Advice of the Ombudsman for Children on the proposed referendum on children's rights

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1. Introduction

In a speech on 3 November, 2006, An Taoiseach stated:

> *"… I believe we should have a constitutional referendum to put the rights of children in a central place in our constitution….I have requested Minister Brian Lenihan to initiate a process of consultation and discussion with the other Dáil parties and with all relevant interest groups in the coming weeks."*[1]

As part of this consultation process and at his invitation, I met with Brian Lenihan, Minister for Children, on 4 December 2006 to discuss the proposed constitutional referendum. At that meeting, I undertook to submit written advice on the matter to the Minister in accordance with Section 7(4) of the Ombudsman for Children Act, 2002. This document sets out my advice.

At the time of writing, it is my understanding that the consultation process is still in train and will continue until mid-January 2007. No firm commitment has yet been given as regards the timeframe for the proposed referendum, however, it is expected that the referendum may be held in advance of the general election.

1 Speech of An Taoiseach on the eve of the 70th Ard Fheis in City West, Dublin, 3 November 2006.

2. Background

Constitutional change aimed at enhancing the protection of children's rights has been called for by many, including the following:[2]

1993 The Kilkenny Incest Investigation Committee[3]

1996 The Constitution Review Group[4]

1998 The UN Committee on the Rights of the Child[5]

2005 The Ombudsman for Children and other organisations in submissions of the All-Party Oireachtas Committee on the Constitution

2006 The All-Party Oireachtas Committee on the Constitution[6]

2006 The UN Committee on the Rights of the Child[7]

2006 An Taoiseach[8]

In addition to my submission to the All-Party Oireachtas Committee on the Constitution in January 2005, I have called for change in a range of other documents, including my report to the UN Committee on the Rights of the Child in April 2006 and my submission to the Joint Committee on Child Protection in August of this year.[9]

2 See Appendix 1 for excerpts from the reports of the bodies listed here.

3 Kilkenny Incest Investigation, Report presented to Mr Brendan Howlin TD, Minister for Health by the South Eastern Health Board, May 1993.

4 Report of the Constitution Review Group, 1996.

5 UN Committee on the Rights of the Child Concluding Observations on Ireland, 1998, CRC/C/15/add.85.

6 The All-Party Oireachtas Committee on the Constitution, Tenth Progress Report, The Family, 2006.

7 UN Committee on the Rights of the Child Concluding Observations on Ireland, 2006 CRC/C/IRL/CO/2.

8 Speech of An Taoiseach on the eve of the 70th Ard Fheis in City West, Dublin, 3 November 2006.

9 Documents available on www.oco.ie

3. Context – current rights protection under the Constitution

Provision is made for the protection of rights in the text of the Constitution and under the doctrine of unenumerated rights whereby rights have been identified by the Courts in case law.

Enumerated rights (rights set out in the Constitution)
The Fundamental Rights provisions in the Constitution are set out in Articles 40 – 44.

General or family rights are provided for under the following Articles of the Constitution:

- Article 40 (personal rights);
- Article 41 (the family);
- Article 42 (education);
- [Note: Article 43 deals with property rights and Article 44 deals with the right to freedom of religion].

See Appendix 2 for the text of these Articles.

Article 42.5 refers to the "natural and imprescriptible rights of the child". However, it is important to note that these rights are referred to in the context of the State supplanting the place of the parents who have failed in their duty.[10]

Unenumerated rights (rights developed in case law)
Under the doctrine of 'unenumerated rights' (i.e. rights not listed in the Constitution) the courts have identified a range of rights in case law. The ones relevant to children are listed below.[11]

10 As pointed out by the Honorable Justice Catherine McGuinness in the report of the Kilkenny Incest Inquiry.

11 The principal cases in which these rights were set out are: Re. JH [1985], in RE. Article 26 and Adoption (Adoption Bill (No 2) [1989], G v Adoption Board [1980] and OG v Eastern Health Board [1998].

