

Observations on the Proposed Thirty-first Amendment of the Constitution (Children) Bill 2012

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I. Introduction

1. On 19 September 2012 the Minister for Children and Youth Affairs, Frances Fitzgerald T.D., published the Thirty-first Amendment to the Constitution (Children) Bill 2012 which sets out the wording for the proposed Children's Referendum which is to be held on 10 November 2012.

2. In accordance with its statutory functions under section 8(a) of the Human Rights Commission Act 2000, namely, to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights; and section 8(d), namely to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights in the State. The IHRC welcomes the opportunity to provide these Observations on the Thirty-first Amendment of the Constitution (Children) Bill 2012 to Government.

3. The Bill is the culmination of successive reports calling for constitutional reform on children's rights, and indeed, the discussion as to the elaboration of constitutional provisions for the protection of children's rights has been ongoing for a considerable period of time.¹ The IHRC broadly welcomes the proposal to put the Thirty-first Amendment to the Constitution to the People insofar as it advances the rights of children in the State.

4. In its Submission of January 2008 to the Oireachtas Joint Committee on the Constitutional Amendment on Children,² the IHRC recalled how the 1996 Constitution Review Group (CRG) concluded that while children hold all of the natural rights which adults hold under Article 40 of the Constitution, there should also be explicit constitutional recognition of children's rights.³ The CRG recommended that an express guarantee of rights of the child might include:

- (a) *the right of the child to be registered immediately after birth and to have from birth a name;*
- (b) *the right of every child, as far as practicable, to know his or her parents; subject to the proviso that such rights should be subject to regulation by law in the interests of the child;*

¹ See in particular the *Report of the Constitution Review Group*, (1996); The All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report, The Family* (2006); Law Society Law Reform Committee, *Rights-based Child Law: The Case for Reform*, (2006); Ombudsman for Children, *Report to the Oireachtas on the Twenty-Eighth Amendment of the Constitution Bill 2007*, (2007); Ombudsman for Children, *Advice of the Ombudsman for Children on the Proposed Referendum on Children's Rights*, (2006), the Joint Committee on the Constitutional Amendment on Children (2010).

² *Submission of the Irish Human Rights Commission to the Oireachtas Joint Committee on the Constitutional Amendment on Children*, IHRC, January 2008.

³ Report of the Constitution Review Group, (1996): "... the Review Group recommends the express inclusion of the unenumerated rights of the child set out above"; at 305, available at www.constitution.ie/reports/crg.pdf

- (c) *the right of every child, as far as practicable, to be cared for by his or her parents; and*
- (d) *the right of every child to be reared with due regard to his or her welfare.*

5. In 2006, the Law Society Law Reform Committee recommended that a provision similar to Chapter 2, Section 28 of the South African Constitution be inserted into the Irish Constitution.⁴ Section 28 of the South African Constitution provides for an express guarantee of children's rights, including; the right to a name and nationality, the right to care, the right to nutrition, shelter, basic health care services and social services, protection from maltreatment and exploitation. Section 28 also provides that a "*child's best interests are of paramount importance in every matter concerning the child.*"

6. The intention behind the Thirty-first Amendment is, *inter alia*, to address a perceived *lacuna* in the legal protection of children in the State, which has been documented in 17 reports on child abuse and child neglect.⁵ The new Article 42A will give stand-alone recognition to children's rights outside the context of the family, and in certain circumstances independent of parent's rights.⁶

7. In line with its mandate under the Human Rights Commission Act 2000, the IHRC sets out here the relevant human rights standards contained in international law and in the Irish Constitution in order to assist both Government and the Oireachtas in considering the provisions of the current Bill. In this regard, section 2 of the Human Rights Commission Act 2000 defines "human rights" thus:

- (a) *the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and*
- (b) *the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party.*

8. The present draft legislation provides an opportunity for a comprehensive consideration of all of the relevant issues surrounding the rights of the child. The Dáil Debates, the final text of the Bill put to the Oireachtas and any text which is consequently put to the People will all assist the statutory bodies that must give effect to those rights and, where necessary, the courts in adjudicating on children's rights.

