SUBMISSION TO THE OIREACHTAS JOINT COMMITTEE ON THE CONSTITUTIONAL AMENDMENT ON CHILDREN

From the

COMMITTEE ON THE FAMILY
OF THE
IRISH CATHOLIC BISHOPS' CONFERENCE

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Introduction: The Church and the Rights of the Child

This year marks the sixtieth anniversary of the promulgation of the Universal Declaration on Human Rights. In terms of the original objective of the Declaration, that of creating 'a common standard of achievement for all peoples and all nations', much has been achieved. Much also remains to be accomplished. The Declaration did not anticipate many areas of human rights which now seem obvious and essential.

This is notably the case regarding the rights of children. The Universal Declaration declares that 'childhood is entitled to special care and assistance'. Yet in the words of Pope Paul VI, addressing Henry Labouisse, the Executive Director of UNICEF in 1978 (the thirtieth anniversary of the Universal Declaration), despite subsequent developments in human rights:

> *...children still suffer and die from the lack of basic nourishment, or as victims of violence and armed conflicts that they do not even understand. Others are victims of emotional neglect. There are people who poison the minds of the young by passing on to them prejudices and empty ideologies. And today, children are exploited even to the point of being used to satisfy the lowest depravities of adults*.

A year later, addressing the General Assembly of the United Nations for the first time on October 2nd, 1979 Pope John Paul II spoke of 'the joy that we all find in children, the springtime of life, the anticipation of the future history of each on our present earthly homeland. Concern for the child,' he went on to say, 'even before birth, from the first moment of conception and then throughout the years of infancy and youth, is the primary and fundamental test of the relationship of one human being to another. And so, what better wish can [we] express for every nation and for the whole of mankind, and for all the children of the world than a better future in which respect for **human rights will become a complete reality** throughout the third millennium?'

This remains a fundamental commitment of the Church, to work with others to give effect to those additional rights which apply to children because they 'are the most precious and, at the same time, the most vulnerable members of the human family and in need of the greatest protection.' (*Intervention by the Holy See Delegation to the United Nations on the occasion of the 55th Session of the General Assembly, 15*

November 2000). The Holy See gave expression to this commitment by being among the first signatories to the United Nations Convention on the Rights of the Child and the two optional protocols associated with it.

It is in this context that we offer our comments on the issues under consideration by the Joint Committee on the Constitutional Amendment on Children. In the words of Pope John Paul II, 'acceptance, love, esteem, many-sided and united material, emotional, educational and spiritual concern for every child that comes into this world should always constitute a distinctive, essential characteristic of all Christians, in particular of the Christian family. (*FC #26)* Conscious of our own failings in this regard, those of individual members of the Church and those of wider society, we are pleased to have this opportunity to engage with the Joint Committee and others in the urgent task of giving full expression to concern for the welfare of children, in all its dimensions.

The Case for Constitutional Change:

We note that on 3rd November 2006, the then Taoiseach, Bertie Ahern TD, announced that the Government intended to hold a referendum to amend the Constitution so as in his words, "to put the rights of children in a central place in our Constitution. In that way, the Irish people can show the value we attach, in the words of the 1916 proclamation, to cherishing all the children of the nation equally."

Such constitutional change could have wide-ranging consequences for the relationship between children, the family and the State. In particular it could profoundly alter the balance achieved by current constitutional provisions between parents and children and between parents (or guardians) and the State. The Committee on the Family of the Irish Bishops' Conference does not detect a need for any significant shift in this balance.

In its submission to the All-party Oireachtas Committee on the Review of Constitutional Provisions relating to the Family in February 2005, the Committee for the Family of the Irish Bishops' Conference addressed this issue directly. It pointed out that, on the on hand, 'It is a matter of prudential judgement for the appropriate experts as to whether the protection of children's rights is best effected through express constitutional enumeration or through entrusting to the Courts the task of specifying said rights in particular circumstances.' On the other hand, the Committee

acknowledged the importance of the 'possible educative value of law' and the role of the Constitution in 'signalling' values of fundamental importance to society.

Given the likelihood that a Constitutional referendum will take place, the case is strong for signalling the value which society and the Church attach to children's rights overall, (such as those protected by the UN Convention on the Rights of the Child). What is less certain is the extent to which such an amendment should seek to enumerate specific rights which might otherwise be secured through the Courts or changes to legislation and/or policy.