The right to:

- life;
- bodily integrity;
- be reared with due regard to his or her religious, moral, intellectual, physical and social welfare;
- be fed;
- be reared and educated;
- have the opportunity of working and of realising his or her full personality and dignity as a human being;
- liberty;
- rest and recreation; and
- follow his or her conscience.

There is a lack of clarity about the content and status of the unenumerated children's rights listed above.[12] In addition, these rights can be subordinated by "family" rights. For example, in what is known as the PKU case (the heel prick case), any (unenumerated) right to bodily integrity the child may have had was superseded by the constitutional presumption that the child's welfare is best met within, and via decisions made by the marital family.[13]

The deficiencies in constitutional protection for children were acknowledged by An Taoiseach when he stated, "It appears increasingly clear that the inadequate recognition in our constitutional law of the rights of children as individuals has to be addressed. That is an essential first step in creating a new culture of respect for the rights of the child."[14]

12 See JM Kelly: The Irish Constitution, GW Hogan and GF Whyte, Fourth Edition at page 1417 – 1418.

13 North Western Health Board v. H.W. [2001] 3 IR 622.

14 Speech of An Taoiseach on the eve of the 70th Ard Fheis in City West, Dublin, 3 November 2006.

4. Advice in relation to the proposed constitutional referendum

It is my view that changes must be made to Articles 40, 41 and 42 of the Constitution in order to provide for express protection of the rights of children in the Constitution.

As regards the substance of those changes, I consider that we must be guided by the UN Convention on the Rights of the Child as regards both the approach to change and the wording to be proposed. Accordingly, my substantive advice on the changes I would like to see, as set out below, is rooted in the UN Convention on the Rights of the Child (CRC). In my advice, I have adhered to my statutory role to provide advice on any matter concerning the rights and welfare of children including the probable effect of legal change as set out in Section 7(3) of the Ombudsman for Children Act, 2002. I have confined myself to this role and do not propose any wording in this document.

The proposed referendum presents a real opportunity for the State to incorporate some of the key provisions of the CRC into the Constitution. Below, I set out the key CRC provisions which should be incorporated into the Constitution. I then deal with how these provisions might be incorporated into Articles 40, 41 and 42 in turn.

3.1 Status and relevance of the UN Convention on the Rights of the Child

The State has ratified the CRC but has not incorporated it into domestic law. This means that it is not a part of domestic law. However, the Vienna Convention on the Law of Treaties provides that once a State has signed up to an international treaty, it must comply with the terms of the Treaty in good faith.[15] The State has therefore committed to act in compliance with the CRC.

The Minister for Children noted the specific relevance of the CRC to the status of children under the Constitution during the examination of the State's Second Report to the UN Committee on the Rights of the Child in September 2006 in Geneva, when he undertook to conduct an Article by Article review of the Constitution through the lens of the CRC. I understand that this review is now complete and welcome the Minister's initiative.

Others have alluded to the specific relevance of the CRC in respect of the constitutional status of children including the Constitution Review Group and the Kilkenny Incest Investigation Committee which stated in its report, "We do not ourselves feel competent to put forward a particular wording and we suggest that study might be made of international documents such as the UN Convention on the Rights of Child".[16]

15 Vienna Convention on the Law of Treaties, Article 26 *'pact sunt servanda'* and see Part III of the Treaty generally.

16 Kilkenny Incest Investigation Report p96.

It is also worth bearing in mind that the CRC is the most widely accepted international human rights treaty. It embodies accepted international standards and principles including the recognition of children as individual rights holders and the best interests rule. In addition, although the CRC is not part of our domestic law, the European Convention on Human Rights has been given further effect in our domestic law since December 2003. The European Court of Human Rights looks to the CRC when making decisions regarding children. Irish courts can now take account of judgments of the European Court of Human Rights (which in turn takes account of the CRC). This indirect link to our legal system should also be kept in mind.

