The Iona Institute

Submission to the Joint Oireachtas Committee on Children's Rights on the proposed constitutional amendment

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Introduction

A constitutional referendum on children's rights is to be put before the people probably later this year. The proposed change to the Constitution could have profound implications for the way in which social services and the courts can intervene in family life and in the lives of children. It could also profoundly alter the balance the Constitution currently strikes between parents and guardians on the other hand, and the State on the other.

The Iona Institute is not opposed in principle to the holding of a referendum on children's rights but would have a number of concerns about the proposed wording which we believe need to be addressed.

The following submission will examine the background to the proposed amendment. It will look briefly at the whole area of children's rights particularly the issue of who is best placed to vindicate the rights of children, parents or the State?

It will comment on the proposed wording. It will also look at the question of whether biology or attachment, or a combination of both, is most important when considering the best interests of a child. This is relevant to the Baby Ann case. Finally it provides a comment on the Baby Ann case itself which has been used, quite possibly incorrectly, as a partial justification for the referendum.

Background to the proposed Children's Rights amendment.

The proposed children's rights amendment was first announced by the Government earlier this year.

Children's rights groups argue that a referendum in some form is needed for a number of reasons. One is that it is currently too hard to adopt the children of married parents even when the parents have manifestly failed in their duties to their children and the children have been in foster care for years.

They cite the Baby Ann case (see appendix two for a further discussion of this important case) in which the Supreme Court ordered that a young child be given back to her natural, married parents even though the child had bonded with her would-be adoptive parents. Instancing the Baby Ann case, supporters of the referendum say that it is currently too difficult for a court to act in the 'best interests' of the child in cases of adoption, access etc, especially when the parents are married.

Supporters of the referendum also say that children cannot request certain medical procedures, or the intervention of social services, without seeking the permission of their parents.

Third, they say that the referendum is necessary to allow for the restoration of absolute liability so that an adult can be found automatically guilty if he or she commits a particular offence against a minor.

Fourth, child protection agencies want the sharing of 'soft information' about suspected sexual offenders.

A wording aimed at addressing some of these perceived deficiencies was unveiled by the then Minister for Children, Brian Lenihan, in March 2007. (The proposed amendment is reproduced below).

A broad overview of children's rights.

Ireland as a society must arrive at a consensus about children's rights. The Oireachtas Committee established to consider the wording of the proposed children's rights amendment will ideally arrive at a consensus of its own. This consensus will then inform its opinion as to the proposed wording. It is appropriate, therefore, to begin this submission with a broad overview of the whole area of children's rights.

At the outset it should be said that there is a danger in this debate that a false dichotomy will be established between parent's rights on the one hand, and the rights of children on the other as though these must somehow and necessarily be in conflict. For example, it might be (falsely) asserted that parent's rights are at the expense of children's rights and vice versa. However, very few people doubt that children have rights and it is probably safe to assert that most people recognise that in the vast majority of cases parents are the best protectors of their children's rights.

Consideration of the following questions might help to clarify the issues at stake when we discuss children's rights.

1. Which rights should a child enjoy?
2. At what age do these rights come into operation?
3. Who decides when they come into operation, that is, should it be the parents or some third party such as the State?
4. Who is the best protector of those rights, again, the parents or some third party such as the State?

1. Which rights should a child enjoy?

A good place to start is with the UN Convention on the Rights of the Child (CRC), to which Ireland is a signatory. The rights contained in the CRC fall into two broad categories, namely 'protection' rights and 'choice' rights.

Protection rights are uncontroversial. They include, for example, a right to be protected from abuse or neglect.

Choice rights are more controversial. They include freedom of association, freedom of belief, freedom of expression etc. No-one denies that these rights and needs belong to adults and few people deny that children have them too. It would seem quite oppressive to assert that children have no freedom of

expression or association, for example. But we should hesitate before too easily accepting that these rights attach to children in the same way as to adults. In the interests of children there must be limits to the scope of their exercise of these rights. For example, we do not allow children to vote, or to drive, or to drink, or to engage in sexual relations below the age of consent. We would also agree that parents should be permitted, for example, to stop their children viewing pornography on say, the internet.

