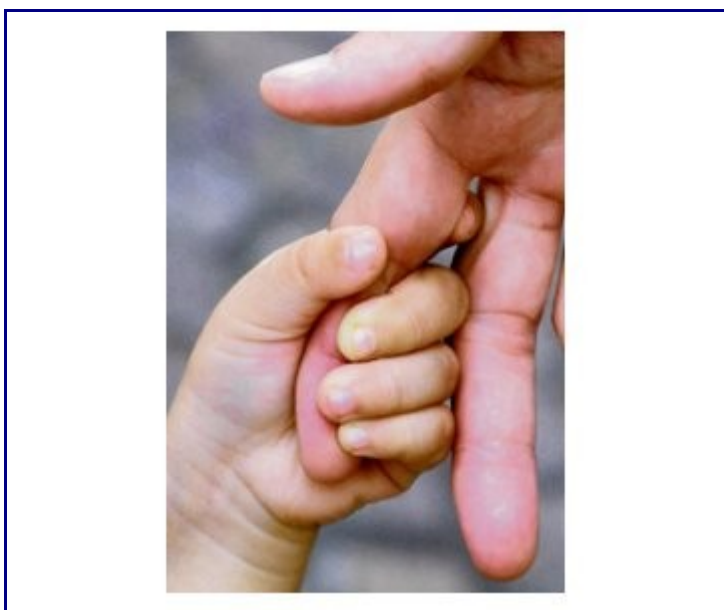


A brave new model for the rights of Irish children



Matter in hand: the lack of protection for children's individual rights has led to them being overshadowed in law, policy and decision-making.

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ANALYSIS: The proposed changes to the Constitution would force the State to give deserved priority of place to children in all decisions that might affect them

IRELAND HAS come late to children's rights. The inadequate provision for children's rights in the Constitution and the knock-on effect is well-documented.

Numerous reports have detailed the extent to which children's rights have been ignored and underplayed. The Ryan report documented the appalling abuse and neglect of children in State institutions over several decades, and others have detailed the failure of those in authority to prioritise children's right to protection, listen to them and to speak up on their behalf.

Litigation has demonstrated the impact on children's lives of the absence from the Constitution of express protection for the rights of children and revealed, in cases like the adoption of Baby Ann, the absence of a framework to ensure that decisions about children take their interests into account. The lack of express protection for children's individual rights, combined with the exceptional deference shown to the marital family, has led to the rights of children being overshadowed in law, policy and decision-making generally.

Reform has been recommended over the years by a range of authorities including Mrs Justice Catherine McGuinness in her capacity as chairwoman of the Kilkenny Incest Inquiry in 1993 and the Constitution Review Group in 1996. Ireland's signature of the United Nations Convention on the Rights of the Child almost 20 years ago led to several initiatives to bring Irish law and practice into line with children's rights principles. Yet Ireland has been criticised for failing to take a rights-based approach to policies and practices affecting children. Bodies such as the United Nations Committee on the Rights of the Child have urged Ireland to undertake meaningful constitutional reform. The Government responded in 2007 by publishing proposals to amend the Constitution.

These did little to address the relative invisibility of children in the Constitution and, accordingly, were not well-received. In 2008, they were sent to an Oireachtas Joint Committee on the

Constitutional Amendment on Children for consideration. Following two years of consultation and deliberation, the committee has now published an impressive, unanimously agreed 118-page final report and its recommendations for constitutional reform have received almost universal praise.

Two provisions of the Constitution are relevant to the treatment of children. Article 41 concerns the family – here the State recognises the family as the natural primary and fundamental unit group of society and undertakes to protect the family as the necessary basis of social order. The family has been interpreted by the courts as the family based on marriage and this is reinforced later in article 41 by the pledge to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack. None of these provisions is affected in any way by the current proposals.

The second provision of relevance here is article 42 on education. Currently, this provision addresses parents' rights regarding the education of their children. Of note is the recognition of the family as the primary and natural educator of the child (article 42.1) and the provision (in article 42.5) that in exceptional cases, where parents fail in their duty, the State shall endeavour to supply the place of parents, but always with due regard for the rights of the child.

The near-absolute terms of article 42.5 have been criticised for setting the threshold too high for intervention in the family to protect children and the provision has come to epitomise how the rights of children are overshadowed by the rights of parents.

The new proposals advocate inserting a new article 42 into the Constitution, reiterating the bulk of its provisions on education, but adding several new sections. The new provision begins with a declaratory statement, reprising from the 1916 Proclamation the commitment that “the State shall cherish all the children of the State equally” (which, incidentally, was a commitment to embrace green and orange equally and not to do with children as such).

However, the substance of the provision begins with the new article 42.1.2 whereby the State recognises the natural and imprescriptible rights of all children and undertakes, as far as practicable, to protect and vindicate those rights. This clear statement that the State has a duty to vindicate the rights of the child is a welcome affirmation that children, like adults, enjoy human rights the State is duty-bound to uphold.

In addition, the provision incorporates the right of children to have their welfare regarded as a primary consideration. The value of this relates to its broad scope. This requirement to take a child-centred approach to such issues is strengthened by article 42.1.3, which requires that the welfare and best interests of the child must be the first and paramount consideration in areas concerned with family law decision-making, such as custody and guardianship. This requires children's interests to be paramount, not just in judicial proceedings, but in “the resolution of all disputes”, including determination of the broad issues of “care” and “upbringing”.

Taken together, these provisions will ensure that decisions affecting children are focused, first and foremost, on their rights and interests. This mandates a genuinely child-focused approach to the treatment of children by all organs of the State.

But, it is article 42.2 which truly breaks new ground by proposing to require the State to recognise and vindicate the rights of “all children as individuals”, in clear recognition of the status of children as rights-holders, independent of adults. These rights include the right to care and protection, to education and the right of the child's voice to be heard in any proceedings affecting the child, having regard to the child's age and maturity.

Including the duty to listen to children here will have the effect of ensuring that children are heard as well as seen.

The remaining, significant provisions in the new article 42 deal with adoption – including a

welcome provision that makes it possible to adopt children born to married parents – and education. In the latter respect, the proposal acknowledges the primary and natural carers, educators and protectors of the welfare of a child are the child's parents and guarantees to respect their right and responsibility to provide for their children's welfare.

Although the failure to redraft article 41, with its emphasis on the family based on marriage, may be criticised, the committee has neatly side-stepped the issue by replacing the reference to the family in article 42 with a reference to parents. This may well have implications for the constitutional rights of unmarried fathers and parents in less traditional family forms.

The final provision of note – article 42.4 – addresses the concerns with the existing article 42.5 by setting a new threshold, based on proportionality, for State intervention in the family to protect children. The provision makes clear that children are entitled to State support regardless of their family status and represents a major advance in the relationship between children, their parents and the State. Rather than bringing more children into care, this provision suggests that removal of a child from the family should only occur where no less invasive measure would suffice.

Although not perfect, the proposals represent a significant step forward in Ireland's commitment to realising the rights of children in Irish law. They reflect a new model for the treatment of children and a redrawing of the responsibilities of the State and parents. No date has been set for a constitutional referendum and it remains to be seen whether these proposals are offered to the people. What is clear is these proposals have the potential to result in greater respect for children's rights in practice and in law.

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