As others have pointed out, Article 40 of the Constitution, which provides for a series of fundamental rights for all citizens, already establishes many rights of children as unenumerated rights. For example, the courts have judged that a child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. Importantly, in *F.N v. C.O.* [2004] 4 I.R. 311; [2004] IEHC 60. the Courts have judged that a child has the right 'to have decisions in relation to guardianship, custody or upbringing, taken in the interests of his/her welfare'.

In this context, the proposal to amend the wording of Article 42.5 to include reference to 'all' children may be justified in terms of allowing the rights of the individual child to be taken into account without interfering with the constitutional presumption about the primacy of the family as the unit within which the rights and welfare of the child are best exercised and met.

Therefore, with reference to the Committee's Terms of Reference at 1(b), items (i) and (ii), namely:

(i) the acknowledgement and affirmation of the natural and imprescriptible rights of all children;

(ii) the restatement and extension of the existing provision in relation to children and parents contained in Article 42.5 of the Constitution to include all children;

the Committee on the Family of the Irish Bishops' Conference supports these. Indeed, it is submitted that these would merely make explicit what is already implicit in the Constitution (in Article 40.3 and in Article 42.5 by implicit cross-reference). At the same time, the *general* reference to unenumerated children's rights is a powerful, overarching and inclusive statement.

What is less certain is how explicit reference to these unenumerated rights and to the principle of the 'best interests' of the child might be included in a way which would sufficiently maintain the existing constitutional balance and avoid the ever-present risk of unintended consequences in the context of constitutional change.

The Question of the 'Best Interests' of the Child

As has been previously noted tensions can emerge between families and outside agencies as to the determination of the best interests of children. In certain exceptional circumstances the question may arise as to whether the family or the State is best positioned to safeguard the rights of children. Sadly, some children are victims of domestic sexual abuse, violence or neglect. In these and similar circumstances, the State may clearly intervene. Thus, for example, the Childcare Act 1991 and the Adoption Act 1988 enable children to be protected from the effects of the failures of their parents. The Supreme Court made it clear in In re Article 26 and the Adoption (No. 2) Bill 1987 [1989] IR 656, that Article 41 is no barrier to the compulsory adoption of children on the basis of continuing parental failure.

In re JH (an infant) [1985] IR 375, the Supreme Court held that section 3 of the Guardianship of Infants Act 1964, which requires the Court to regard the welfare of the infant as the first and paramount consideration, should: "be construed as involving a constitutional presumption that the welfare of such a child is to be found within the family unless the Court is satisfied that there are compelling reasons why this cannot be achieved or the evidence establishes an exceptional case where the parents have, for moral or physical reasons, failed, and continue to fail, to provide education for the child."

Some have suggested that the Constitution should enshrine the principle that the welfare of the child is in all circumstances "the paramount consideration" (as opposed to 'a' paramount consideration, the phrase used in the UN Convention on the Rights of the Child). To posit any welfare test in isolation from its constitutional context, including the principle of family autonomy as per Article 41, can be misleading. One can imagine wording whereby parental failure would no longer be a precondition of the State's taking the child away from his or her parents and giving the child to other possibly more economically and educationally advantaged adults. It is submitted that

the State should not be constitutionally entitled, or indeed required, to take children from poor families and move them to rich families on the basis of any such welfare test. This cannot happen at present. The Supreme Court made it clear in In re Article 26 and the Adoption (No.2) Bill 1987 [1989] IR 656, that compulsory adoption is not permissible on the ground of the poverty of the child's parents. Article 42.5, as it is currently worded, would not allow it.

While it is clear therefore that the Constitution must afford legal protection for measures which are necessary to protect the rights of children, it is also important that the family unit be allowed to retain its appropriate authority and autonomy. This is a principle and value of fundamental importance which touches on the very nature of the family and its relationship with the child.

