

Barnardos' submission to the Joint Committee on the Constitutional Amendment on Children:



Proposed Amendment to Article 42 (A) of the Constitution

31 January 2008

Barnardos' vision is of an Ireland where childhood is valued and every child is cherished equally. We welcomed Taoiseach Bertie Ahern's thoughtful and considered words at the announcement of the Government's decision to hold a referendum when he spoke of the need to recognise children's rights in the Constitution and commit to truly valuing childhood:

"It appears increasingly clear that the inadequate recognition of our constitutional law of the rights of children as individuals has to be addressed. That is the first step in creating a new culture of respect for the rights of the child.

"Our objective should be to have in our fundamental law, provisions which are strong and as effective as that possessed by any other country in the world. We should be second to none in giving effect to our commitment to truly value childhood."¹

Childhood is a time for learning and development and also a time of particular vulnerability. All children in Ireland are in need of the protection afforded by the supreme source of law in the country and from which all other laws flow. As it stands children's rights when specifically referenced are in the context of the family. Case law has demonstrated that when there is conflict between the rights of the family and the rights of children, the family's rights take precedence.

Before addressing the specific areas the committee has been asked to consider in more detail, Barnardos would underline the fact that Ireland ratified the UN Convention on the Rights of the Child in 1992. In 1998 the UN Committee on the Rights of the Child urged the Government to:

"Take further steps to ensure that the convention is incorporated into domestic law, taking due account of its general principles as defined in Article 2 (non-discrimination), Article 3 (best interests of the child), Article 6 (right to life, survival and development) and Article 12 (respect for the views of the child)."²

In 2006 the UN Committee on the Rights of the Child (UNCRC) reiterated the same recommendation and advised the Government to take measures to ensure the best interests of the child principle is "applied in all political, judicial and administrative decisions" that have an impact on children recommending that the Government:

"Strengthen its efforts to ensure, including through constitutional provisions, that children have the right to express their views in all matters affecting them and to have these views given due weight in particular in families, schools and other educational institutions, the health sector and in communities."³

Recommendation

Barnardos recommends that any wording put before the people contains the following key elements which mirror the four general principles underlying the UN Convention on the Rights of the Child:

An express recognition of the right of the child's voice to be heard in all matters affecting the child in accordance with age and maturity (UNCRC Article 12).

The same level of protection and care be afforded equally to each child regardless of parental status (UNCRC Article 2).

1) As reported in The Irish Times and Irish Independent 4 November 2006

2) The Case for Constitutional Change, Barnardos, 2007

3) Ibid

The principle of the best interests of the child should be seen as having paramount importance in all matters of welfare and protection of the child (UNCRC Article 3).

The principle that each child should be entitled to support in order to achieve their developmental potential (UNCRC Article 6 as well as articles dealing with education, health and disability Articles 23, 24, 26, 27, 28, 31 and 39).

Recommendation

Barnardos would advocate that legislation relating to key aspects of the amendment be drafted before people are asked to vote on the referendum in order to reduce any potential confusion arising on the issues .

Please note we have set out the submission according to the relevant sections of the terms of reference following by the accompanying proposed draft wording.

Article 42 (A)

This section discusses point (i) of the orders of reference of the committee

1. The State acknowledges and affirms the natural and imprescriptible rights of all children.

Barnardos believes that children are rights-holders in their own capacity. The reality is, however, that children's rights and the rights of parents are mutual in most situations, for example, children have a right to grow up in their natural families and parents have a right to raise their children. By providing children with constitutional rights, it could be argued that the State must support families more effectively in order to vindicate the rights of children and parents together.

The fact that the rights of young children are exercised by their parents on their behalf could mean that constitutional protection for children's rights will strengthen the family, in all its forms.

Recommendation

Barnardos supports an explicit statement of children's rights in the Constitution which recognises the child as an individual with rights of their own as well as those rights accorded to the child as a member of a family.

Recommendation

Barnardos further recommends that childhood be recognised as a unique time which needs to be safeguarded both for the good of individual children and the benefit of society. To that end the state needs to allocate sufficient resources to ensure that the special nature of childhood is protected.