3.2 The umbrella provisions of the CRC – best interests rule, right of non-discrimination, family rights and the right to participation

Articles 1-5 set out what are known as the umbrella provisions of the CRC. They set the context for the implementation and understanding of the substantive rights set out in the CRC. In other words, Articles 1-5 are interpretive tools for the rights set out in the CRC. See Appendix 3 for the text of Articles 1-5.

Of particular relevance here are Articles 2, 3 and 5. It is my view that the substance of these Articles should be incorporated into the Constitution. Article 2 prohibits discrimination, Article 3 sets out the best interests rule and Article 5 provides for parental guidance and the child's evolving capacities.

In addition to the 'umbrella provisions' construct, the UN Committee on the Rights of the Child has deemed Articles 2, 3 and 12 of the CRC to be general principles of fundamental importance relevant to all aspects of the implementation of the CRC and to the interpretation of all other Articles. In light of this, I consider that Article 12 of the CRC, which deals with participation rights, should also be incorporated into the Constitution.

(a) Best interests rule – Article 3 CRC

The basic premise of the CRC, taken as whole, is the application of its provisions with the best interests of the child constantly in mind.

The best interests rule is set out Article 3 of the CRC:

> *"In all actions concerning children, the best interests of the child shall be a primary consideration"* (emphasis added).

In addition to Article 3, the best interests provision is set out in other articles of the CRC. In these contexts, the best interest principle is expressed in stronger terms – as a necessary requirement or as the paramount consideration:

- Article 9.1 (child protection) states a child shall not be removed from its family unless it is necessary for the best interests of the child;
- Article 9.3 (custody) states a child can maintain contact with both parents except if it's contrary to the child's best interests;
- Article 18.1 (parental decision making) states that parents have the primary responsibility for bringing up the child and that the best interests of the child will be their basic concern;
- Article 20.1 (deprivation of family environment) refers to situations where a child cannot be allowed to remain in a family in its own best interests;
- Article 21 (adoption) states that, in adoption systems "the best interests of the child shall be the paramount consideration";
- Article 37(c) (deprivation of liberty) states a child in detention shall be separated from adults unless it is in the best interests of the child not to do so; and
- Article 40(2)(b)(iii) (criminal proceedings) sets out a right to have parents present in court, unless it would be considered in the child's best interests for them not to be there.

The best interests rule is a procedural rule, it governs how we go about decision-making with regard to children. It is a legally binding rule that states must follow. The rule doesn't state that children's interests always come first. The aim of the rule is not to encroach on the rights of others, but to facilitate an examination of the interests of a vulnerable group. Article 3 places the burden on governments/decision-makers to show why a child's best interests should not be followed (this is part of their obligation to consider a child's best interests).[17]

A child's best interests should be considered in relation to all actions concerning them, that is when the action directly affects them or regards or touches them.

17 Alston in Ayotte, Wendy p6 "Canada's Children", newsletter of the Child Welfare League of Canada, Winter 2001, pp4-11.

In general, the CRC does not specifically define "best interests". However, there is purpose to this lack of specificity – it allows for an appropriate balancing of considerations within a well defined procedural framework. The CRC does define best interests in some specific instances as set out below:[18]

1. In the case of actions and decisions affecting an individual child, it is the best interests of that individual child which must be taken into account;
2. It is in a child's best interests to enjoy the rights and freedoms set out in the CRC. For example, it is in children's best interests to develop respect for human rights and for other cultures (Article 29.1(b) and (c)). It is in a child's best interests to maintain contact with both parents in most circumstances (Article 9.3);
3. It is in the best interests of indigenous children to be raised in the indigenous community (Articles 5, 8.2 and 30);
4. A child capable of forming a view on his or her best interests must be able to give it freely and it must be taken into account (Article 12); and
5. Parents have primary decision-making responsibility on behalf of their children (Articles 5 and 18.1) but, if they fail to make the child's best interests a basic concern, the State may intervene to protect those interests (see Article 9.1 for example).