⁴ *Child Law Report*, Law Society Law Reform Committee, March 2006, at p.8

⁵ See Speech by Minister Frances Fitzgerald at the publication of the wording of the Children's Referendum. Available at: <http://www.dcy.gov.ie/viewdoc.asp?DocID=2333&ad=1>

⁶ Article 42 currently provides: "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 the religious and moral, intellectual, physical and social education of their children. 2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.... 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".

9. It is recalled that human rights are expressly universal in nature, enjoyed by all persons, including children, as an essential feature of their humanity. Their scope is set out in international treaties developed through the auspices of multilateral organisations, such as the United Nations and the Council of Europe, and ratified by the governments of the Member States of those bodies.

II. The Proposed Amendment

10. The Thirty-first Amendment of the Constitution (Children) Bill 2012 proposes to insert a new Article 42A after Article 42.4 and to provide for the repeal of Article 42.5 of the Constitution.

11. Article 42.5 provides that the State may, in exceptional circumstances, by appropriate means “*supply the place of the parents*” of a child who have failed in their duty to that child.

12. The present Article 42.5 provides that:

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.

13. The proposed Article 42A as presently drafted states:

1. *The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*
2.
 - 1° *In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*
 - 2° *Provision shall be made by law for the adoption of any 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 shall be made by law for the voluntary placement for adoption and the adoption of any child.*
4.
 - 1° *Provision shall be made by law that in the resolution of all proceedings—*
 - i. *brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or*

ii. *concerning the adoption, guardianship or custody of, or access to, any child,*
the best interests of the child shall be the paramount consideration.

2° *Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.*

14. Section 1 of the Bill thus provides for the repeal of Article 42.5 of the Constitution and the insertion of a new Article 42A after Article 42. Section 2 states that the amendment of the Constitution shall be called the Thirty-first Amendment of the Constitution.

III. General Observations

15. The structure of the proposed Thirty-first Amendment to the Constitution has two distinct parts. The first is a general recognition and affirmation of children's rights, while the second part deals with specific issues concerning child protection and care.

16. Turning to the general statement of children's rights in the proposed Article 42A.1, the IHRC considers it important that the amendment to the Constitution contain a clear statement of the rights that it is proposed to incorporate into the Constitution, and thereby those rights that it will in the future be the obligation of the State to protect and vindicate. On the present reading of the proposed text, the "rights of all children" sought to be secured are not clearly set out.

17. While the phrase "*recognises and affirms*" is welcome, the phrase "*natural and imprescriptible rights*" is not defined and for reasons set out below may not without further definition meet what may be presumed to be the objective of the provision, that is, that children's rights will be given protection in all circumstances where State responsibility is engaged.

18. The term "*natural and imprescriptible rights*" is the term already present in Article 42.5, which provision is proposed to be replaced in the November referendum. As will be noted below, the interpretation of Article 42.5 by the Courts to date has not been without controversy.⁷ In particular, the word "*natural*" in the context of rights does not have a generally agreed meaning, and has been subject to differing interpretation and fluctuating usage by the Courts.⁸ It is also

⁷ The term "*imprescriptible*" is not one used in general discourse, but refers to the process known in law as prescription whereby a right may be lost over time through failure to assert it. Therefore "*imprescriptible*" may be understood in relation to rights as meaning that the right will not be lost through failure to invoke or assert it.

⁸ For a detailed discussion of natural law theory and its relationship to the Constitution, see JM Kelly: *The Irish Constitution*, Hogan and Whyte, 4th Ed., paras 7.1.08- 7.1.20. The doctrine was understood to have fallen into some disuse following the Supreme Court judgment in *Re Article*

noted that the phrase “*natural and imprescriptible rights*” is also invoked in the proposed Article 42A.2.

