



Propositions 1-4 on the Protection of Children

The ICCL Position on the Minister for Children's
Proposed Amendments to the Constitution

9 February 2006

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About the Irish Council for Civil Liberties (ICCL)

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone.

Founded in 1976, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. These have included establishing an independent Garda Síochána Ombudsman Commission, legalising the right to divorce, securing more effective protection of children's rights, decriminalising homosexuality and the introduction of multi-ground equality legislation.

We believe in a society which protects and promotes human rights, justice and equality.

What we do:

- Advocate for positive changes in the area of human rights;
- Monitor government policy to make sure that it complies with international standards;
- Conduct original research and publish reports on issues as diverse as equal rights for all families, the right to privacy, police accountability and judicial accountability;
- Run campaigns to raise public and political awareness of human rights, justice and equality issues;
- Work closely with other key stakeholders in the human rights, justice and equality sectors.

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Introduction

This paper is a response to a briefing prepared by the Minister for Children, Mr Brian Lenihan T.D. on proposed amendments for a constitutional referendum. It is the view of the ICCL that the Minister's Propositions only relate to a number of child protection issues arising from case law and to certain adoption matters.

None of the Propositions take adequate cognisance of the UN Convention on the Rights of the Child, 1989 (UNCRC) and they do not include any express rights for children. Moreover, no rationale is provided for maintaining the primacy of the marital family, even though this has consistently caused difficulties in recognising children's rights. Therefore, in the view of the ICCL, this referendum is not about children's rights, rather it is a referendum on the protection of children.

In this paper, the ICCL comments on Propositions 1-4:

- Proposition 1: Rights of Children
- Proposition 2: Protection of Children taken into the Care System
- Proposition 3: Protection of the Best Interests of Children Placed in Care or for Adoption with the Consent of Their Parents
- Proposition 4: Protection of Best Interests in Decision on the Termination of Care

Proposition 5, which raise different issues, is the subject of a separate ICCL paper.

Proposition 1: Rights of Children

Proposition 1 refers to the rights of children. Under this heading, the Minister indicates that it is his and the Attorney General's view that Article 40's personal rights provisions apply to children. The Minister asserts that "these rights which relate to equality and the vindication of personal rights do not need explicit or exhaustive restatement".

The only specific amendment the Minister recommends is to Article 42.5 (see below).

Article 42.5 at present contains an implicit reference to "the natural and imprescriptible rights of the child". The Minister proposes to make this reference explicit through a clear acknowledgement by the State that all children have natural and imprescriptible rights and that all parents have the primary duty to respect these rights.
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The Minister explains that the purpose of this proposed amendment is to give explicit expression to children's rights, "linking those rights to the duty of parents to their children". The Minister asserts that this statement would ensure that the rights of the child, the duties of their parents and constitutional protections would apply equally to all children and would "remove any residual doubt regarding the application of Article 42 to all children which might derive from the State's guarantee to protect the family based on marriage", without amending the concept of the family founded on marriage as the "natural, primary and fundamental unit group of society" (Article 41.1.1).

What will be the practical effect of Proposition 1?

The practical effect of Proposition 1 is that the Constitution will provide that all children have "natural and imprescriptible rights" and that parents have a primary duty to respect these. In reality, this means that if the parents fail to protect children in respect of the specific forms of conduct identified in Article 42 (as amended), it should make it easier for the State to intervene to protect the rights of the child where the family becomes a site of abuse or neglect.

What difficulties does Proposition 1 raise?

Proposition 1 is not a proposed amendment on children's rights, as it only refers to child protection issues. Consequently, the ICCL believes that Proposition 1 is highly problematic for the reasons listed below:

1. THE CONSTITUTION DOES NOT PROVIDE DISTINCT LEGAL RIGHTS FOR CHILDREN

First, it is inaccurate to claim that children can exercise their rights on the same basis as adults under Article 40 of the Constitution. They clearly cannot and this was confirmed in the Baby Ann judgment.¹ Indeed, the whole rationale and purpose behind the UNCRC is to recognise that children require specific and distinct legal protection. Children are in a markedly different situation to adults, as their rights tend to be exercised on their behalf by their family. In other words, they are subject to other people's will. Children are also economically dependent on their families and other actors and this is why they need additional child specific rights which recognise this inevitable imbalance of power. As children mature and develop, their capacity for autonomy increases, hence the UNCRC obliges states to put in place mechanisms which ensure that children are enabled to participate as members of society according to their age and development.

