

Report to the Oireachtas on the
Twenty-Eighth Amendment of the Constitution Bill 2007

March 2007

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1. Background

In a speech on 3 November, 2006, An Taoiseach announced his intention to hold a referendum on children's rights and that he had requested the Minister for Children, Brian Lenihan, to initiate a process of consultation and discussion with the other Dáil parties and with all relevant interest groups.¹

As part of this consultation process, and at his invitation, I met with the Minister for Children on 4 December 2006. On 22 December 2006, I submitted my written advice on the proposed referendum on children's rights to the Minister.² This advice was published on 5 January 2007. An excerpt from the advice setting out my recommendations is appended to this paper at Appendix 1. The full text of the advice is available at www.oco.ie

My advice was prepared and published prior to the circulation of proposed wording for the constitutional referendum. In the document, I set out recommendations for change which are rooted in the UN Convention on the Rights of the Child (CRC). My advice was underpinned by my statutory role to promote the rights and welfare of children, including the principles and provisions of the CRC and how the rights in the CRC can be enforced. My advice was submitted in accordance with 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.

During the first two weeks of February, I responded in writing to two briefing documents circulated to me by the Minister for Children. I also met with the Minister to discuss my views on the first briefing document.

Subsequently, on 19 February 2007, the Twenty-eighth Amendment of the Constitution Bill 2007 was published.

This report sets out my comments on the Bill in light of my advice to Government on this matter of 22 December 2006. I am submitting this report to the Oireachtas further to Section 13(7) of the Ombudsman for Children Act, 2002, which provides for the submission of occasional reports to the Oireachtas.

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

² Advice of the Ombudsman for Children on the proposed referendum on children's rights, 22 December 2006.

2. General comment

The Minister for Children has engaged in a process of consultation on the proposed constitutional referendum with a view to achieving consensus for a wording. I recognise that achieving consensus on a wording relating to this issue is an extremely complex task and welcome the Minister's efforts to consult with all those involved, including my Office.

The Bill contains elements which are progressive in light of the proposals which were first mooted in briefing documents one and two circulated by the Minister. In my responses to these documents I expressed concerns in relation to a number of matters including:

- the proposal to place the proposed provisions relating to children in Article 42.5;
- the linking of children's rights to the primary duty of parents to respect those rights with no obligation on the State to ensure those rights; and
- the limited application of the best interests principle.

I therefore welcome the proposal in the Bill to create a new, free-standing article entitled 'children', the revision of the link between children's rights and parental duties with no reference to the State's obligations to ensure those rights and the extension of the application of the best interests rule as positive developments.

While welcoming these developments, it is my view that the proposals set out in the Bill do not go far enough. They appear to represent a restricted application of the principles of the CRC to the position of children in the Constitution. They do not appear to meet the specific recommendations of the UN Committee on the Rights of the Child set out in its Concluding Observations on Ireland's Second Report issued in September 2006.³³

In its Concluding Observations of September 2006 the Committee recommended that the State:

- undertake further action to incorporate the Convention into domestic law;
- 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;

³³ UN Committee on the Rights of the Child Concluding Observations on Ireland, 29 September 2006, CRC/C/IRL/CO/2.

- ensure that the best interests principle is applied in all political, judicial and administrative decisions, as well as projects, programmes and services that have an impact on children;
- strengthen its efforts to ensure, including through Constitutional provisions, that children have the right to express their views in all matters affecting them; and
- ensure that children are provided with the opportunity to be heard in any judicial and administrative proceedings affecting them, and that due weight is given to those views in accordance with the age and maturity of the child.

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.

While welcoming the attempts undertaken by the Minister for Children to enhance the protection of the rights of children in the Constitution, it is incumbent on me, in light of my Statutory role to promote the rights and welfare of children, including the principles and provisions of the CRC and how the rights in the CRC can be enforced, to set out my comments on the content of the Bill, including the extent to which it complies with the minimum standards set out in the CRC.

3. Placement of the provisions in a new Article 42(A)

The Bill provides for a new Article 42 (A) to follow after Article 42 of the Constitution. This new Article is to be headed "Children".

