years has worked to improve supports, services and recognition for anyone living with the challenges of caring for a family member or friend who is ill, frail, disabled or has mental health difficulties. We have over 4,000 members and operate 20 Carer Resource Centres and almost 100 active Community Groups throughout the country. We also provide in-home respite and homecare throughout the country as an approved HSE provider. This submission is based on our experience of supporting and advocating for Ireland's 355,000 family carers (*CSO Health Survey 2016*).

On the issue of the 38<sup>th</sup> Amendment of the Constitution of Article 41.2 Family Carers Ireland does not support the proposal for repeal simpliciter. We do support the overwhelming consensus that the article should be reworded to make it gender neutral. We also agree with the IHREC that the new wording should reference 'family life' and that such reference should be understood as including a wide range of family relationships and include situations where families do not live in the same home. Finally, and most importantly, we believe that the replacement Article 41.2 should make the recognition and support for unpaid care in the home that is implicit in the current wording explicit in the new wording.

Framing this issue in an international context:

- (i) Ireland is typical of every country in the world in that its health and social care system is predicated on complementary care and support provided through an extended family system; however
- (ii) it is quite unusual in not specifying a constitutional framework around the respective roles of the state and the community in the provision of care.

Family Carers Ireland believes that the overwhelming consensus in Ireland would support a constitutional provision that recognises the family's primary role in provision of care and the state's (self-interested) responsibility to support families in performing this role as well as acting as the provider of last resort where a family is unwilling or unable to perform the role properly.

Our overall preference would be based on the relevant provision (article 67) in the Portuguese constitution (Appendix 1) but we acknowledge that this would not sit comfortably within the current structure of Bunreacht na hÉireann. Therefore we commend the wording proposed by the Constitution Review Group 1996 to the committee and the government i.e. delete 41.2 and replace it with the following:

“The state recognises that 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.”

We would reject the suggestion that the second sentence be moved to Article 45 as we believe it is appropriate to frame the state’s role as a “duty of imperfect obligation” rather than a “guiding principle”. We also believe that this approach is more in keeping with the government’s own national carer strategy (2012).

The existing article 41.2 has included the formula “shall .. endeavour to support” for 80 years and has hardly acted as a magnet for successful litigation or judicial subversion of the separation of powers. Indeed, in the event of a challenge under the proposed wording it would seem reasonable for the state to point out that it spends about €2.5 billion annually on its existing endeavours to support family carers through schemes that are defined in statute. We could be critical of the adequacy and effectiveness of some of this expenditure, particularly the arbitrary pattern of its delivery (a postcode lottery) and the fact that care in the home saves the state well in excess of €10 billion per year, but I struggle to see how any court might conclude that it did not represent a material “endeavour” in most circumstances.

Others have already pointed out in this committee that judiciable rights in the constitution are not absolute. What I haven’t noted in the considerations so far is the point that a right does not have to be enumerated in the constitution to be guaranteed by it. If the government is really worried about unknown risks I venture they are more controlled around the wording we are recommending than they would be around a series of requests to the Supreme Court to affirm one or more unspecified (and therefore potentially unqualified) ‘rights’.

Deletion simpliciter has been described as the “pathway with the fewest risks” and the “safest way forward” – we would argue that deliberately and publicly repudiating the contribution of family care in the home constitutes a much greater risk to society and public policy in the medium term. Ireland faces a significant and rapidly growing demographic challenge – there has been a 36% increase in our older population and a 63% increase in people living with a disability over the past decade. Currently one in 10 people living in Ireland are providing some level of family care – with these demographic changes that figure will need to have increased to 1 in 5 by 2030 if our existing policies are to be sustainable. How will this happen without a clear ‘social contract’ between the state and family carers?

In recent years it has not been unusual to hear leading government figures speak of building “an Ireland which is the best place in the world in which to live, work and grow old”. Where is that ambition hiding in talk of running away from “unintended consequences” in regard to modernising Article 41.2? Do we want to take the pathway of less risk or the right pathway? We should be thinking in terms of “intended consequences” – and these should be to recognise and support care in the home.

**Article 67: Family**

**1.** As a fundamental element in society, the family shall possess the right to protection by society and the state and to the effective implementation of all the conditions needed to enable family members to achieve personal fulfilment.

**2.** In order to protect the family, the state shall particularly be charged with:

- a.** Promoting the social and economic independence of family units;
- b.** Promoting the creation of, and guaranteeing access to, a national network of crèches and other social facilities designed to support the family, together with a policy for the elderly;
- c.** Cooperating with parents in relation to their children's education;
- d.** With respect for individual freedom, guaranteeing the right to family planning by promoting the information and access to the methods and means required therefore, and organising such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned;
- e.** Regulating assisted conception in such a way as to safeguard the dignity of the human person;
- f.** Regulating taxes and social benefits in line with family costs;
- g.** After first consulting the associations that represent the family, drawing up and implementing a global and integrated family policy;
- h.** By concerting the various sectoral policies, promoting the reconciliation of professional and family life.