(b) Prohibition of discrimination – Article 2 CRC

Article 2 of the CRC prohibits discrimination on the grounds "of the child's or his or 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".

The UN Committee on the Rights of the Child has stressed the need for an active approach to the implementation of this Article and has stated that it must be vigorously applied.[19] It has also identified non-marital children as one of the grounds envisaged by the words 'other status' in Article 2.[20]

18 Australian Human Rights and Equal Opportunities Commission, Human Rights Brief No1, www.hreoc.gov.au

19 See Implementation Handbook for the Convention on the Rights of the Child, UNICEF, 2002, at p22.

20 Ibid.

(c) Family rights – parental guidance and the child's evolving capacities – Article 5 CRC

The CRC is consistent with the Constitution in terms of its presumption that the family environment is the optimal environment for a child's growth and wellbeing. The Preamble to the CRC states:

> *"Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.*
>
> *Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".*

Article 5 gives effect to the approach set out in the preamble. It provides for a flexible definition of family, for parental responsibilities, rights and duties and for the evolving capacities of the child. It also clearly identifies the child as an individual rights holder emphasising the exercise by the child of his or her rights.

The condition of childhood means that very young children will have to depend on others to provide, protect and enforce their rights. This factor does not negate their claim to individual rights. There is a distinction between possessing a right and exercising a right. Young children possess rights that their parents may exercise on their behalf and that they will exercise when capacity allows.

This approach is carried through in the other substantive provisions of the CRC. The CRC notes that the parents or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development (Article 27).

Article 18 states that State Parties must ensure recognition of the responsibilities of parents and that the State must assist parents. The obligation to assist goes further than raising the child, the State must assist parents in providing guidance in the exercise by the child of her rights.

It is worth noting that the European Convention on Human Rights (ECHR) also recognises the right to family life (Article 8). There is a right of parents to be with their children and a

right of children to be with their parents. Both the CRC and the ECHR recognise that family rights can be limited where necessary to protect the rights of the child. However, the State's role is to supplement rather than supplant the family. See for example Article 27(3) of the CRC which talks about the role of the State to support families.

International recognition of the importance of the family was again set out in the recently adopted Recommendation of the Council of Europe's Committee of Ministers to Member States on policy to support positive parenting.[21]

There is evidence that the family provides the best environment for children to grow up in and international human rights standards provide a framework for the promotion of this optimal environment.[22]

(d) Right to participate

Article 12 is a procedural right which must be complied with. Where a child will be affected, the decision-maker must allow the child to be heard and must take those views into account in line with capacity.

The best interests rule requires the involvement of children where possible (in accordance with capacity) because best interests cannot be ascertained unless the child's perspective is taken into account.[23]

3.3 Article 40: personal rights

Article 40 of the Constitution sets out a number of personal rights including; equality, liberty, freedom of expression, freedom of assembly and freedom of association. Article 40.3 provides that the State "guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen".

Article 40 does not make any specific references to the rights of the child and although some specific children's rights have been identified by the Courts under Article 40.3, these unenumerated rights are unclear and open to diverging interpretation by different judges.

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21 Recommendation Rec (2006)19 of the Committee of Ministers to Member States on policy to support positive parenting, 13 December 2006.

22 See the conclusion at page 11 below.

23 Tara Collins and Senator Landon Pearson, Personal Representative of the Prime Minister (of Canada) to the UN Special Session on Children, Discussion paper.

The unsatisfactory nature of Article 40 and the case law developed under it is an issue the Minister for Children has commented on:

> *"The distinct status of the Child is somewhat understated in our Constitution. This reflected contemporary attitudes in 1937. It has meant that the courts have been required to develop constitutional norms in this area without clear guidance from the people who are, after all, the ultimate legislators. The courts deserve clear guidance from us".*[24]

As outlined at the meeting with the Minister for Children on 4 December, it is my view that the three umbrella provisions of the CRC listed above (Articles 2, 3, and 5) together with Article 12 of the CRC, should be incorporated into Article 40 of the Constitution. An exact literal incorporation is not required. What is required is that the essence of the provisions be incorporated into Article 40 in a wording which will give express provision for the rights of the child.