2. UNENUMERATED RIGHTS UNDER ARTICLE 40 ARE INCOHERENT AND INSUFFICIENT TO PROTECT CHILDREN

Second, the ICCL believes that the list of unenumerated rights identified under Article 40 are insufficient to protect children's rights. As recognised by the Ombudsman for Children, there is a lack of clarity about the content and status of unenumerated children's rights.² Indeed, the Constitution Review Group has noted that the "list of unenumerated rights does not in any sense form a coherent code"³ and only reflects particular cases which have come up before the courts. The Constitution Review Group recommends that these rights should be expressly recognised in the Constitution, together with other important rights and suggests relying on international standards as a guide for this endeavour. Further, it is important to remember that the individual rights of the child are often

¹ *N. & anor v HSE & Ors* [2006] IESC 60.

² Here the Ombudsman cites Hogan and Whyte in *JM Kelly: The Irish Constitution*, fourth edition, at p. 1417-1418. The Children's Rights Alliance also calls for express rights for children in the Constitution. Refer to Children's Rights Alliance (2006) *The Constitution and Children*, www.childrensrights.ie

³ Constitution Review Group (1996) *Report of the Constitution Review Group*, Government Stationary Officer, at p. 257.

subordinated by the primacy of the marital family. According to Hogan and Whyte:

The courts have developed a strong presumption that the rights and interests of the child are best served by giving custody to the parent. Unfortunately this approach has, on a number of occasions, led to decisions which arguably did not best serve the welfare of the child.⁴

The recent decision in the Baby Ann case demonstrates the Supreme Court's approach in these matters and highlights the inadequacy of Article 40 to protect children's rights.

3. THE LANGUAGE "NATURAL" AND "IMPRESCRIPTIBLE" IS UNCLEAR AND WILL PRESENT INTERPRETATIVE PROBLEMS FOR THE JUDICIARY

Third, the language of the proposed amendment i.e. "natural and imprescriptible" is unclear and, in the absence of any further guidance, will present interpretative problems for the judiciary. This would seem to be at odds at odds with the Minister for Children's previous statements on constitutional change. For example, at a recent Barnardos conference he said that "the courts deserve clear guidance from us".⁵

4. THE AMENDMENT PRIVATISES RESPONSIBILITY FOR THE WELFARE AND PROTECTION OF CHILDREN

Fourth, the effect of the amendment is to privatise responsibility for the welfare and protection of the family, thus limiting any obligation on the State to provide additional resources for the rights of children. The Irish Government signed and ratified the UNCRC in 1991. The Minister gave an undertaking to the UN Committee on the Rights of the Child that he would review the Constitution to look at improving children's rights. However, the Minister's propositions do not include any of the principal provisions on children's rights from the UNCRC. For example:

⁴ Hogan, G. W. and Whyte, G. F., *ibid*, at p. 1921.

⁵ Address by Mr Brian Lenihan, T.D., Minister for Children, Barnardos conference on "Children's Rights and the Constitution", 6 November 2006.

- Equality and Non-Discrimination: Article 2.1 of the UNCRC provides that government agencies shall respect and ensure the rights of all children without discrimination, irrespective of the child's or his/her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Article 2.2 requires government agencies to take appropriate measures to protect children against all forms of discrimination. Existing constitutional provisions on equality before the law (Article 40.1) compare unfavourably with Article 2 of the UNCRC. In effect, Article 40.1 **only prohibits arbitrary or invidious discrimination**, it arguably applies only to citizens and includes no explicit provisions outlawing discrimination on any ground against children. Its flaws have been catalogued by the Constitution Review Group, which recommended a complete overhaul of the provision. In addition, jurisprudence under this article is remarkably underdeveloped and since no case law on the subject exists, it has not been established whether discrimination on the ground of age is prohibited. Unless the UNCRC's principle of non-discrimination is incorporated, children's rights to be free from discrimination will not be protected by the Constitution.
- Best Interests of the Child: The best interests formula of Article 3⁶ of the UNCRC is an interpretative principle aimed at reaching the best outcome for children in all actions concerning them. Such a provision is necessary since it directs courts and all other parties involved in the implementation of children's rights to: (a) explicitly consider the manner in which a child's interests are affected by the issues at hand and (b) regard furtherance of the child's best interests as the objective which should be accorded primary weight. The Minister's proposals only take account of the best interests of the child in restricted circumstances, i.e. in decisions on children being placed for adoption (Proposition 3) and on the termination of care (Proposition 4). Therefore, the Minister's proposals fail to respect the scope of Article 3, which makes it clear that in all actions concerning children, the best interests of the child should be a **primary consideration**.