2. How do these rights develop?

We might say that these (choice) rights ought to come into effect as the child matures. But this isn't very helpful because it leaves unanswered the key question of who gets to decide when the child is mature enough to, for example, read and watch what they wish, to have whatever friends they like, to go to church or not with their parents etc. Do the child's parents decide when he or she is old enough, or some third party such as a State agency? If the answer is the latter, then the concept of children's rights could become very controversial.

3. What role do parents have in guiding the exercise of choice rights?
4. Who is the best protector of those rights?

It seems clear that, as children become older and more mature, they can more adequately and safely exercise a range of choice rights. Parents should not unreasonably prevent children from doing so. But what is the point where parents should be considered to be acting unreasonably?

For example, if one family thinks that a 14 year old is too young to go to a dance and the family next door takes a different view, the idea that the State should determine the question would strike the vast majority of people as very mistaken. There has to be a wide 'margin of appreciation' in which parents, who know their children best, can set the parameters.

Generally society has judged that parents should decide what is in the best interests of their children. First of all, they are the parents, the people who brought the children into the world. Secondly, they are likely to know their children better than anyone else, and certainly better than a third party such as a State agency. Therefore they will likely be the best judge of when their child is old enough to enjoy some or all of the choice rights, and to what degree, associated with adulthood.

Third, allowing parents to decide what is in their child's best interests set down limits on the power of the State and prevents the State from intervening in family life unnecessarily. Of course, fierce arguments can be fought over when an intervention is necessary and when it is unnecessary. However, the presumption has always been that the State should only be allowed to intervene in family life in 'exceptional' circumstances, and this is the word used by our Constitution. We should be very slow to extend the power of the State beyond this.

Quite apart from the fact that it is a general principle of liberal societies that the State should only be given powers of intervention in the lives of its citizens when absolutely necessary, the State can be a blunt instrument for so delicate a task as child-rearing and is liable to make mistakes.

We should also remember that both Bunreacht na hEireann and the Universal Declaration of Human Rights recognise the right of parents to choose the kind of education they want for their children. 'Education' means more than what a child will learn at school and also includes what they learn at home.

Finally, we must keep in mind that the welfare of children is generally best secured within the natural family and the interests of the family and the interests of the child will normally coincide.

We will end this section with a relevant quotation from the ruling of Justice Adrian Hardiman in the Baby Ann case. Commenting on the widespread idea that the Constitution values parents more than children he had this to say:

"In the case of a young child, an approach to its welfare which is sometimes described as 'child centred', in a particular sense, in reality involves acting wholly or partly upon some third parties view of the interests of the child. It is, of course, difficult to criticise an approach denominated 'child centred' or to fail to acknowledge imperatives denominated 'the rights of the child'.

"The effect of our constitutional dispensation is that, presumptively, the right to form a view of the child's welfare and to act on it belongs to the parents.

"There are certain misapprehensions on which repeated and unchallenged public airings have conferred undeserved currency. One of these relates to the position of children in the Constitution. *It would be quite untrue to say that the Constitution puts the rights of parents first and those of children second. It fully acknowledges the 'natural and imprescriptible rights' and the human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights. The Constitution does not prefer parents to children. The preference the Constitution gives is this: it prefers parents to third parties, official or private, priest or social worker, as the enablers and guardians of the child's rights.* [Emphasis ours]. This preference has its limitations: parents cannot, for example, ignore the responsibility of educating their child. More fundamentally, the Constitution provides for the wholly exceptional situation where, for physical or moral reasons, parents fail in their duty towards their child. Then, indeed, the State must intervene and endeavour to supply the place of the parents, always with due regard to the rights of the child."

The proposed wording

While The Iona Institute agrees with the broad thrust and aims of the proposed amendment, it is of the belief that the amendment, as worded, may give the State more power than it needs. It has an additional concern with regard to Section 3 dealing with voluntary adoption. Our observations are as follows:

1. Presume in favour of the natural family.

Article 7 of the Convention on the Rights of the Child states that the child "shall have, as far as possible, the right to know and be cared for by his or her parents". This is in recognition of the fact that, in general, a child's welfare is best secured within his or her own family, and that whenever the welfare of a child is being considered, a presumption must be made in favour of the child's family unless it can be clearly established that this presumption should not apply. This would help to ensure that the State could only intervene in a family when it was absolutely necessary.