I recommend that this opportunity be taken to incorporate these CRC provisions into Article 40 as follows:

- A provision that in all actions concerning children, the best interests of the child shall be a primary consideration; and
- A provision setting out express rights for children to include: the right to freedom from discrimination, the right to participate in all matters affecting the child and the right to family care or to appropriate alternative care when removed from the family. This provision could be modelled on Chapter 2, Section 28 of the South African Constitution (as recommended by the Law Society Law Reform Commission).[25]

As regards non-discrimination in particular, it is my view that a clear statement of the prohibition of discrimination is required. The equality guarantee set out in Article 40.1 of the Constitution is limited with regard to "differences of capacity … and social function". As such, this wording may allow for differential treatment of children that would not be in compliance with the terms of Article 2 of the CRC.

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24 Address by Mr Brian Lenihan, TD, Minister for Children, Barnardos Conference on 'Children's Rights and the Constitution', 6 November 2006.

25 See appendix 2 for Chapter 2, Section 28 of the South African Constitution.

3.4 Articles 41 and 42

Articles 41 and 42 of the Constitution deal with the rights of the family. The courts have held that these Articles apply only to the marital family.[26]

At the outset, I wish to state that my Office supports the family as the best environment for a child to grow up in. As noted in the conclusion below, there is evidence for this assertion and international human rights conventions such as the CRC and the ECHR support this approach and provide a framework for the support of families through law, policy and practice.

It is my view that changes should be made to Articles 41 and 42 to ensure that:

- in all actions concerning them the child's best interests are considered;
- children are not discriminated against on the basis of the marital status of their parents; and
- an adequate child protection regime is provided for.

(a) Status of the marital family – best interests

Articles 41 and 42 establish the constitutional presumption that the welfare of the child is best met within the marital family. This presumption is so strong that, in the context of the marital family, a child's best interests may not specifically be examined by courts. It is presumed that those rights will be best met within the marital family.[27] It is only where the presumption in favour of the marital family has been rebutted or where the marital family does not exist that a Court can have regard to the interests or rights of a child.[28]

As pointed out in the Kilkenny Investigation Report, the constitutional presumption renders it constitutionally impermissible to regard the welfare of the child as the first and paramount consideration in any dispute as to its upbringing or custody between the parents and third parties such as the HSE without first bringing into consideration the constitutional rights of the family.[29]

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26 Murray v Ireland [1985] IR 532.

27 See N v Health Services Executive [2006].

28 For example, in respect of a non-marital child the Guardianship of Infants Act, 1964 applies. This states the welfare of the child shall be the first and paramount consideration. For a marital child, the constitutional presumption in favour of the family trumps the 1964 Act.

29 Kilkenny Incest Investigation, Report presented to Mr Brendan Howlin TD, Minister for Health by the South Eastern Health Board, May 1993 at p31.

(b) Status of the marital family – non-discrimination

The constitutional status of the family gives rise to an anomaly whereby children of non-marital families in some instances have greater legal protection than children of marital families. Children of non-marital families can have their interests considered whereas it is presumed that the interests of children of marital families are best met within the family. This situation can and does give rise to different treatment of children from marital and non-marital families.

(c) Status of the marital family – child protection

The threshold for rebutting the constitutional presumption in favour of the marital family in order to address a child protection concern or other matter concerning the best interests of the child is extremely high. The test for rebutting this presumption has been developed in case law and was set out recently by the Supreme Court, in very strict terms, in what has become known as the Baby Anne case.[30] In adjudicating between the competing interests of both couples in the case, the primary consideration for the Court was the constitutional presumption that the welfare of the child is best met within the marital family. This presumption can only be rebutted under the strict terms set out in Article 42.5. of the Constitution.