My understanding is that Article 42 (A) is a new free-standing Article, that is, it is not part of existing Article 42.

Under the new Bill, the fundamental rights provisions of the Constitution would therefore be comprised of:

Personal Rights	Article 40;
The Family	Article 41;
Education	Article 42;
Children	Article 42 (A);
Private Property	Article 43; and
Religion	Article 44.

*My advice of 22 December 2006*⁴

In my advice of 22 December, I recommended changes to Articles 40, 41 and 42 of the Constitution.

I recommended that an express statement of children's rights be set out in Article 40 and that Articles 41 and 42 be amended to provide for protection from discrimination and the consideration of the best interests of children. The reasons for recommending changes to these articles are as follows:

- Article 40 sets out the personal rights provisions under the Constitution. Subsection 3(1) provides "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". This subsection has been used by the Courts to identify unenumerated rights.
- Given both the content of Article 40 and the manner in which it has been used by the Courts, it is my view that this is the optimal place for the insertion of a clear statement of express rights for children.

⁴ Advice of the Ombudsman for Children on the proposed referendum on children's rights, 22 December 2006.

- Articles 41 and 42 deal with the rights of the family. The courts have held that these Articles apply only to the marital family. In practice, these Articles have led to instances of different treatment of children from marital and non-marital families and instances where the best interests of a child could not be given appropriate weight in decision making.
- At the outset of the consultation process, it was understood that a change to Article 41, in particular the interpretation of 'family' as being based on marriage, was not under consideration. In light of this, it was my view that a non-discrimination provision and a 'best interests of the child' provision should be inserted into Articles 41 and 42 to guard against differential treatment between marital and non-marital families and to expressly provide for consideration of the best interests of the child.

Positive aspects

The proposed insertion of a new Article 42(A) into the Constitution is preferable to the previous proposal that Article 42.5 of the Constitution be amended to include the new provisions. I therefore welcome the move away from confining the provisions to the realm of Article 42.5 as previously proposed.

There is potential for the provisions in this new article to be developed by the courts - in particular Articles 42(A)1 and 42(A)2.1 – if it is linked to current Article 40.3.1 (see below).

Aspects of concern

While there is a statement of rights in Article 42(A)1, there is no requisite commitment on the part of the State to defend and vindicate those rights. Had the statement of rights been placed in Article 40, along with an affirmation that the personal rights set out in Article 40 apply equally to children, the statement might have benefited from the State's commitment in Article 40.3.1 to "defend and vindicate" personal rights.

As regards the provision aimed at ending differential treatment between marital and non-marital families in Article 42(A) 2.1, I would query whether this provision can attain its intended effect given that Article 41 remains unchanged. This scheme may not provide the clarity of direction it was hoped the referendum might achieve.

Recommendations

- Words to the effect that the statement of children's rights set out in Article 42(A)1 benefits from the same status as the rights set out in Article 40 might be added to Article 42(A)1.
- In particular, the words should clarify that the commitment to vindicate and defend rights set out in Article 40.3.1 applies equally to the statement of rights in Article 42(A)1 and that the personal rights set out in Article 40 apply equally to children (a point asserted by the Minister for Children and a view ascribed to the Attorney General in briefing documents one and two).

4. Comments on the provisions of the Bill

(i) Article 42 (A) 1

“The State acknowledges and affirms the natural and imprescriptible rights of all children”

My advice of 22 December 2006

In my advice, I recommended the insertion of 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 or appropriate care. I emphasised that a clear statement of non-discrimination was required. As outlined above, I recommended that this provision be inserted into Article 40.

Positive aspects of the provision of the Bill

I welcome the intention to insert a statement of children’s rights into the Constitution. I also welcome that this statement is not attached to the primary duty of parents to respect the rights of children, in the absence of any obligation on the State to ensure those rights, as was previously proposed.

Aspects of concern

The proposed statement of express rights falls short of what I recommended in my advice and falls short of the recommendations of the UN Committee on the Rights of the Child issued in September 2006⁵. My specific concerns in this connection are set out below.