Article 42 (A)

This section discusses point (ii) of the orders of reference of the committee

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

The Supreme Court has effectively summarised a child's rights under Articles 41 and 42:

- The right to belong to a family and the right to have that family protected (Article 41)
- The right to be educated by the family (Article 41)
- The right of the child to be provided by parents with moral, intellectual, physical and social education (Article 42)

According to the Supreme Court, Article 41 recognises the family based on marriage and only the marital family is entitled to the protection and guarantees of Articles 41 and 42. The rights of the non-marital family and its members are classed as “personal rights” and so are subject to Article 40.

Currently there is a two-tier threshold for state intervention in the family on behalf of the child. It would be Barnardos’ understanding that using the phrase “any child” in the proposed amendment would seek to ensure all children are subject to the same threshold for state intervention. It has to be considered how all children can be subject to the same threshold for state intervention when this proposed provision is taken in conjunction with Article 41 recognising the family based on marriage as the “constitutional family”.

We appreciate the State is walking a tightrope between necessarily respecting the rights of the family as a unit and as the same time intervening to safeguard the welfare and protection of children where a child’s best interests may be at stake. It would be useful to define the criteria for “exceptional”. At present it is a high threshold for intervention where the child may already have experienced significant neglect and/or other forms of abuse before action is taken.

While Barnardos believes that a safe and loving family environment is the best place for a child to be brought up, there are a group of particularly vulnerable children for whom this type of family life does not exist. For those children their families can be unsafe places where children do not thrive but struggle to survive.

Children in such a position of vulnerability should be able to avail of state intervention before truly exceptional circumstances arise, as at this stage the damage can already be done. International best practice also holds against such an “*after the fact*” approach to child protection.

The state in order to safeguard the welfare and protection of children and support families needs to provide a flexible response with a particular emphasis on early intervention and prevention services. Barnardos has consistently called for a fully resourced, national 24/7 social work service to be available to families in crisis. At the same time, we recognise that children may require alternative family care outside their family of origin or in a residential care setting. In all cases we believe the principle of the best interests of the child should be applied.

Recommendation

Barnardos recommends that the Constitution includes the right of children to be cared for by their parents and that that right reside with the child. The right of a child to be cared for should be extended to a child’s entitlement to state intervention and/ or provision of alternative care when parents, regardless of marital status, fail to adequately protect their children.

Recommendation

Barnardos recommends that provision be made for early intervention where parents fail to adequately care for their children. While this is still indicative of “*after the fact*” protection, it is a stronger protection than that currently provided. The Constitution needs to reflect the child’s right to a safe childhood and that right should be the overriding concern in such cases.

Recommendation

Barnardos recommends that services and resources be put in place to provide for needs-led family supports.

Article 42 (A)

This section discusses point (iii), (iv) and (v) of the orders of reference of the committee

2.2 Provision may be made by law for the adoption of a child where parents have failed for such a period of time as may be prescribed by law in their duty towards their 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 the proceedings before any court concerning the adoption, guardianship and custody of, or access to, any child the Court shall endeavour to secure the best interests of the child.

Children need to grow up in a safe and stable environment if they are to achieve their full developmental potential. The rights of children and the best interests of the child are usually achieved within their family. Children who require it should be entitled to have their welfare protected through the provision of alternative care such as fostering and adoption.

The law currently allows for both marital and non-marital children to be adopted. The adoption of marital children, however, is more difficult. Under the Adoption Acts, an un-married mother can place her child for adoption and consents then to the order being made. The High Court can in some instances dispense with her consent.

The children of married parents, however, can only be adopted if the High Court is satisfied that parents for physical or moral reasons have failed in their duties towards a child for a continuous period of at least 12 months, *and that such failure is liable to continue without interruption until that child is 18*, and that such a failure constitutes an abandonment of all parental rights in respect of the child and that the state should intervene as guardian for the common good.

Children in long term foster care situations where foster parents may wish to adopt often have to wait until they are nearly 18 to be adopted as otherwise it may be possible for birth parents to resume parental duties. The effect on the child is that they are effectively denied alternative family stability which would have benefited them most at a time when they most needed it.

Barnardos agrees that provision should be made by law for the voluntary placement for adoption and the adoption of any child.

Recommendation

Barnardos recommends that in order to ensure that the welfare principle is properly enshrined and is effective it needs to be expressed as the first and primary consideration in any matter affecting the child.

Recommendation

Barnardos recommends that the voice of the child should be heard on any matter that affects the child in any proceedings involving the child and that the state give the child's views due weight according to age and maturity.

Recommendation

Barnardos recommends that the best interests of the child are best served when the child is independently represented in all matters affecting the child.