⁶ "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

- Right to Life, Survival and Development: Under Article 3 of the UNCRC, every child has the inherent right to life and the state has an obligation to ensure the child's survival and development. This principle is elaborated further in the provisions of the Convention that safeguard children's socio-economic rights including the right to health⁷, the right to education⁸ and to an adequate standard of living.⁹ The need for inclusion of express protection for children's socio-economic rights is especially acute in light of relevant Irish case law. In *T.D. v Minister for Education and Others*, the Supreme Court overturned (by a 4:1 majority) a High Court order directing the State to adhere to its own time-scales for the building of special care and high-support units for children at risk.¹⁰ Many of the judges accepted that, in principle, the plaintiff's constitutional rights had been violated but nonetheless declined to grant the remedy sought. Such orders were said to fall outside the Court's competence, being exclusively matters for the Government as they implicated expenditure of resources. Insertion of a guarantee along the lines of Section 28 of the South African Constitution¹¹ would grant the Irish courts jurisdiction to remedy breaches of children's socio-economic rights. Moreover, children's socio-economic rights are also material in cases concerning state benefits paid to parents. However, experience before the Irish courts indicates that, in the absence of express constitutional recognition of these rights, judgments can neglect to consider the impact of impugned state policies on children.¹²

⁷ Article 24, UNCRC.

⁸ Article 28, UNCRC.

⁹ Article 27, UNCRC.

¹⁰ The injunction in issue was the culmination of a series of cases involving failure to provide such accommodation; as a result some children had remained homeless, others were placed in temporary accommodation such as B&Bs or sent to units in the UK and further afield, while a number of boys and girls were even detained in adult prisons despite not having committed any criminal offence. In *D.G. v Ireland* (2002) ECHR 447 the ECtHR found that such practices violated Article 5 of the European Convention which safeguards the right to liberty.

¹¹ Refer to Appendix A.

¹² *Lowth v Minister for Social Welfare* [1999] 1 ILRM 5.

- Respect for the Views of Children: Under Article 12 of the UNCRC, States Parties are to assure to children who are capable of forming their own views the right to express those views freely in all matters affecting them with the “views of the child being given due weight in accordance with the age and maturity” of the child. This provision of the Convention encourages adults to listen to and take into account the opinions of children when making decisions about their welfare and other matters. It does not give children authority over adults or interfere with the parents’ rights and responsibilities. However, the Minister’s proposals make no mention of this principle.

5. FAILURE TO AMEND ARTICLES ON THE FAMILY WILL PERMIT DISCRIMINATION AGAINST CHILDREN BORN TO NON-MARITAL FAMILIES

Fifth, the Minister suggests that the proposed amendment in Proposition 1 will “remove any residual doubt regarding the application of Article 42 to all children which might derive from the State’s guarantee to protect the family based on marriage”. As mentioned above, the only practical effect of the constitutional amendment in Proposition 1 is that it should make it easier for the State to intervene when the parents fail in their duty to protect children in the specific ways outlined in Article 42 as amended. However, if Articles 41¹³ and 42.1¹⁴ are left intact, it will be open to the courts to continue to afford constitutional priority to the marital family, thus permitting discrimination against children born outside marriage in all other areas of life. For example, in *O’B v S*¹⁵, the Supreme Court held that exclusion of children whose parents are not married to each other from certain succession rights was permissible in light of the constitutional provisions that protect the position of the marital family. Therefore, constitutional articles on the marital family need to be amended.

¹³ Article 41.1.1 “The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”.

¹⁴ Article 42.1 “The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children”.

¹⁵ [1984] IR 316 (Sup Ct).

