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**SUBMISSION BY BARNARDOS TO THE OIREACHTAS
COMMITTEE ON THE CONSTITUTION**

11th February 2005

Submission to the Oireachtas Committee on the Constitution

Introduction

Barnardos welcomes the initiative taken by the Oireachtas Committee on the Constitution in reviewing Family Rights in the Constitution. Barnardos recently launched an ambitious long-term strategy for children in Ireland which set out the following vision and mission statements:

Barnardos' vision is an Ireland where childhood is valued and all children and young people are cherished equally.

Barnardos' mission is to challenge and support families, communities, society and government to make Ireland the best place in the world to be a child, focusing specifically on children and young people whose well-being is under threat.

Barnardos works with over 12,000 children and families in Ireland each year. Our services are led by the needs of children, working with 'a whole child approach' involving families and the community. Barnardos is also committed to advocacy and has identified 4 priority areas for our advocacy which are Child Poverty, Child Protection, Educational Disadvantage and Alcohol Abuse.

The importance of this constitutional review and the opportunity to effect positive change in the lives of children, particularly the most vulnerable children, cannot be over estimated. In spite of a range of legislative provisions, policies, systems and services designed to protect children and to promote their welfare and development, there are many children who still experience threats to their development and whose lives are shattered by conditions of abuse, neglect, discrimination, violence, exploitation, alcohol and drug misuse and homelessness.

The content of this submission focuses on two particular issues raised in the Committee's terms of reference as follows:

- Should the rights of the child be given and expanded constitution protection?
- Does the Constitution need to be changed in view of the UN Convention on the Rights of the Child?

The structure of the submission is presented as follows:

- The Case for Constitutional Reform
- Case Studies
- The Constitution & the Family
- The Constitution & the Child
- International Law
- Conclusions
- Recommendations

The Case for Constitutional Reform

The case of the inclusion of children's rights in the constitution was highlighted in the report of the Kilkenny Incest Investigation (1993).

"We feel that the very high emphasis on the rights of the family in the constitution may consciously or unconsciously be interpreted as giving a higher value to the rights of parents than to the rights of children. We believe that the Constitution should contain a specific and overt declaration to the rights of born children. We therefore recommend that consideration be given by the government to the amendment of Article 41 and 42 of the Constitution so as to include a statement of the constitutional rights of children." (Ibid p.96)

In 1996, the Report of the Constitutional review group indicated that "it is desirable to put into the Constitution an express obligation to treat the best interests of the child as a paramount consideration on any actions relating to children". Any such provision might be modelled with the appropriate changes to suit an Irish context, on Article 3.1 of the CRC (UN Convention on the Rights of the Child) which provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of paramount consideration.

In 1998 the United National Committee on the Rights of the Child in its concluding observations, emphasised the recommendations of the reports of the constitution review group would reinforce "the status of the child as a full subject of rights."

In his seminal work *Child Law* (2005) Geoffrey Shannon concludes that "injustice, inequality, hypocrisy and the denial of human rights occur in many areas of child law". In considering the current constitutional provision as it relates to children, Barnardos has drawn on 'Child Law' as the most authoritative source of legal analysis. However, Barnardos is also drawing on the extensive experience we have had in working with children and families over many years.

The most central issue that arises is that of the relationship and balance between the rights of parents and the rights of children. It is Barnardos view, informed by our experience in working with very vulnerable children, that the Constitution as it currently stands, creates an environment where the rights of the family supersede the rights of individual children. In order to illustrate the impact of this problem on the lives of children, we have included a number of case-studies of real children, with names and identifying details changed to preserve confidentiality.

x Best interests of the child
✓ parental rights
supersede.

Case Studies

The following case studies have been gathered from Barnardos staff. Many of the issues that arise are linked with long term plans for children, their ongoing relationships with their families of origin, and the impact that this has on their foster families.

Examples of Child Protection cases

Case A: Tara is a 3 year old little girl who has been with same foster family since the age of 3 months. She has court ordered access to her mother twice weekly for three hours. Tara displays great distress at going to access and her distress is given little credit in court and there is no Guardian Ad Litem involved. The quantity of access and the disruption to their lives is affecting the foster carer's ability to care for Tara.