19. While it is accepted that the phrase “*natural and imprescriptible rights*” could provide the Courts with a basis on which to develop a line of jurisprudence that will name, on a case by case basis, what rights are being recognised, affirmed and vindicated in the new Article to the Constitution, there is a risk that the phrase could be considered too vague to yield any solid basis on which the rights of the child may be advanced. While the IHRC considers that there should be a general recognition of the rights of the child in the proposed Article that would allow the Courts to develop a line of jurisprudence identifying certain unenumerated rights, as has been the case with Article 40.3 (the protection of fundamental rights), reliance on the Courts to develop such rights is not sufficient in itself without recognition of a number of core principles guiding the Courts, which will be set out more fully below.

20. In relation to actually securing the rights of the child, the phrase “*as far as practicable*” is also problematic as it limits the extent of the obligation on the State under the proposed Article. If this proposed wording is contrasted with the fundamental rights guarantee under Article 40.3.1, where the State “*guarantees in its laws, to respect, and, as far as is practicable, by its laws to defend and vindicate the rights of the citizen*”, it may be seen that Article 40.3 places a more absolute obligation on the State to respect the rights enshrined in the Constitution, and it would be desirable that a less equivocal protection be given to children’s rights in the present proposed amendment.⁹

For the reasons set out above, and subject to the further Observations below in relation to the second part of the proposed constitutional amendment, the IHRC considers the general statement of rights contained in the proposed Article 42A.1, does not meet the level of protection required by Ireland’s international human rights obligations. The current text could thus benefit from the insertion of a specific reference to the rights contained in the Convention on the Rights of the Child (“CRC”) as set out further below.¹⁰ In this way, the CRC could be a direct source and interpretative tool in clarifying to the Courts the precise nature of the rights to which it is proposed to give constitutional status. In particular, the Article could be significantly strengthened by a statement that, in all situations where the rights of the child are engaged, the best interests of the child shall be a primary consideration and that the principle of non-discrimination will apply, that the right to development is recognised and that the right of the child to participate in decisions concerning them is included.

26 and the Regulation of Information (Services Outside the State for Termination of Pregnancy) Bill [1995] 1 IR 1. In broad terms, natural law doctrine affirms that certain fundamental rights are of divine origin and are superior to man made law, including the Constitution itself. While natural law theory has its place in jurisprudential discourse, it remains a nebulous concept.

⁹ It should also be noted that the word “protect” replaces Article 40.3’s formulation of the word “defend” in the proposed wording. While child protection is a clear policy aim of Article 42A2-4, the child’s rights under the CRC extend beyond protection from harm rights.

¹⁰ See too the IHRC submission to the Oireachtas Joint Committee on the Constitutional Amendment on Children, January 2008.

IV. The UN Convention on the Rights of the Child and Best Practice in International Law

21. The United Nations Convention on the Rights of the Child (CRC), which entered into force in 1990, may be considered as representing best international practice regarding children's rights. The CRC is the most widely ratified international treaty, a fact which underscores the international acceptance of its principles.¹¹ Ireland ratified the CRC in September 1992, thereby committing itself to "*respect and ensure*" the rights set forth in the Convention. In September 2006, during the most recent examination of Ireland's periodic reports by the United Nations Committee on the Rights of the Child, the then-Minister for Children reaffirmed Ireland's commitment under the Convention.¹²

22. The IHRC's long-standing position is that the rights set out in those international conventions ratified by the State, within the meaning of section 2(b) of the Human Rights Commission Act 2000 – such as the CRC, should be made enforceable in the Irish Courts by their incorporation into Irish law, both at constitutional or legislative level.¹³ The IHRC is concerned that any constitutional amendment pertaining to children's rights must support and protect those rights which form the general principles of the CRC.