In this regard it is interesting to note that the authors of *J M Kelly: The Irish Constitution* draw attention to the following statement from a judgement of Mr. Justice Ellis: 'In my opinion, the inalienable and imprescriptible rights of the family under Article 41 of the Constitution attach to each member of the family including the children. Therefore in my view the only way the "inalienable and imprescriptible" and "natural and imprescriptible" rights of the child can be protected is by the courts treating the welfare of the child as the paramount consideration in all disputes as to its custody, including disputes between a parent and a stranger. I take the view also that the child has the personal right to have its welfare regarded as the paramount consideration in any such dispute as to its custody under Article 40.3 and that this right of the infant can additionally arise from "the Christian and democratic nature of the State".' On the basis of their analysis of that judgement, they conclude that "it indicates how a more balanced approach to the complex area of custody disputes…. can be achieved by rearguing the constitutional principles involved and without the necessity of a constitutional amendment." This view would seem to be re-enforced by the recent judgement of Mrs. Justice Finlay Geoghegan in the case *F.N. v C.O* cited earlier. It would also appear appropriate that the courts would have due regard to the UN Convention on the Rights of the Child in understanding their mandate under Article 40.3 to vindicate the personal rights of all citizens including children.

It is also worth recalling a relevant quotation from the ruling of Mr. 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:

"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. 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."

This is not to exclude a form of constitutional amendment which upholds the general principle that the welfare of children is 'a paramount consideration' (although we note that such wording does not currently appear in the Government's proposal). It is rather to express concern as to some of the potential consequences of constitutional amendment by way of giving the State more power in this area than it requires (or intends). It also emphasises the need to give due recognition to the principle that the welfare of children is generally best secured within the natural family and that the interests of the family and the interests of the child will normally coincide.

In fact, the Government's proposed wording for the referendum, as instanced in the Joint Committee's Terms of Reference 1(b) at (v), spells out what is already in the jurisprudence, namely:

"the provision of legal authority so that the courts shall be enabled to secure the best interests of a child in any court proceedings relating to adoption, guardianship, custody or access of that child".

Indeed, some such provisions already appear in statute law, which case law in turn has greatly elaborated upon. This includes the definition of the concept of 'best interests' against the background presumptions of family unity. The Committee of the Family of The Irish Bishops' Conference agrees with this approach.

The Joint Committee's Terms of Reference 1(b) at (iii) and (iv) refer to:

(iii) the provision of legal authority for the adoption of children who have been in care for a substantial period of time if it is in the best interests of those children; and

(iv) the provision of legal authority so that all children may be eligible for voluntary adoption.

The Committee on the Family of the Irish Bishops' Conference does not oppose such changes in principle. However, the wording of the referendum will require close scrutiny before actual support could be given.

In fact, the relevant part of the Government's proposal for Article 42A reads:

> "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.
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> 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.
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> 3. Provision may be made by law for the voluntary placement for adoption and the adoption of any child."

We suggest that a number of concerns arise out of this particular wording including the following:

- the open-ended reference to a statutory 'period of time' in the proposed Article 42A.2.2: We ask should this particular provision not also reflect the language 'exceptional' as used in the preceding sub-paragraph (42A.2.1) and which is already the constitutional norm?
- the retention in the proposed Article 42A.2.1 of the apparently 'all-or-nothing' solution of 'supplying' the place of the parents. The Joint Committee might wish to give consideration to more nuanced language, such as: 'by

appropriate means and *to an appropriate extent* shall endeavour to supply the place of the parents'? In this way, where for example there were parental problems such as mental illness, alcoholism, or destitution, the State could intervene to support but not necessarily supplant the parents.

- the proposed Article 42A.3 appears open-ended. We understand the reference to 'any child' to be designed to include children of married parents, a change which we do not oppose in principle. However, the reference to 'any' might be misinterpreted to imply some kind of open-ended enabling power to legislate in this area. While the current legal situation is that the principles governing adoption are not specifically spelled out in the Constitution (and have instead been implied by the judiciary when interpreting the relevant legislation in a constitutional light), if a constitutional referendum on children is to take place it is critical that it be as specific and accurate as possible in its intention and outcome. For example, a cursory reading of the proposed Article 42A.3 in isolation would suggest that, say, a statute could be introduced allowing married parents to simply give up their children for adoption as a matter of choice. Quite aside from the need to ensure genuine voluntary choice in any adoption which does take place, it cannot be suggested that parents could somehow by choice flout Article 41, and indeed the newly articulated (but hitherto present) rights of the child, and their own corresponding parental duties. Therefore, while bearing in mind that constitutional interpretation should always take a harmonious approach to the entire text, nevertheless consideration should be given by the Joint Committee to whether there is a need to expressly qualify this particular enabling provision by reference to Article 41 (Family), Article 42 (education – duties of parents) and the new Article 42A itself (natural and imprescriptible rights of children, etc.).