(a) The strength of the statement

The words “natural and imprescriptible rights” have always been in Article 42.5 in the context of the State supplying the place of parents. The courts, in case law, have elaborated upon the unenumerated rights of the child, however, there is no clear agreement in the judicial system or elsewhere as to what the “natural and imprescriptible” rights of the child are.

⁵ UN Committee on the Rights of the Child Concluding Observations on Ireland, 29 September 2006, CRC/C/IRL/CO/2.

(b) Protection of children's rights

In the proposed statement the State "acknowledges and affirms". These words do not include a commitment to ensure the rights of the child.

In briefing document one, it was proposed that the primary duty be placed on parents to respect the rights of the child in the absence of any obligation on the State to ensure those rights. This wording has been reviewed, however it has not been replaced with a duty on the State to ensure the rights of the child. This statement falls short of the level of protection provided in Article 40. Article 40.3.1 provides that the State will defend and vindicate the personal rights of the citizen. There is no equivalent guarantee offered here.

This statement also falls short of the State's obligations under the CRC. The CRC obliges state parties to "respect and ensure" the rights set out in the CRC to all children in their jurisdiction.

(c) Non-discrimination protection

This statement does not include the clear statement of non-discrimination I recommended, in line with our CRC obligations.

(d) Express right to participate

This statement does not include express provision for the right to participate. This lacuna is more significant given the limited application of the best interests rule in the Bill (see below). Factors feeding into the decision-making process of best interests should include both any expression of views by the child and an objective assessment of the child's interests.

It should be recalled that, in September 2006, the UN Committee on the Rights of the Child recommended that the State "strengthen its efforts to ensure, including through Constitutional provisions, that children have the right to express their views in all matters affecting them".

Recommendations

- I recommend that further consideration be given to setting out express rights for children, including; 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 as per my advice of 22 December 2006.
- If further consideration is not being given to setting out express rights, including certain specific rights, then words to the effect that the statement of children’s rights set out in Article 42(A)1 benefits from the same status as the rights set out in Article 40 should be added to Article 42(A)1. In particular:
 - the words should clarify that the commitment to defend and vindicate rights set out in Article 40.3.1. applies equally to the statement of rights in Article 42(A)1; and
 - the words should clarify that the personal rights set out in Article 40 apply equally to children (a point asserted by the Minister for Children and a view ascribed to the Attorney General in briefing documents one and two).

A clarification along these lines would enhance the potential of the statement of rights in Article 42(A)1 to be developed by the courts. It would also clarify the relationship between the rights set out in Article 40 and the statement of rights in Article 42(A)1.

(ii) Article 42(A) 2.1

“In exceptional cases, where the parents of any child for physical or moral reasons fail in their duty towards such child, 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”.

Prohibition of discrimination

Marital and non-marital families are treated differently under our Constitution and in our legal and administrative systems. Article 41.3.1 states “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”. This provision has been interpreted as providing that, under the Constitution, the family is defined as comprising marital families only. Therefore, all references to the family in Articles 41 and 42 are viewed as referring only to the family based on marriage.

The Bill reproduces the existing text of Article 42.5 verbatim save for the insertion of the words “any” child and “such” child in Article 42(A)2.1.

The Government has asserted that the insertion of these words will end different treatment between children from marital and non-marital families.

My advice

In my advice, I acknowledged and understood that, at this time, Article 41 is not under consideration. As such I made two recommendations aimed at enhancing the protection of children from different treatment based on their families’ marital status. I recommended the insertion of a provision setting out express rights for children including the right to non-discrimination. I emphasised that a clear statement of non-discrimination was required. I also recommended the insertion of the best interests rule in Articles 40, 41, and 42 to counter different treatment based on marital status.

Positive aspects

I welcome the Government’s intention to provide for the ending of differential treatment of children from marital and non-marital families.

Aspects of concern

It is suggested that the wording proposed will end different treatment between marital and non-marital families arising from the State’s guarantee to protect the family based on marriage (Article 41.3.1). I am unclear as to how this wording could achieve this effect given that Article 41 will remain unchanged.