23. The general principles of the CRC are set out in Article 2 (prohibition of discrimination), Article 3 (best interests of the child principle), Article 6 (right to life, survival and development) and Article 12 (right to participate) of the Convention.¹⁴ A key test of any constitutional amendment is whether it incorporates these principles which are set out below.¹⁵

(a) Prohibition of Discrimination (Article 2 CRC)

24. Article 2 of the CRC provides:

- (a) *States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*
- (b) *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on*

¹¹ Only two UN member states have not ratified the Convention; Somalia and the United States of America.

¹² See Speech by Mr. Brian Lenihan, T.D., Minister for Children, Opening Address to the UN Committee on the Rights of the Child (September 2006).

¹³ Submission to the UN Committee on the Rights of the Child, IHRC, 2006 at p.3.

¹⁴ Committee on the Rights of the Child, General Comment No. 5, 2003, CRC/GC/2003/5, para. 12; UNICEF Implementation Handbook for the Convention on the Rights of the Child, 2002, p.39.

¹⁵ Other provisions are noted elsewhere - see Article 19 CRC below.

the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

25. The prohibition of discrimination has been identified by the Committee on the Rights of the Child as a general principle of fundamental importance for implementation of the whole Convention. The Committee has repeatedly stressed the need for an “active” approach to implementation with particular regard to the principle of non-discrimination.¹⁶

26. There is no explicit prohibition of discrimination included in the current wording of the proposed Thirty-first amendment of the Constitution. The IHRC is of the view that both the existing constitutional provisions and the newly proposed provisions in the proposed Article 42A are inadequate to guarantee the equal treatment of all children, irrespective of human difference.

27. The existing equality guarantee in Article 40.1 of the Constitution is limited as to its scope and allows the State to have due regard to “*differences of capacity, physical and moral, and of social function*”.¹⁷ It falls short of an all-embracing effective equality guarantee as required by Article 2 of the CRC.

28. The IHRC recommends that consideration be given to the inclusion of an effective equality guarantee in the Constitution. Reference to the CRC in Article 42A1 could allow inclusion of the non-discrimination principle in Article 2 of the CRC in relation to the rights of children.¹⁸

(b) Best Interests of the Child Principle (Article 3 CRC)

29. The best interests of the child principle is one of the core principles of the CRC, and is of primary importance in assuring full respect for children's rights. It is set out as a general principle in Article 3(1) of the CRC, 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 a primary consideration.

30. Article 3(1) CRC is relevant to the interpretation of all the Articles of the CRC and the implementation of the Convention itself. The importance of this principle can be seen by its further incorporation into specific articles of the

¹⁶ UNICEF Implementation Handbook for the Convention on the Rights of the Child, 2002, p. 19-22.

¹⁷ Article 40.1 provides: “1. All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.” While Article 40.1 has the potential to be interpreted expansively by the courts, this has arguably not occurred in recent times.

¹⁸ The importance of an effective equality guarantee in the Constitution has been previously raised by the IHRC. See for example, *Submission of the Irish Human Rights Commission to the UN Committee on the Elimination of Discrimination Against Women in respect of Ireland's Combined 4th and 5th Periodic Reports under the Convention on the Elimination of all Forms of Discrimination Against Women* (2005).

CRC.¹⁹ The best interests of the child principle can also be found in other international documents such as the 1959 Declaration on the Rights of the Child, and Articles 5(b) and 16(1)(d) of the Convention on the Elimination of all forms of Discrimination Against Women. Furthermore, in interpreting Article 8 of the European Convention on Human Rights, the European Court of Human Rights has attached particular importance to the principle of the best interests of the child.²⁰ More recently the principle has been affirmed as part of EU law.²¹

31. The current wording proposed for the proposed Thirty first amendment of the Constitution restricts the principle of the best interest of the child to the proposed Article 42A.2.2°, concerning the adoption of a child where the parents have failed in their duty towards the child, and Article 42A.4 regarding proceedings before a court concerning the adoption, guardianship, or custody of, or access to, any child. The IHRC strongly **recommends** that there should be express recognition in the Constitution of the principle of the best interests of the child in all actions concerning children, as set out in Article 3(1) of the CRC.²² The best interests principle should thus not be confined to child care and family law proceedings, lest the failure to apply it to all situations concerning the rights of the child limit the potential benefit to children of the currently proposed wording.