ICCL Recommendations

Express Rights for Children in Article 40

- A genuine referendum on children's rights should include proposals to insert express rights for children in the Constitution. Proposals on children's rights should be reflective of the UNCRC. The ICCL believes that the Government should rely on Section 28 of the South Africa Constitution as a guide. **The ICCL believes that express rights for children should be included under Article 40.**

Replace Article 41 and 42.1 with a Broad Definition of the Family

- Articles 41 and 42.1 need to be replaced with a broader definition of the family which recognises the diversity of family life and does not subordinate the rights of children to the rights of the marital family.

Language of Amendments Should Not Rely on Ambiguous Natural Law Terms

- The language of the amendments should be clear and not rely on ambiguous natural law terms. The difficulties with natural law language in judicial interpretation have already been highlighted by the Constitution Review Group.¹⁶

¹⁶ Constitution Review Group, *ibid*, at p. 250.

Proposition 2: Protection of Children taken into the Care System

It is proposed that Article 42.5 will be restated with two additional qualifications.

In exceptional cases, where the parents of any child for physical and moral reasons, fail in their duty towards that child, the State as guardian of the common good, by appropriate and proportionate means shall endeavour to supply the place of the parents but always with due regard for the natural and imprescriptible rights of the child.

The second part of the Minister's proposals relate to the adoption of children in long-term care.

It is proposed to empower the Oireachtas to provide by law for such adoptions where there has been substantial continuity of care and the best interests of the child so requires.

What will be the practical effect of Proposition 2?

The first part of Proposition 2 will allow the State to intervene in the protection of all children and take appropriate and proportionate means to supply the place of parents. Previously, it had been understood that certain elements of Article 42 only referred to the marital family.¹⁷ However, this is restricted to "exceptional cases" where the parents fail for "physical and moral reasons" (this test currently applies). On its face, this would seem to be an improvement given that this article now refers to all children.

The second part of Proposition 2 is a welcome development, given that there are so many children in long-term care who cannot be adopted because of an existing relationship with their natural parents.

¹⁷ *The State (Nicolaou) v An Board Uchtála* [1966] IR 567; *WO'R v EH* [1996] IESC 4, at para 106.

What difficulties does Proposition 2 raise?

There are a number of difficulties with Proposition 2.

First, it does not comply with standards set out in the UNCRC, in particular Article 8 and Article 19, which are much more detailed. For example, Article 19 specifies that:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Proposition 2 maintains the language of Article 42.5 and the terms, “moral” and “physical” reasons, which have posed interpretative problems for the judiciary. Also, Proposition 2 only provides that the State will take “appropriate” and “proportionate” measures in “exceptional cases” and this is not elaborated upon. The amendment could explain in more detail what action the State will take and rely on Article 19 of the UNCRC as a guide.

Second, under Proposition 2, the threshold for taking a child into care will not be lowered. This is confirmed by the Minister in his briefing document on the proposed wording:

The test for family failure remains at the existing threshold; it will neither be easier nor more difficult for a child to be taken into care. The proposed change will not result in any increase in the number of children being taken into care. The proposal will ensure that the response to such family difficulties is proportionate.

The Ombudsman for Children has already pointed out that the courts have developed a very strict test before taking a child into care i.e. “compelling reasons” and “exceptional circumstances”.¹⁸ The Ombudsman recommended that this Article should be amended to expressly recognise the right of the State to intervene in the “best interests of the child”. Recognising that the courts will judge the best interests of the child to be in the marital family, Articles 41 and 42 would also need to be amended.

Third, the fact that Proposition 2 now applies to all children actually raises the threshold of intervention for children born outside marriage. In reality, this means that children of non-marital families will be equally disadvantaged.

Lastly, the ICCL believes that the second part of Proposition 2 on the adoption of children in long-term care is a welcome development. However, we believe that it is important to specify that children in long-term care can be adopted after a reasonable period of time, having regard to the shortness of childhood, for instance, a period of five years.

ICCL Recommendations

Amendment of Article 42.5 to Reflect the UNCRC

- The ICCL believes that Article 42.5 should be amended to reflect Articles 8 and 19 of the UNCRC. The imprecise language “natural” and “imprescriptible” should be avoided and Article 42.5 should specifically state that the State will intervene in the “best interests of children”. This would re-calibrate the standard for state intervention to protect the most vulnerable children.