Article 42.5 states:

> *"In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian 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."*

In deciding whether the terms of 42.5 have been met, the court applies the following test:[31]

1. There must be 'compelling reasons' why the welfare of the child cannot be met in the family. In essence, it must be demonstrated that it would be impossible for the welfare of the child to be met in the family. In assessing the 'compelling reasons' the Court looks at the family and asks whether it would be impossible for the family to provide for the welfare of the child.

30 N. v. Health Service Executive [2006].

31 See N. v. Health Service Executive [2006].

2. There must be exceptional circumstances where there has been a physical or moral failure of the parents. For the court to find a moral failure, it must find the parents culpable.

In the PKU case (heel prick case), the Chief Justice stated:

> *"The failure of the parental duty which would justify and compel intervention by the State must be exceptional indeed. It is possible to envisage misbehaviour or other activity on the part of parents which involves such a degree of neglect as to constitute abandonment of the child and all rights in respect of it".*[32]

The test does not involve an examination of the rights or interests of the child. Consideration of the position of the child is confined to an examination of its right to belong to a marital family and the marital family's right to provide for the child.

The Baby Anne judgement reflects the unequivocal wording of 41 and 42 (as pointed out by Justice Catherine McGuinness in her judgement). The Articles cannot be said to provide an adequate constitutional child protection framework.

In light of the above, I recommend that this opportunity be taken to incorporate, in general terms, the umbrella provisions of the CRC into Articles 41 and 42 as follows:

- The insertion of a provision into Articles 41 and 42 to the effect that in all actions concerning children, the best interests of the child shall be a primary consideration. Given the status accorded to the marital family in Articles 41 and 42, the best interests rule which I have recommended be inserted into Article 40 should be re-stated in these two Articles.
- The insertion of a provision that, in child protection matters, the best of interests of the child shall be the primary consideration. This would be in line with Section 3 of the Guardianship of Infants Act, 1964 and the CRC (see page 7 above).

32 North Western Health Board v. H.W. [2001] 3 IR 622.

- The description of any rights and duties specified in Articles 41 and 42 should not include the words 'inalienable' or 'imprescriptible'. This recommendation was previously made by the Constitution Review Group. The removal of these words would give recognition to the fact that the Courts have held that rights in Articles 41 and 42 can be limited.[33]
- Article 42.5 should be amended along the lines proposed by the Constitution Review Group, however with a reformulation which does not include any reference to parental failure:

"an amended form of Article 42.5 expressly permitting State intervention either where parents have failed in their duty or where the interests of the child require such intervention and a re-statement of the State's duty following such intervention"

"an express statement of the circumstances in which the State may interfere with or restrict the exercise of family rights guaranteed by the Constitution loosely modelled on Article 8(2) of ECHR".

Conclusion

As regards the status of the marital family, in the work of this Office, my team and myself are mandated to promote the rights of children without prejudice. In so doing, the Ombudsman for Children's Office supports all types and structures of families equally and recognises that, in today's Ireland, family structures can take many forms.

A recent research study, commissioned by the National Children's Office and undertaken by NUIG, sought to determine children's understandings of well-being. They were asked what "makes them well" or "keeps them well". Asked to rate in order of significance, "family" was judged to be the most important. The results indicate strongly the centrality of interpersonal relationships with family for children and young people.

33 See Murray v Ireland, 1985, in which an imprisoned married couple claimed they were denied their family rights by virtue of the lack of conjugal visits. Their claim was rejected, but on an interpretation which deviated from the strict language of Article 41. "It is clear that the exercise by the family of its imprescriptible and inalienable right to integrity as a unit group can be severely and validly restricted by the State when, for example, its laws permit a father to be banned from the family home or allow for the imprisonment of both parents of young children". Costello J.

These results are borne out in the experience of my Office through our direct contact with children and young people; through participatory work and a proportion of complaints, which come directly from children. They seek support for their families, even in the most difficult of circumstances they ask for help for their family. This has consistently been expressed as a supplementing rather than supplanting of their family responsibilities.