2. Voluntary adoption section needs to be qualified.

With regard to the section on voluntary adoption, this appears to be too unqualified as it stands. For example, it could allow for unrestricted surrogate motherhood where a woman bears a child with the explicit intention of giving that child up for adoption. It is doubtful whether this is in a child's best interests.

In addition, it could potentially allow other parents, including married ones, to give up their children for adoption for any reason. There should perhaps be a qualifier added to the effect that a parent cannot voluntarily give up a child for adoption unless there is good reason to believe the parent(s) cannot fulfill their duties towards the child.

3. Failure of duty need only be temporary?

Section 2.2 allows 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". As has been noted by several commentators including Professors William Binchy and Gerard Whyte of Trinity College Dublin, the failure under this wording need only be temporary and could be of extremely short duration.

4. Giving meaning to the 'best interests' test?

Everyone of goodwill wishes that the best interests of children would be advanced at all times. But there is a need to give this goal a substantial and workable test; otherwise it would lack specificity and could lead to uncertainty in its application. It is therefore suggested that the amendment should make it clear that there is a presumption that the best interests of children are, generally, to be found in the family. Of course, this presumption should be capable of being rebutted in particular cases.

A recent case in the UK shows how far the 'best interests' test can be stretched without proper safeguards. In this case a court ruled that two sisters aged 4 and 7 must be removed from their biological mother. The mother had been in a relationship with another woman but they had separated. The mother violated a visitation order and moved with the children to another part of the country. The court ordered that the former partner be given custody of the children instead.

The Times Online (April 4, 2006), reported the case and reaction to it as follows: “Lord Justice Thorpe, who headed the panel of three judges, said in his ruling: ‘We have moved into a world where norms that seemed safe 20 or more years ago no longer run.’ He then posed the question: ‘Who is the natural parent?’ In the past, judges have held that the biological parent is the natural parent, he said. ‘But in the eyes of the child, the natural parent may be a non-biological parent who, by virtue of long-settled care, has become the child’s psychological parent.’

“He said that in this case, the upbringing of the children had been shared, and the sisters would not distinguish between the women on the ground of biological relationship. None of the parties can be identified, by order of the court.

“Mark Harper, a family law partner with Withers and a member of the Law Society family law committee, welcomed the decision as ground-breaking. He said: ‘It shows how the courts recognise that it can be the quality of parenting, not genes, that matters, especially in the face of flagrant disobedience of court orders.”’

“Andrew Greensmith, national director of Resolution, the family solicitors’ association, said: ‘This is welcome recognition of the fact that the world has moved forward and of the effect of a joint parental responsibility that would come from a civil partnership anyway.’

“Andy Forrest, of Stonewall, the gay rights group, said: “We are really pleased that the courts are doing what is in the best interests of the child.”

The result of the decision in this case is that the children will be raised neither by their biological mother nor father even though they were attached to the biological mother. It can be questioned the degree to which this decision was really in the best interests of the children. However, and to repeat, it shows how far the concept of ‘best interests’ can be stretched without proper safeguards.

5. A child’s right to be raised by his or her own parents

As mentioned above, Article 7 of the Convention on the Rights of the Child states that a child “shall have, as far as possible, the right to know and be cared for by his or her parents”. Serious consideration should be given to including this in the amendment but with the qualifier that ‘parents’ means biological parents. This is the clear meaning of the Article but probably needs to be made explicit in view of a growing legal tendency around the world, as illustrated by the British case quoted above, to supplant the notion of biological parents with social parents, or even to suggest that the natural parent need not be the biological parent which appears to be an assault on the ordinary meaning of words.

One effect of the inclusion of a section of this sort in the amendment would be to ensure that donor-conceived children are told about their biological origins and that children cannot be intentionally deprived of a father and mother from the day of their birth.

Also, because the intention of Article 7 is that a child has a right to be raised by *parents* where possible, as distinct from a parent, where a child cannot be raised by his or her biological parents it should perhaps be stipulated that they have a right to be raised by a mother and father.

Appendix one

Biological parents or 'social parents'? The question of attachment.

In the original High Court decision in the Baby Ann case Mr Justice John MacMenamin was persuaded by expert testimony that the best interests of the child would be served by leaving her with her would-be adoptive parents. The argument was that she had become attached to them and that it would be psychologically harmful to her if she was removed from them and placed with her natural/biological parents.