In addition, as there is no proposal to change the threshold for state intervention, set out in existing Article 42.5, should this provision have its intended effect and end differential treatment, it may have the unintended effect of placing children of non-marital families in a less advantageous position. This is because, at present, the courts can have regard to the welfare of an infant from a non-marital family as the first and paramount consideration (under Section 3 of the Guardianship of Infants Act, 1964). In respect of children of marital families, Article 42.5 applies and there is a presumption that the best interests of the child lie within the marital family. Therefore, if different treatment of children of marital and non-marital families is ended without a reformulation of Article 42.5, the courts could be further restricted from specifically examining the best interests of a child.

Recommendation

I reiterate my recommendation, set out at 4(i) above that a general right to non-discrimination should be set out in an express statement of rights as per my advice of 22 December 2006. Protection against discrimination should not be confined to the role of the State in child protection as is currently proposed in Article 42(A)2.1.

Role of the State in child protection

The Bill does not propose a change to existing Article 42.5, which sets out the threshold for state intervention, other than the addition in Article 42(A)2.1. of the words "any" and "such" child. The Government has submitted that it does not intend to or wish to alter current Article 42.5

Articles 42(A) 2.2 and 42(A)4 of the Bill propose that the best interests of the child be provided for in limited circumstances and in limited situations by ordinary law (see below). It is suggested by the Government that these proposed changes will provide for consideration of the best interests of the child without altering in any way the State's child protection role set out in Article 42.5.

My advice

I recommended amending Article 42.5 by removing the references to parental failure and inserting an express statement of the circumstances for State support and intervention modelled on Article 8(2) of the European Convention on Human Rights (ECHR) which includes the principle of proportionality.

Aspects of concern

(a) Limited change to Article 42.5

My advice sets out the reasons why I feel that Article 42.5 needs to be reformulated (see my advice of 22 December 2006).

I consider that, should laws be enacted to provide for the consideration of the best interests of the child, the decision making process with regard to State support and intervention set out in this Article could be altered somewhat. However, these laws, if enacted, would still fall short of what I recommended.

(b) Provision for proportionate support and intervention

The Minister for Children's proposal to include the concept of proportionality in current Article 42.5 set out in the first briefing document has not been retained in the text of the Bill. This is very disappointing as it would have gone some way to meet the recommendations set out in my advice and the State's obligations under the CRC and the ECHR.

Recommendation

I recommend that renewed consideration be given to the inclusion of the concept of proportionality in Article 42(A)2.1.as previously indicated by the Minister for Children in briefing document one. Proportionality is a concept which is supportive of families. It comprises an obligation on the State to provide the right level of support at the right time including an inherent emphasis on early support to avoid crises developing.

(iii) Article 42(A) 2.2

"Provision may be made by law for the adoption of a child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child, and where the best interests of the child so require."

This provision of the Bill provides that the Oireachtas may pass law relating to the best interests of children in the specific case of adoption. It is proposed a new law may provide for adoption; (i) where parents have failed, (ii) for a period of time; and (iii) where the best interests of the child so require.

In my advice of 22 December, 2006, I recommended the insertion of a provision in Articles 40, 41 and 42 that the best interests of the child shall be a primary consideration in all matters concerning them and the paramount consideration in child protection matters. My advice sets out a description of the requirements of the best interests rule as per the CRC.

Positive aspects

I welcome the provision that the Oireachtas may provide for the best interests of the child to apply in adoption cases.

I welcome the provisions aimed at improving the situation of children in long term foster care and children involved in court proceedings. This provision may facilitate the enactment of the required reforms in the adoption legislation to free children of marital families in long term foster care for adoption. This is a welcome development.

Aspects of concern

(a) Constitutional insertion of the best interests rule

There is no provision for the direct insertion of the best interests rule into the Constitution.

(b) The use of enabling provisions

The Bill provides that "provision may be made by law". This gives rise to two uncertainties. The first is that the Oireachtas may or may not proceed to legislate in this area. The second is that we are uncertain as to the exact content of any legislation the Oireachtas may choose to enact.