Case B: A four year old girl Mary has been with same family since the age of 6 months. She court ordered weekly access to her mother who is giving Mary messages that she is getting her back. The case is under review in court every six months. Each time the case is coming up rehabilitation is looked at seriously. Mary is showing great distress and insecurity.

Case C: Two siblings Shane and Tom aged 5 and 3 years are in foster care. The last four years have been spent trying to rehabilitate, thus social workers have been unable to identify a permanent family. The 3 year old is showing signs of attachment disorder. Social workers appear very confused and parental rights are placed before the needs of the children. Courts assume that children and parents have an attachment as do the social workers and thus planning and access is based on this. However the mother disappears for long periods and then turns up seeking access which is then automatically given. Family Care Workers who are strangers to the children, bring them to access in cars. Which parent among us would place their two young children into a car with a total stranger each week? The children are showing signs of great disturbance. Tom the 3 year old has been in care since 3 weeks old.

Presumption of parental rights / attachment

Case D: A case referred to us was of a 15 old girl who was introduced to heroin by her 28 year old boyfriend, and who quickly progressed to IV use. The man's previous partner died after an overdose injected into her body by him. The Health Board would not become involved. The case was referred to the solicitor by Gardai who were utterly frustrated by the girl's situation. Her solicitor referred the case to us as she wanted to take High Court proceedings to secure services for the girl but the girl's mother would not agree to this and therefore the case could not progress. We recently heard again of the girl, who was before the courts for criminal activity related to drug taking.

Case E: A boy aged 6 who was in foster care. The mother had long term mental health problems and was unlikely to ever regain care of him, but had regular access. The foster carers did not propose providing a long term home for the

boy and he would have to move within the next 12 months. No foster placements were available locally and the child would be likely to be admitted to residential care. An extended family member in the UK who knew the child, was willing to adopt him and to allow post adoption contact with the mother. This person was assessed and approved, however the mother would not give permission either for the adoption or the child's removal from the jurisdiction. The case was heard in the High Court but no information was made available as to the outcome of the case.

Case F: John is 5 and in long term foster care, having been removed from his mother's care at birth. After several moves in his first year, John was placed in foster care at 15 months with Ann and Mark Kennedy and their adopted son, Peter. John has access with his father Kevin once a week. His mother died a few months after his younger sister Fiona was born. Fiona joined John at the Kennedy's when she was 6 weeks old. Fiona, who has no Legal Guardian, is in the process of being adopted by the Kennedy's. Kevin is not Fiona's father. At age 3, she is a happy, healthy, secure child.

Kevin suffers from depression. Kevin has had regular and good quality access when he has been well. Kevin does not agree that John should be in care, and openly criticises the Kennedy's care of John. John has shown progress in many areas and is benefiting from foster care. However when John is unsettled his behaviour deteriorates. He can be aggressive and threatening to other children. The Kennedy's are exhausted and wondering how much longer they can cope.

Kevin has a right to see John. John has a right to grow up with a relationship with his father. However John also has a need to grow up with stability. John is particularly vulnerable to change and cannot manage the stress of belonging to two households that he perceives to be in conflict. His tenuous sense of security is being undermined by the frequency of access arrangements and the resultant behaviour is placing strain on the placement. If John's placement breaks down it will be a developmental catastrophe for him and will create long term, potentially lifelong damage. When Fiona's adoption is completed, she will have a different legal status than John and will have no legal relationship with him, even though they are brother and sister being reared in the same household.

Case studies from private law

There are many cases where children attend access whatever their wishes and feelings are about the non resident parent. There is one case at the moment where the father is requiring access, and the children have made very clear and credible allegations of abuse against him.

An 'audit' of children with whom we work in the High Court came up with the following:

12 of the 28 children we represented were in care prior to age 8, 6 of those were raised in care since their infancy. All but two had social workers for most of their lives. They

have a lengthy history of attachment difficulties and placement disruption. Family and environmental risk factors include behavioural and mental health disorders, lack of social commitment, drug and alcohol use by the child and/or within the family, growing up in poor housing conditions, low income, poor school achievement, bullying, harsh and erratic discipline, family conflict, and parental offending.