The ruling pitted the notion of attachment against biology. The thinking is that what is most important to a child is not who his or her biological parents are, but to whom he or she has become attached. In other words, the bonds of attachment matter more than biological origins.

To put it another way, according to this thinking a child's 'social' parents are more important than the child's biological parents and such parents should be recognised as the child's legal parents also.

Certainly the bonds of attachment are very important to a child and may under certain circumstances outweigh biological considerations. However, two questions arise. The first is whether the question of biological or natural origins is of no importance to a child.

The second is whether the biological parents must surrender all rights to their child, even when no failure of care has been demonstrated, because the child has developed an attachment to another person.

The question of whether or not biological origins matter to a child is partly answered by the experience of adopted children. We now know that many adopted children seek out their natural parents, especially their mother, sometimes well into adulthood. This has led to so-called 'closed' adoptions being frowned on, that is, adoptions which deny to the child knowledge of his or her natural parents. 'Open' adoption is now considered to be the best course.

This being so, it is highly tendentious to suggest that a child can have the link to his or her biological parents severed without any adverse consequence. In the case of Baby Ann, the child was in a very unfortunate position in that she had become attached to her social parents but to find in their favour against the biological parents would probably have ill-served the child also. It was not a cut and dried case.

Currently courts in Ireland have the power to override the wishes of a child's parents, including their wish to raise their own children, in 'exceptional' cases, that is, in cases where it is clear that a child's best interests are not served by leaving them with his or her parents. These will mostly be cases involving

abuse or neglect. Should courts be given the power to override parent's wishes even when the matter is not so clear-cut? It seems doubtful.

However, the question of a natural parent's rights must also be considered. Do the rights of a natural parent come to an end if their child forms the primary attachment with another adult? Should a court be given the right to rule that the natural parent no longer has the right to raise their child in any and all cases when this happens?

Obviously a natural parent's right to raise their own child come to an end where, for example, there has been a failure of moral duty. However, when there is no failure of duty should a court be given the power to quash that right?

If the question of attachment is given centre-stage, as it was in the ruling by Justice MacMenamin, then Irish courts would have the power to quash the right of natural parents to raise their own children even when there has been no failure of duty and when the parent(s) have not surrendered their right.

As mentioned above, it is questionable whether a child's interests are really served by setting aside biological origins so easily. However, in theory at least, it could lead to a parent's right being quashed because of an inability, say through illness, to care for their child in infancy with the result that the child was being cared for by someone else with whom an attachment developed. Would this truly be just?

This submission would argue, therefore, that while attachment is important, so are biological origins and that such origins are important both to the child – as the experience of adoption has shown – and to the natural parents. The presumption in Irish law must therefore continue to be made in favour of the child's biological family.

In this respect it is worth quoting once again from the decision of Justice Adrian Hardiman in the Baby Ann case. He said:

"Like Geoghegan J. and Fennelly J., I have been struck by the coincidental reporting, while the judgments in this case were being drafted, of an English case, Re G. (Children) [2006] 4 AER 241. The context of that case is far removed from the facts of the present dispute. But it is most interesting to see that, in a jurisdiction lacking the specific social and cultural context which has led Ireland to protect the rights of the family by express constitutional provision, the interest of a child in being reared in his or her biological family is nonetheless fully acknowledged.

"I wish specifically to refer to what was said in that case by Lord Nicholls of Birkenhead:

"'In this case, as in all cases concerning the upbringing of children, the Court seeks to identify the course which is in the best interests of the children. Their welfare is the Court's paramount consideration. *In reaching its decision the Court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care*

of his or biological parents without compelling reasons. Where such a reason exists the judge should spell this out explicitly'." [Emphasis ours]

Appendix two

Baby Ann: Could social services have dealt with this case in a different way?

The finding in the 'Baby Ann' case that the natural parents were entitled to have their child returned to them has been cited by a number of legal experts as a reason why the Constitution needs to be changed in order to make it a more 'child-centred' document.

However, the contention that the Supreme Court decision in this case strengthens the argument for a change to the Constitution is open to question because social services could, and possibly should, have dealt with the competing interests of Baby Ann, her natural parents, and her would-be adoptive parents, differently.

Baby Ann was born in on 7th July, 2004. On 11th July Ann was admitted to foster care. On the 14th September 2004 her mother signed a form consenting to place Ann for adoption. The child was placed with the prospective adoptive parents in the month of November, 2004.