While I fully appreciate the concept of enabling provisions, I would query their use in this particular context. This approach has been used before on two occasions in relation to the Bail and Seanad referenda. It has also been used in relation to the ratification of international treaties. For further information on the use of this approach, see Appendix 3.

In the case of the Bail and Seanad referenda and in the case of the referenda enabling the State to ratify international treaties, there was certainty as to the substance of the proposition being put to the people. As such, this approach was appropriate. In this context however, there are uncertainties with respect to the Bill. As such, I would query the appropriateness of the use of enabling provisions in this Bill when the Government's original commitment was to clarify the status of children as individual rights holders and their position in the Constitution.

(c) Application of the best interests rule

This provision provides only for the possible application of the best interests rule to adoption cases. It should be recalled that, in September 2006, the UN Committee on the Rights of the Child recommended that the State "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" (see section 2 above).

(d) Compliance with the CRC

The CRC requires that, in child protection matters and as regards adoption, the best interests of the child must be the paramount consideration. The proposals fall short of this requirement by adding additional elements (eg parental failure and duration of failure).

Recommendations

I recommend that the best interests rule be directly enshrined into the constitution. If further consideration is not to be given to this recommendation at this time, then, at a minimum, I suggest the following.

- The Bill should state that provision shall be made by law.
- The Bill should comply with the recommendation of the CRC that the State “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”.

(iv) Article 42 (A) 3

“Provision may be made by law for the voluntary placement for adoption and adoption of the child.”

I welcome this provision.

(v) Article 42 (A) 4

“Provision may be made by law that in proceedings before any court concerning the adoption, guardianship or custody of, or access to, any child, the court shall endeavour to secure the best interests of the child.”

I welcome the provision that the Oireachtas may provide for the best interests of the child to be secured by the courts in respect of certain proceedings.

Aspects of concern

My concerns here are the same as my concerns with respect to Article 42(A)2.2. above:

- there is no provision for the direct insertion of the best interests rule into the Constitution;
- the provision is enabling only;
- the application of the best interests rule is limited to specific court proceedings; and
- the requirements of the CRC that the best interests of the child must be the paramount consideration in adoption and child protection matters are not met.

In addition, it should be recalled that, in September 2006, the UN Committee on the Rights of the Child recommended that the State “ensure that children are provided with the opportunity to be heard in any judicial and administrative proceedings affecting them, and that due weight is given to those views in accordance with the age and maturity of the child” (see section 2 above).

Recommendations

My recommendations in respect of this provision are the same as for Article 42 (A) 2.2 above, with one additional point.

I recommend that the best interests rule be directly enshrined into the constitution. If further consideration is not to be given to this recommendation at this time, then, at a minimum, I suggest the following.

- The Bill should state that provision shall be made by law.
- The Bill should comply with the recommendation of the CRC that the State:

“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;”

“ensure that children are provided with the opportunity to be heard in any judicial and administrative proceedings affecting them, and that due weight is given to those views in accordance with the age and maturity of the child.”

(vi) Article 42 (A) 5.1

“Provision may be made by law for the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law.”

I welcome this provision which could facilitate the adoption of legal measures providing for the exchange of so-called ‘soft information’.

Any legal measures providing for the exchange of such measures would need to be tightly drafted and include adequate protection for the rights of those in respect of whom information is shared. Such protections would be required in order to ensure compliance with relevant international and domestic human rights standards including the Constitution and/or the European Convention on Human Rights (ECHR).

(vii) Article 42 (A) 5.2

“No provision in this Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.”

The aim of this provision is to facilitate the restoration of the law on statutory rape similar to that which existed prior to the Supreme Court’s judgement in the CC Case.⁶

I welcome this provision as the reintroduction of an offence of absolute liability in relation to sexual activity with children under the age of consent would limit the possibility that child victims could be exposed to potentially damaging court proceedings - a possibility which exists under the current Criminal Law (Sexual Offences) Act, 2006.