It can be difficult to separate out the individual causal factors which disadvantage children who are not able to be raised with their families. Certainly the emphasis on the rights of the parents, the priority placed on repeated rehabilitation attempts and the high frequency of access appears to Barnardos to impede the capacity of children and their foster carers to make long term commitments to each other. The child who has already lost his family of origin can be denied the right to belong to any family. In some cases as illustrated above, this can have a significant detrimental impact on the child's welfare and development.

By contrast however, there are a number of cases where positive and protected contact between parents and children have meant that when a placement has not worked for a child, and where the parent has made significant recovery, the child has been able to be reunited with their birth family.

There is huge variation in access arrangements and practice between various Health Boards. Some have dedicated access facilities with regular staff conducting the access, providing continuity for children, parents and carers, all of whom are involved in the planning. Others take place to a 'formula' – typically once a month for long term care, and rely on ad hoc arrangements, taking place in hotel rooms and shopping centres, supervised by a variety of people, and it is hard to see how this can be a meaningful experience for any of the participants.

Quality of
care.
constant →
challenges

The Constitution and the family

According to Shannon (2005) the main source of fundamental rights in Irish Family Law is the Constitution, with the key Articles being Articles 41 and 42. Article 41 of the Constitution of 1937 relates to the family and "recognises the family as the natural and primary unit group of society" and also guarantees "to protect the family in its constitution and authority". These rights are bestowed on the family unit as a whole rather than individual family members. An individual on behalf of a family may invoke them but as Costello J. noted in *Murray v Ireland*,¹ they "belong to the institution in itself as distinct from the personal rights which each individual member might enjoy by virtue of membership of the family".

Article 41 of the Constitution fails to recognise the child as an individual in their own right. This derives from the principle of parental autonomy inherent in Article 41. This article establishes a level of privacy within family life, which the state can enter only in the exceptional circumstances detailed in Article 42.5 of the Constitution as follows:

¹ [1985] I.L.R.M. 542 at 547.

“(1) The State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for religious and moral, intellectual, physical and social education of their children...

(5) In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, 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 subordination of children’s rights to the precedence of the family unit has been reflected in many Supreme Court judgements. Article 42 deals with education, which includes child-rearing and holds it to be not only a right but a duty of parents. This Article reinforces the decision-making autonomy of the family. Article 42.5 addresses the complete inability of some parents to provide for their children’s education. “It has been interpreted as being confined not just to a failure by the parents of a child to provide education for him and her, but may in exceptional circumstances extend to failure in other duties necessary to satisfy the personal rights of the child. This interpretation supports the assertion that the right to education in Article 42 is a mere extension of the concepts of “the family” in Article 41. Articles 41 and 42 of the Constitution together render the rights of married parents in relation to their children ‘inalienable’.” (Shannon 2005, page 4). The implication of these articles is that the scope for the legal overturning of the rights of married parents is severely limited and the experience of Barnardos as illustrated by the case studies above, means that child protection and child welfare can be compromised.

Shannon also refers to the importance of section 3 of the Guardianship of Infants Act 1964 which makes it clear that in considering an application relating to the guardianship, custody or upbringing of a child, the court must have regard to the welfare of the child as the “first and paramount consideration.” The Supreme Court, however, has determined that the welfare of a child must, unless there are exceptional circumstances, be considered to be best served by its remaining as part of the marital family. Shannon concludes that there is “an uneasy tension between, on the one hand, the provisions of Articles 41 and 42 of the Constitution and on the other hand, the welfare principle outlined in Section 3 of the Guardianship of Infants Act 1964.” (Ibid p. 4).