The mother signed Form 4A, colloquially known as the "final consent" to adoption, on 11th July 2005. By August, the natural parents were having second thoughts and before an Adoption Order was made they changed their minds. (Until an Adoption Order is actually made by An Bord Uchtála it is open to the natural mother to withdraw her consent and seek the return of her child.)

This decision was communicated in writing to the Adoption Board in September of 2005. The natural parents married on 9th January 2006. The child was still in the custody of the other couple when, in the month of February, 2006, the parents, who had married the previous month, instituted Article 40.4.2 proceedings seeking the release of the child from the custody of the prospective adopters.

The case came before the High Court in May 2006. The judge, Justice McMenamin, ruled in September that year in favour of the adoptive parents on the basis that the child had become attached to the putative adoptive parents, and that returning her to the custody of her natural parents would not be in the child's best interests.

This ruling was appealed to the Supreme Court in October, which overturned the High Court. They held that no adoption could be made, since the natural parents were now married. Adoption law in Ireland makes it very difficult for the children of married parents to be adopted. In order for a child of a married couple to be validly adopted, the parents must have shown an almost total failure of duty, eg abandonment.

Legally, the Supreme Court ruling was based on the fact that, according to the relevant laws a) no adoption order had been granted, since the birth mother had not given her final consent for the adoption and b) the birth parents were now married, Baby Ann could not legally be adopted.

Ms Catherine McGuinness in her judgement in the Baby Ann case argues essentially said her hands were tied by the Constitution and that the court's finding in favour of the child's natural parents, was reflective more of the legal situation than of the "best interests of the child".

Given that the infant had been placed for adoption two years before the court action, it was argued that transferring her summarily would cause emotional damage to the young girl.

However, in his findings, Mr Justice Hardiman pointed to a number of facts in the case, in particular what he referred to as "certain unusual features of the pre-adoption procedures". He is of the view that the Constitution should not be held to account in this case.

Mr Justice Hardiman declared [emphases ours]:

"Before an adoption order was made, however, the natural parents changed their minds in relation to adoption. This was not a wholly surprising development: there seem to have been uncertainties on the topic from the beginning. This decision was communicated in writing to the Adoption Board in September of 2005 *and was not, I have to say, acted upon very rapidly*. The child was still in the custody of the other couple when, in the month of February, 2006, the parents, who had married the previous month, instituted the present Article 40.4.2 proceedings seeking the release of the child from the custody of the prospective adopters.

"Secondly, there were certain unusual features of the pre-adoption procedures. It transpired that the proposed adopters and in particular the lady, were known to certain of the social workers involved, including the social worker assigned to the natural parents. Considerations of anonymity make it undesirable to say precisely how this came about. There is however evidence that it came to cloud their relationship with this practitioner, and indeed others. There is a distinct change in the tone and content of social work notations about the mother after she manifested an intention to regain custody of the child.

"Finally, there is no doubt that subsequent to the natural mother's request for the return of the child in September, 2005, relations became rather fraught between the natural parents and the social worker. The latter, as the learned trial judge found, was in a somewhat invidious position by reasons of the connection to both couples and this may have resulted in the social worker 'expressing in rather stark and emotive terms the effect of the applicants' decision to reclaim custody of her on the [proposed adopters]'. There was an unresolved conflict of evidence as to whether very melodramatic language indeed was used by the social worker in that connection. What is clear, however, is that the natural parents became concerned that the passage of time was weakening their position. This is a matter of some significance having regard to the nature of the case advanced on behalf of the respondents. The parents felt that after they attempted to regain custody of the child they were being 'stalled', to use a word the mother used in dealing with the Adoption Board. I cannot disagree with her. This was the background to the initiation of the present proceedings.

Thus, in the view of one senior judge, at least part of the reason for the delay in ending custody of the adoptive parents, which led to the child becoming more attached to them, was a seeming lack of urgency on the part of the social workers involved.

This sums up the argument in favour of not laying the blame at the foot of the Constitution in this instance and should certainly be taken into account if can when the Committee considers the Baby Ann case.

Appendix three: the proposed amendment

The proposed wording of the children's rights amendment will replace the current Article 42.5. It reads as follows:

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.

2.2 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.

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.

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.