If we are to genuinely respect the rights of children in Ireland, we will need to recognise them as individual rights holders, neither possessions of family or State. While there continues to be debate about the definition of the family, in giving this advice, I acknowledge that there may not be consensus on the issue but that the changes I have recommended could substantially enhance the protection of children in the State.

Appendix 1

Excerpts from reports recommending constitutional change

1. Kilkenny Incest Investigation Report 1993[34]

"We have referred to the importance of Articles 41 and 42 of the Constitution and the effect which they have had both on the interpretation of the law and on the framing of legislation in regard to children. While we accept that the courts have on many occasions stressed that children are possessed of constitutional rights we are somewhat concerned that the "natural and imprescriptible rights of the child" are specifically referred to in only one sub article (Article 42.5) and then only in the context of the State supplying the place of parents who have failed in their duty.

We feel that the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the rights of parents that to the rights of children. We believe the Constitution should contain a specific and overt declaration of the rights of born children.

We therefore recommend that consideration be given by the Government to the amendment of Articles 41 and 42 of the Constitution so as to include a statement of the constitutional rights of children.

We do not ourselves feel competent to put forward a particular wording and we suggest that study might be made of international documents such as the United Nations Convention on the Rights of the Child."

2. Report of the Constitutional Review Group, May 1996

Recommendations

1. All family rights, including those of unmarried mothers or fathers and children born of unmarried parents, should nowbe placed in Article 41.
2. Delete existing Articles 41.1.1°, 41.1.2°, 41.2.1°, 41.2.2° and 41.3.1°.
3. The description of any rights or duties specified in Articles 41 or 42 should not include adjectives such as 'inalienable' or 'imprescriptible'.
4. A revised Article 41 should include the following elements:
    i. recognition by the State of the family as the primary and fundamental unit of society

34 Kilkenny Incest Investigation, Report presented to Mr Brendan Howlin TD, Minister for Health by the South Eastern Health Board, May 1993 at p.96.

ii. a right for all persons to marry in accordance with the requirements of law and to found a family

iii. a pledge by the State to guard with special care the institution of marriage and protect it against attack subject to a proviso that this section should not prevent the Oireachtas from legislating for the benefit of families not based on marriage or for the individual members thereof

iv. a pledge by the State to protect the family based on marriage in its Constitution and authority

v. a guarantee to all individuals of respect for their family life whether based on marriage or not

vi. an express guarantee of certain rights of the child, which fall to be interpretated by the courts from the concept of 'family life', which might include:

    a. the right of every child to be registered immediately after birth and to have from birth a name

    b. the right of every child, as far as practicable, to know his or her parents, subject to the proviso that such right should be subject to regulation by law in the interests of the child

    c. the right of every child, as far as practicable, to be cared for by his or her parents

    d. the right to be reared with due regard to his or her welfare

vii. an express requirement that in all actions concerning children, whether by legislative, judicial or administrative authorities, the best interests of the child shall be the paramount consideration

viii. a revised Article 41.2 in gender neutral form which might provide. The State recognises that home and family life give society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home

ix. an amended form of Article 42.5 expressly permitting State intervention either where parents have failed in their duty or where the interests of the child require such intervention and a re-statement of the State's duty following such intervention

x. an express statement of the circumstances in which the State may interfere with or restrict the exercise of family rights guaranteed by the Constitution loosely modelled on Article 8(2) of ECHR

xi. retention of the existing provisions in Article 41.3.3° relating to recognition for foreign divorces.

3. UN Committee on the Rights of the Child[35]

Concluding Observations on Ireland's First Report: 1998

24. The Committee recommends that the State Party take all appropriate measures to accelerate the implementation of the recommendations of the Constitutional Review Group for the inclusion of all the principles and provisions of the Convention and the implementation of the Child Care Act of 1997, thereby reinforcing the status of the child as a full subject of rights.