The Collection and Exchange of 'Soft' Information

A critical area under consideration by the Joint Committee on the Constitutional Amendment on Children is the provision of legal authority for the collection and exchange of information relating to the risk or actual occurrence of child sexual abuse. The Ferns Report (November 2005) recommended that Government should introduce such legislation to facilitate inter-agency exchange of information necessary to assess and manage risk in cooperation with organisations which work

with children and young people. We welcome in principle any legislative or administrative development which, with due regard for the 'natural and imprescriptible rights' of every person, particularly the right to justice and a person's good name, enhances the safety and welfare of children.

In this regard we note with interest the development of the vetting system known as POCVA (and the related ACCESS clearance system) in Northern Ireland and its associated legislation. The Catholic Church in Northern Ireland participates fully in this vetting system.

Key to the success of this system we believe is the strict control over who has access to such information, the strict standards and processes applied to assessing the level of risk in an individual case, the strict data protection measures applied to the information held and the just limits applied to the type of information which is recorded and assessed. Necessary checks and balances to protect innocent adults from unjust, unnecessary, accidental or malicious damage to their reputation appear to be in place while the capacity for assessment of risk to children is maximised.

It has been pointed out by a number of child care organisations and others that the absence of such a comprehensive system of vetting, based on the sharing of 'soft' information gives rise to the danger that those who pose most risk to children will seek to reside and pursue employment in this part of the island where such protections cannot, for Constitutional reasons, be put in place. This difference in systems and the level of information sharing between the two jurisdictions poses a real risk to children across the island. In addition to supporting the development of a system of vetting and exchange of information similar to POCVA and ACCESS in Northern Ireland, therefore, we also strongly support protocols for the sharing of such information between both jurisdictions on the island.

It would appear that in the opinion of Government as well as many agencies involved in the safeguarding and welfare of children and various legal experts, that to achieve a similar system in this jurisdiction, some level of constitutional change is required. If this is so and no other legal mechanism exists to achieve this end, then it would seem appropriate to give serious consideration to constitutional change to allow for the collection and exchange of information relating to the risk or actual occurrence of child sexual abuse, subject to assurances that the type of safeguards and limitations

as exist in the Northern Ireland POCVA and ACCESS systems will be in place. Indeed, in the experience of the Church, this would be far preferable to the current situation, involving merely non-statutory guidelines for reporting of abuse.

As it is, we note that the current wording proposed by Government does not limit or specify the type of information which may be collected or by whom. Nor does it indicate whether the wording is to be interpreted subject to or notwithstanding provisions in the Constitution such as the right to one's reputation (Art. 40.2). These are important issues which we suggest require further consideration. Critical questions also arise as to whether it is necessary, just or appropriate to legislate for the collection and exchange of information which is manifestly untrue, as is proposed in the *Ferns Report*.

Therefore, with reference to the Terms of Reference of the Joint Committee 1(b), point (vi), the Committee on the Family of the Irish Bishops' Conference supports this measure in principle. However, it suggests that the Joint Committee give consideration to whether the wording is sufficiently clear as regards the inter-relationship of this proposal with other Articles of the Constitution (e.g. Art.40). Furthermore, we suggest that much will depend on the detail of the legislation ultimately enacted thereunder. While recognising that it may not prove possible to draft the legislation before proceeding with a referendum, it is suggested that, if the referendum is passed in this regard, any draft legislation in this particular area should be opened to a specific consultation process. The Joint Committee might consider recommending this.

Strict Liability

Finally, the general objective behind the proposal that 'no provision in the Constitution should invalidate any law providing for absolute or strict liability in respect of sexual offences against or in connection with children' is in our view laudable and worthy of detailed consideration.

Clearly the legislation developed in support of such constitutional provision will be critical in assessing its effectiveness and balance. The wording of such legislation will require very careful consideration. It would appear that some level of prosecutorial

discretion would be appropriate to allow for a proportionate and just assessment of all the facts in a given case.

It is unnecessary at this juncture to over-anticipate the future and to comment on the many forms which statute-law could take were a referendum passed in this regard. As stated, we welcome the general objective behind the proposal referred to in the Joint Committee's Terms of Reference 1(b) at (vii). However, we reserve the right to comment on the detail of any proposed legislation in due course. We note in conclusion that very considerable work has already been done in this field by the Oireachtas Joint Committee on Child Protection.

ENDS.