Recommendation

Barnardos recommends that failure of duty is not the determining criterion for the adoption of children born into a marital family.

Recommendation

Barnardos recommends that the legislation accompanying this provision be set out in advance of a referendum and include the establishment of clear time limits in respect to fostering and eligibility for adoption.

Article 42(A)

This section discusses point (vi) of the orders of reference of the committee

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.

An effective vetting procedure for persons working with children, in a paid or voluntary capacity, must be in place. Barnardos sees the proposed extension of the vetting system to include relevant matters such as cautions and serious allegations rather than dealing solely with convictions as another vital step towards protecting children from those who would seek to harm them.

The current amendment is limited in scope by focusing on the endangerment by sexual predators. Children must also be protected from all forms of abuse - physical abuse, neglect and emotional abuse by those who could potentially have direct and unsupervised contact with children either by applying to work in the sector or by volunteering with clubs and organisations.

While any comprehensive vetting procedure must be child focused and rights based, the constitutional amendment must have a sound constitutional footing to ensure it is insulated from challenge. Constitutional considerations arise not just for protection of children's rights but also the rights of those being vetted such as 'right to a good name' and a 'right to livelihood'. Striking a balance between these articles is essential and will lead to enhanced confidence in the roll out of the system.

Barnardos calls for legislation to be drafted to accompany the amendment outlining the processes involved. Such legislation should be clear, concise, limited in application and contain procedural safeguards so as to operate in a harmonious manner with all current Constitutional provisions and laws.⁴ A mechanism should be in place that provides for judicial oversight to build confidence in the impartiality and accountability of the system.

Barnardos advocates that a model similar to that operating in Northern Ireland under the Protection of Children and Vulnerable Adults (POCVA) Order 2003 be operational in the Republic. This comprehensive system checks against convictions and other relevant matters and while the focus is on protecting child and vulnerable adults there are safeguards and due processes for those being vetted, including the right to appeal.

Recommendation

Barnardos recommends that the amendment be widened in scope to include all forms of abuse.

Recommendation

Barnardos recommends that the amendment be harmonious with other Constitutional rights and laws to ensure public understanding and co-operation.

4) Shannon, Geoffrey (2007) Report of the Special Rapporteur on Child Protection

Article 42(A)

This section discusses point (vii) of the orders of reference of the committee

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.

This amendment is to be largely welcomed especially it is not gender specific and benefits both boys and girls potentially at risk of abuse and/ or exploitation.

The Constitution must copper-fasten the protection of children from those who would seek to harm them, regardless of the age of the perpetrator. Such protection in both Constitutional and legislative terms should supersede the plea of honest mistake. Barnardos advocates that it should be up to the accused to prove that they took reasonable steps to ascertain the age of the child prior to engaging in sex with them. Such steps should not be based on presuming the child was older based on normal developmental changes.

Finding the balance between protecting children from those seeking to exploit and / or abuse them and not to penalise those teenagers engaging in consensual sexual experimentation is difficult. At present the current Amendment would criminalise all sexual activity amongst adolescents, even though it may be consensual, because it has specified the age of 18 years.

Barnardos believes that it would be better for young people not to engage in sexual relationships at an early age given the impact it can have on their health physically and psychologically including the risk of exposure to sexually transmitted infections and unplanned pregnancies. However, in cases of consensual sex between young people and more importantly teenage pregnancies, Barnardos disagrees with the possible prosecution of these young parents. Barnardos believes that the State should not make it more difficult for young parents to provide a stable and caring environment for their child.

However, it is important to realise that relationships among teenagers can be exploitative too with one in four abusers identified in the Sexual Abuse and Violence in Ireland⁵ report being under 17 years of age. A distinction based purely on age is too simplistic but Barnardos believes it is up to the legislature to address this. The Constitutional Amendment should ensure protection from abuse by enabling the provision for absolute and strict liability to be enshrined in law. The recommendation of the Joint Committee on Child Protection 2006⁶ providing for absolute criminal liability in respect of sexual activity with children under 16 years or 18 years where the alleged abuser is a person in authority is a starting point when finalising legislation in this area.

Recommendation

Barnardos recommends that the amendment does not set a specific age in the Constitution.

Recommendation

Barnardos recommends that adolescents engaging in consensual sexual activity are not criminalised.

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5) SAVI (2001)

6) Houses of the Oireachtas (2006) Joint Committee on Child Protection – Report on Child Protection