Children in Long-Term Care – Eligible for Adoption after Five Years

- Children in long-term care should be eligible for adoption after a reasonable period of time i.e. five years. This should be reflected in the constitutional amendment.

¹⁸ Ombudsman for Children (22 December 2006) *Advice of the Ombudsman for Children on the proposed referendum on children’s rights*, Ombudsman for Children, at p. 11.

Proposition 3: Protection of the Best Interests of Children Placed in Care or for Adoption with the Consent of Their Parents

Current care practice permits the voluntary placement in care of any child. **It is proposed to recognise this practice in the Constitution and require that best interests of the child apply to any placement in care.**

Current adoption practice does not permit the adoption of a child of a marriage. It is proposed to make all children eligible for consensual adoption. It is also proposed to require that the best interests of the child apply to any such adoption.

What will be the practical effect of Proposition 3?

The effect of Proposition 3 is that the best interests of the child shall apply to any placement in care, and that all children, even those of married parents should be eligible for consensual adoption. The latter proposal, in particular, is a positive step given the current situation whereby children in long-term foster care who maintain contact with their natural married parents cannot be adopted by the foster family.

What difficulties does Proposition 3 raise?

There are two main issues arising with Proposition 3. First, Proposition 3 provides that “the best interests of the child apply to any placement in care”. Will this apply to separated refugee children under the care of the Health Services Executive (HSE)? There are still a lot of questions to be answered about the HSE’s role in respect of such children and so this constitutional amendment may have no effect here.¹⁹

Second, Proposition 3 may not prevent the Baby Ann case from happening again as it only refers to consensual adoptions. If a child is put up for adoption and his/her natural parents subsequently marry “there is a constitutional presumption that the “best interests of the child” are found within its family”²⁰ i.e. this is the way the courts interpret Article 41 on the marital family.

¹⁹ According to Mooten, N. the HSE have stated that use of difference sections of the Child Care Act 1991 to care for separated children requires specific advice from the Attorney General. See for example, (2006) *Making Separated Children Visible*, Irish Refugee Council: Dublin, at p. 40.

²⁰ Shannon, G. (2005) *Child Law*, Thompspon/Roundhall: Dublin, at p. 306.

ICCL Recommendations

Amendment of Articles 41 and 42.1

- Articles 41 and 42.1 on the family need to be amended to ensure that the best interests of the child are not deemed subordinate to those of the marital family.

Proposition 4: Protection of Best Interests in Decision on the Termination of Care

Proposition 4 concerns children who are placed in foster care for a number of years. Here, the Minister's proposals make clear that the courts need clear guidance as to what principles apply when adjudicating on cases where it is proposed to terminate a care placement.

It is essential that the courts are empowered to make decisions in the best interests of such children and having regard to the need for continuity of upbringing.

What will be the practical effect of Proposition 4?

The practical effect of Proposition 4 is that the courts will be empowered to take account of the best interests of the child when making decisions on the termination of care, paying particular regard to the need for the continuity of their upbringing.

What difficulties does Proposition 4 raise?

While, on its face, it appears that the court will be empowered to take account of the best interests of the child when making a decision on termination of care, again, if a scenario arises where two natural parents marry, the courts may automatically assume that the best interests of the child lie with the marital family. For example, the courts already have regard to the best interests of children, but read the constitutional protection accorded married families as creating a presumption that the best interests of the child are served by an within the marital family.

ICCL Recommendations

Amendment of Articles 41 and 42.1

- Articles 41 and 42.1 on the family need to be amended to ensure that the best interests of the child are not deemed subordinate to those of the marital family.

Appendix A: Text of Section 28, South African Constitution

28. (1) Every child has the right

- a. to a name and a nationality from birth;
- b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
- c. to basic nutrition, shelter, basic health care services and social services;
- d. to be protected from maltreatment, neglect, abuse or degradation;
- e. to be protected from exploitative labour practices;
- f. not to be required or permitted to perform work or provide services that
 - i. are inappropriate for a person of that child's age; or
 - ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be
 - i. kept separately from detained persons over the age of 18 years; and
 - ii. treated in a manner, and kept in conditions, that take account of the child's age;
- h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- i. not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.