The Constitution and the Child

Court judgements over the past number of years have accepted that children have certain personal, unenumerated rights under Articles 40 and 42 of the Constitution. In the case of *G v An Bord Uchtala*, Finlay P held that the child “has a constitutional right to bodily integrity and has an unenumerated right to an opportunity to be reared with due regard to his or her religious, moral, intellectual, physical and social welfare.” O’Higgins C.J. in the Supreme Court expanded upon Finlay P.’s statement when he stated:

“The child also has natural rights... [T]he 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. The rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State. In exceptional cases the State, under the provisions of Article 42.5 of the Constitution, is given the duty as guardian of the common good, to provide for a child born into a family where the parents fail in their duty toward they child for physical or moral reasons. In the same way, in special circumstances the State may have an equal obligation in relation to a child born outside the family, to protect that child, even against its mother, if her natural rights are used in such a way as to endanger the health or life of the child or to deprive him of his rights.”²

In this same case, Walsh J. stated that: [T]here is nothing in the Constitution to indicate that in cases of conflict the rights of the parents are always to be given primacy.”³ He went further by analysing the rights of children in the following terms:

“Not only has the child born out of lawful wedlock the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock, but a *fortiori* it has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth. The child’s natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to practice of religion, and to follow his or her conscience... It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child’s natural right to life and all that flows from that right are independent of any right of the parent as such.”⁴

In a more recent case of *D.G. v Eastern Health Board*, Denham J., held that the child had “the right to be reared with due regard to his religious, moral, intellectual, physical and social welfare; to be fed, accommodated and educated; to suitable care and treatment; to have the opportunity of working and of realising his personality and dignity as a human being.”⁵

More recently it appears that the Supreme Court has moved away from enumerating children’s rights by holding that the government was responsible for articulating the rights of children. According to Shannon “this approach can be gleaned from four landmark judgements of the Supreme Court in the past four years on Children’s Rights. They concern the children in society who are most in need; children who are dependent on the state for their education, health, welfare and citizenship. Such children now inhabit a legal limbo.”⁶

Barnardos’ concern is that if the state fails to protect the lives of individual children, and if the Supreme Court refuses, except in exceptional circumstances, to uphold children’s rights, then vulnerable children will not be adequately protected. ||

² Ibid at 69.

³ Ibid at 78.

⁴ Ibid at 69.

⁵ [1998] 1 I.L.R.M 241 at 262.

⁶ Shannon p6.

International Law

Our dualist approach to International Law generally makes international human rights treaties binding on the state, though not on the courts, as such treaties have traditionally not been incorporated into Irish Law. Ireland has ratified two international instruments that have a significant bearing on children's rights. Ireland ratified the 1989 United Nations Convention on The Rights of the Child (CRC), without reservation on September 21, 1992. That said, the provisions of the CRC do not form part of Irish Law. This convention it should be stated, gives recognition to children's rights in the widest of terms.

Ireland has also ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) into domestic law. However, the incorporation of the ECHR has been at sub-constitutional level which has resulted in Children's rights remaining subordinate to parental rights. Without an expressed statement on children's rights in the Constitution, children's rights will remain inferior to parental rights.

Conclusions

- The current position is that under the Irish Constitution, children's rights are not adequately protected. (See Kilkenny Incest Investigation Report).
- The Constitution creates an environment where the rights of the family takes precedence over the rights of individual children. This impacts on the culture of child protection work and policy-making. Also the decision-making flows from assumptions that plans for children are created around the rights of parents.
- The report of the Victoria Climbié inquiry (2003) has made 108 recommendations concerning early intervention, inter-agency co-operation and the need for increased social work resources. These recommendations reinforce the report of the Cleveland Inquiry (1988). The question must be asked as to how the whole child care system in Ireland could be strengthened if the Irish Constitution were to include an explicit children's rights provision. Barnardos is of the view that this would strengthen the effectiveness of child and family services in terms of child protection.

Recommendations

- That the Irish Constitution be amended to include an article which expressly guarantees and secures the protection of children's rights.
- With regard to the UNCRC Barnardos recommends that the terms of this instrument should be reflected in the constitution.

References

Shannon G. 2005. Child Law. Thompson Round Hall.

Kilkenny Incest Investigation (1993). Government Publications.

Report of the Inquiry into Child Abuse in Cleveland 1987 (1988). Her Majesty's Stationery Office.

The Victoria Climbié Inquiry Report (2003) TSO.