25. In view of the fact that the Convention can only be referred to before the courts as a means of interpretation of national legislation, the Committee recommends that the State party take further steps to ensure that the Convention is fully incorporated as part of the domestic law, taking due account of its general principles as defined in Article 2 (non-discrimination), Article 3 (best interests of the child), Article 6 (right to life, survival and development) and Article 12 (respect for the views of the child).

Concluding Observations on Ireland's Second Report, 2006

6. While welcoming various measures taken to follow-up and implement the Committee's previous ConcludingObservations, the Committee regrets that some of the concerns expressed and recommendations made have not yet been fully addressed, in particular those related the status of the child as a rights-holder and the adoption of a child rights-based approach in policies and practices.

7. The Committee urges the State Party to make every effort to address the recommendations issued in the concluding observations on the initial report which have not yet been fully implemented, and to address the list of concerns contained in the present concluding observations related to the second periodic report.

35 UN Committee on the Rights of the Child Concluding Observations on Ireland, 1998, CRC/C/15/add.85, and UN Committee on the Rights of the Child Concluding Observations on Ireland, 2006 CRC/C/IRL/CO/2.

22. The Committee notes that steps have been taken in some areas to ensure respect for the best interests of the child, yet remains concerned that the principle is still insufficiently addressed.

23. The Committee recommends that the State party:

    a. Ensure that the general principle of the best interests of the child is a primary consideration without any distinction and is fully integrated into all legislation relevant to children; and

    b. Ensure that this principle is also applied in all political, judicial and administrative decisions, as well as projects, programmes and services that have an impact on children.

25. In light of Article 12 of the Convention, the Committee recommends that the State party:

    a. Strengthen its efforts to ensure, including through Constitutional provisions, that children have the right to express their views in all matters affecting them and to have those views given due weight in particular in families, schools and other educational institutions, the health sector and in communities.

4. The All-Party Oireachtas Committee on the Constitution, 2006[36]

A new clause should be inserted in Article 41 dealing with the rights of children as follows:

> *"All children, irrespective of birth, gender, race or religion, are equal before the law. In all cases where the welfare of the child so requires, regard shall be had to the best interests of that child."*

36 The All-Party Oireachtas Committee on the Constitution, Tenth Progress Report, The Family, 2006.

5 Law Society Law Reform Commission, 2006[37]

"We recommend that a provision similar to Chapter 2, Section 28 of the South African Constitution be inserted into the Irish Constitution."

It provides:

"Every child has a 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 form 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.

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

37 "Rights-based Child Law": The Case for Reform", A Report by the Law Society's Law Reform Committee, March 2006.

6 An Taoiseach[38]

> "My priority is to find a wording for our Constitution that will reflect the desire of the Irish people to establish robust safeguards for the rights and liberties of all the children of our nation."

"I believe that the fundamental law of our land, the Constitution, should fully reflect our commitment to valuing and protecting childhood. I believe we should make provision in our Constitution for children to be **protected from maltreatment, neglect or abuse**. I would also like to see the Constitution have a specific provision which requires that **in relevant circumstances, the welfare of the child should be the paramount consideration**. And we need to **explicitly set out rights of the child in our Constitution.**

38 Speech of An Taoiseach on the eve of the 70th Ard Fheis in City West, Dublin, 3 November 2006.

Appendix 2

Excerpt (of relevant sections and sub-sections) from the Constitution of 1937

Fundamental Rights

Personal Rights

Article 40

1. All citizens shall, as human persons, be held equal before the law.

   This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

3. 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

4. 1° No citizen shall be deprived of his personal liberty save in accordance with law.

5. The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.

6. 1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality:

   i. The right of the citizens to express freely their convictions and opinions.

   ii. The right of the citizens to assemble peaceably and without arms.

   iii. The right of the citizens to form associations and unions.

The Family

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.

   2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

   2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

Education

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.
2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.
3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

   2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.
4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.
5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian 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.

Appendix 3

Articles 1 to 5 and 12 of the UN Convention on the Rights of the Child (CRC)

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or 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.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. 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.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.