However, I would have concerns that this provision is very widely drawn. It is not limited to sexual offences. This provision does not exclude children from its ambit. Therefore, legislation enacted by the Oireachtas under this provision could provide for the prosecution of children in relation to offences of absolute or strict liability.

Given that I have a statutory mandate to provide advice on the probable effect on children on the implementation of any proposals for legislation, it is incumbent on me to raise a concern as regards the scope, ambit and potential application and impact of any legislation.

⁶ CC v Ireland [2006] IESC 33.

(viii) Article 42 (A) 5.3

“The provisions of this section of this Article do not, in any way, limit the powers of the Oireachtas to provide by law for other offences of absolute or strict liability.”

I reiterate my concerns expressed in 4(vii) above as regards the unlimited scope, ambit and potential application and impact upon children and young people of any legislation enacted pursuant to this provision.

Appendix 1

Excerpt from Advice of 22 December 2006 – Recommendations

Article 40: Personal Rights

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).⁷

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.

Articles 41 and 42

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 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 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 5 above).

⁷ See Appendix 2 for Chapter 2, Section 28 of the South African Constitution.

- 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.⁸
- 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.”

⁸ 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.

Appendix 2

Excerpt from the 28th Amendment of the Constitution Bill, 2007

Part 2 Children

Article 42(A)

1. The State acknowledges and affirms the natural and imprescriptible rights of all children.
2. 1° In exceptional cases, where the parents of any child for physical or moral reasons fail in their duty towards such child, 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.
- 2° Provision may be made by law for the adoption of a child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child, and where the best interests of the child so require.
3. Provision may be made by law for the voluntary placement for adoption and the adoption of any child.
4. Provision may be made by law that in proceedings before any court concerning the adoption, guardianship or custody of, or access to, any child, the court shall endeavour to secure the best interests of the child.
5. 1° Provision may be made by law for the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law.
- 2° No provision in this Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.
- 3° The provisions of this section of this Article do not, in any way, limit the powers of the Oireachtas to provide by law for other offences of absolute or strict liability.

Appendix 3

Information relating to the use of the formulation “provision may be made by law” in previous referenda.

The formulation “provision may be made by law” has been used before on two occasions in relation to the Bail and Seanad referenda.

The Sixteenth Amendment of the Constitution Act, 1996 stated:

“Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person”.

The Seventh Amendment of the Constitution (Election of Members of Seanad Éireann by Institutions of Higher Education) Act, 1979 stated:

“Provision may be made by law for the election, on a franchise and in the manner to be provided by law, by one or more of the following institutions, namely:

- i. the universities mentioned in subsection 1° of this section,*
- ii. any other institutions of higher education in the State,*

of so many members of Seanad Éireann as may be fixed by law in substitution for an equal number of the members to be elected pursuant to paragraphs i and ii of the said subsection 1°.

A member or members of Seanad Éireann may be elected under this subsection by institutions grouped together or by a single institution.

Nothing in this Article shall be invoked to prohibit the dissolution by law of a university mentioned in subsection 1° of this section”.

The words “the State may ratify” were used in the Tenth, Eleventh, Eighteenth, Twenty-third and Twenty-sixth Amendment of the Constitution Acts which enabled the Oireachtas to ratify the Single European Act, Maastricht, Amsterdam, the Rome Statute of the ICC and the Nice treaty respectively. For the sake of completeness, it should be noted that the Third Amendment of the Constitution Act provided that “the State may become a member” of the three founding European treaties and the Nineteenth Amendment of the Constitution Act provided that “the State may consent to be bound by” the Belfast Agreement.

In the case of the Bail and Seanad referenda and in the case of the referenda enabling the State to ratify international treaties, there was certainty as to the substance of the proposition being put to the people. As such, this approach was appropriate. There are uncertainties with respect to the present Bill, in particular, the manner in which the best interests rule will be framed in any future legislation.

As such, I would query the appropriateness of the use of enabling provisions in this Bill the aim of which, it should be recalled, was to clarify the status of children as individual rights holders and their status in the constitutional framework in general.

In addition, my advice to Government was that the best interests rule be enshrined into the Constitution. As such, the enabling provisions proposed fall short of what I recommended.

