



One Family's Submission to the Joint Committee on the Constitutional Amendment on Children May 2008

Background

One Family is working to ensure a positive and equal future for all members of all one-parent families in Ireland – changing attitudes, services, policies and lives. Together with one-parent families and those working with them, we are committed to achieving equality and respect for all families.

In addition to striving for fundamental structural change, we support individual one-parent families as they parent through times of family, work and life change, and those experiencing a crisis pregnancy. We know that every family is unique, and so we work in a family centred way to bring about better lives for parents and children.

Introduction

In general One Family supports the submissions to the joint committee made by the Ombudsman for Children and by the Children's Rights Alliance. One Family is therefore limiting its response to Clause 1 (Article 42(A).1), Clause 2 (Article 42(A) 2.1) and Clause 4 (Article 42(A).4).

Clause 1

The inclusion of an express confirmation of the natural and imprescriptible rights of the child is to be welcomed. We welcome, in particular, the inclusion of "all children", without distinction, a statement that moves some way (though we would submit, not far enough), towards acknowledging the equality of all children.

Some difficulties arise, however, in relation to the content and scope of these "natural rights", a formula that is uncertain and susceptible to subjectivities that are inappropriate in a context as important as that of children's rights. Numerous templates exist – most notably the UN Convention on the Rights of the Child – for the enumeration of specific children's rights.

In particular, there is an opportunity here to acknowledge the socio-economic needs and entitlements of children. Case law on constitutional rights has traditionally privileged civil and political rights over socio-economic needs and entitlements. In the case of children, social and economic needs tend to predominate over civil and political concerns. Given the reluctance of the courts to foreground economic rights, it is unlikely that a general statement as



to natural rights will facilitate the improvement of the condition of very vulnerable children.

A further difficulty may arise. To date, the issue in the courts has not been whether children enjoy natural rights. It is widely and long accepted that children enjoy rights under the Constitution. The crucial question is how these rights rank alongside those of other persons, including the child's parents and the rights of the family as a unit. To date, in the case of the marital child at least, the rights of the child have generally been subordinated to those of the family as a whole, and of its parents in particular. The acknowledgement of children's rights in the proposed Article 42(A).1 adds little light to the debate on the need to prioritise the genuine interests of children.

In relation to Clause 1 we recommend the following changes to the current wording:

- Inclusion of an explicit statement of rights to include right to material well being, right to be heard, right to family life, right to non-discrimination and right to an objective assessment of the child's interests to apply to all children in Article 40, drawing on the principle of proportionate realisation of rights. Such an explicit statement is in our view required to ensure that these rights can be realised and given full effect. We will also call for legislation to establish minimum rights.
- Article 41 and 42 to be amended to include the principle of 'best interests of the child' and of 'non-discrimination', as recommended by the Ombudsman for Children in her report to the Oireachtas in March 2007. We would also recommend that this sentence begin with the following statement: 'notwithstanding any other provision of the constitution'. This is to ensure that the effect of the amendment is as intended, i.e. that all children are treated equally regardless of the marital status of the parents and always in the best interests of the child. We would also call for the best interest of the child to be fully integrated into all legislation affecting children.

Definition of the Family in Article 41

One Family wishes to reaffirm our long term objective of changing the definition of the family contained in Article 41 of the Constitution to ensure equality for all children and their parents. We recognise that the climate for such a change is not there at present.

We therefore recommend that the impact of the current amendment, if passed, on equality between children be closely monitored and that the government make a commitment to revisit this issue if it is found that



inequalities between married and unmarried families and their children remain or increase following the referendum. We also ask for the equivalence of children's rights on both sides of the border to be monitored.

Though discrimination against children born outside marriage is banned under the Status of Children Act 1987, the Constitution nonetheless permits the State, if it chooses, to favour families based on marriage and the members of marital families. In our view the proposed amendment would not prevent such discrimination from being perpetrated, if justified by the preference for marriage in the Constitution. At best, there is a real danger that this amendment will make little difference to children living in non-traditional family arrangements.

Clause 2

We recommend the re-insertion of the word 'proportionate' in this Clause to ensure, as stated by the Ombudsman, that the State provides 'the right level of support at the right time including an inherent emphasis on early support to avoid crises developing'. The focus in this clause, One Family believes, should be on supporting families with the removal of children as the last resort. This clause should also be framed around the best interests of the child and should reflect the rights established under Clause 1, especially the right to family life, to non-discrimination, to be heard and to have an objective assessment of their interests.

A number of difficulties arise in relation to this clause.

A key difficulty lies in the negatively interventionist focus in the clause. The clause implicitly suggests that the appropriate response to family difficulties requires a state intervention that disrupts family life. The clause suggests that the State "supply the place of parents" where they have failed for physical or moral reasons in their duty towards the child. This implies, first, that the situation of vulnerable children is to be attributed solely to failure on the part of parents, rather than to endemic and systemic socio-structural problems such as poverty and inadequate support and facilities, that lead to family difficulties. It ignores, also, the possibility that the State may more appropriately assist the child through positive intervention that seeks to support and empower parents to support their children.

The citation of the child's best interests, in Article 42(A).2.2 is welcome, though again problematic, for reasons explored further in relation to Clause 4.

Clause 4

This clause proposes that, in court proceedings seeking orders for adoption, guardianship, custody or access, judges seek a solution that is in the best



interests of the child.

While this is already required by legislation, the Constitution as it currently stands qualifies the 'best interests' principle in certain cases. As currently formulated, the Constitution significantly restricts the role of the State in relation to children born within marriage, permitting protective intervention only in very exceptional cases and preferring parental autonomy over state intervention.

In particular, the Constitution as it currently stands requires that, where the welfare of a child is being considered, the courts must presume (unless the contrary is firmly established) that the child's best interests coincide with the views and interests of the child's marital parents - a perspective that prevailed, for instance, in the Baby Ann case.

It is not clear to what extent (if any) the new proposal would recast the balance between parental and children's rights.

Equally, the provision is vague on the threshold for parental failure and consequent state intervention. It is uncertain, for instance, whether the constitutional right of parental autonomy would override or be overridden by this amendment.

Potentially, the preferential position of the marital family could still be used to override children's rights, notwithstanding this amendment. Indeed, the Taoiseach himself - in launching this constitutional initiative - explicitly stated that nothing in the proposal would "undermine the role of parents or the constitutional safeguards for the family".

Parents overwhelmingly intend the best for their children and should be given full support and resources in achieving this goal. The State should not be allowed too readily to second-guess parents' views. It is unclear, however, whether the current proposals have struck the appropriate balance.

ENDS

This submission is made on behalf of One Family – voice, support and action for one-parent families. Queries should be directed to Candy Murphy, Policy & Research Manager Tel: 01 662 9212 Fax: 01 662 9096 Email: policy@onefamily.ie