32. In this regard, the IHRC recalls that the Committee on the Rights of the Child in its Concluding Observations on Ireland's first and second periodic reports recommended that Ireland should ensure that the best interests of the child principle is a primary consideration in all actions concerning children. Following its earlier recommendation in 1998, the Committee in 2006 stated that it remained concerned that the best interest of the child principle was still insufficiently addressed.²³ The Committee recommended the Ireland should:

Ensure that the general principle of the best interests of the child is a primary consideration without any distinction and is fully integrated into all legislation relevant to children; and

¹⁹ See Article 9.1, Article 9.3, Article 18.1, Article 20.1, Article 21, Article 37(c), Article 40(2)(b)(iii).

²⁰ In *Pini v Romania*, 22 June 2004, (2004) 40 EHRR 312, the Court found that the child's best interests could take priority over those of the parents, particularly in the case of a relationship based on adoption. See also *Neulinger and Shuruk v Switzerland*, Grand Chamber, 6 July 2010, and *Sommerfeld v Germany* Appl. No 31871, Judgment of 8 July 2003, where the Court made express reference to the Convention on the Rights of the Child.

²¹ Article 24 of the Charter of Fundamental Rights states as follows: "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

²² This has been recommended by the Ombudsman for Children, the Children's Rights Alliance, the All-Party Oireachtas Committee on the Constitution, 2006, and in the Report of the Constitutional Review Group, 1996.

²³ Concluding Comments of the Committee on the Rights of the Child on Ireland's 1st Periodic Report, 1998, CRC/C/15/add.85, para.25; Concluding Comments of the Committee on the Rights of the Child on Ireland's 2nd Periodic Report, 2006, CRC/C/IRL/CO/2, para. 23.

Ensure that this principle is also applied in all political, judicial and administrative decisions, as well as projects, programmes and services that have an impact on children.

33. In the view of the IHRC, the current wording of the proposed Article 42A.1 of the Thirty-first Amendment, does not fully meet the requirement of the best interests of the child principle.

34. The IHRC **recommends** that the wording of the proposed Article 42A.1 include an express recognition that in all actions concerning children the best interests of the child shall be a primary consideration.

(c) Right to life, survival and development (Article 6 CRC)

37. Article 6 of the CRC provides:

1. *States Parties recognize that every child has the inherent right to life.*
2. *States Parties shall ensure to the maximum extent possible the survival and development of the child.*

38. The Committee on the Rights of the Child, in its General Comment No. 7, has stressed that not only is the child's inherent right to life protected under this provision, but also the child's survival and development. In relation to the latter, the Committee has stressed that "*while ensuring survival and physical health are priorities*" States parties:

*"are reminded that article 6 encompasses all aspects of development, and that a young child's health and psychosocial well-being are in many respects interdependent. Both may be put at risk by adverse living conditions, neglect, insensitive or abusive treatment and restricted opportunities for realizing human potential. Young children growing up in especially difficult circumstances require particular attention ... the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play (arts. 24, 27, 28, 29 and 31), as well as through respect for the responsibilities of parents and the provision of assistance and quality services (arts. 5 and 18). From an early age, children should themselves be included in activities promoting good nutrition and a healthy and disease-preventing lifestyle."*²⁴

39. The current text proposed for the Thirty-first amendment to the Constitution does not refer to the child's right to life, survival or development. Inasmuch as it may be suggested that the right to life is adequately protected under Article 40.3 of the Constitution, it is noted that that provision has not been

²⁴ Committee on the Rights of the Child General Comment No. 7 (2005) *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1 20 September 2006; at para 10.

interpreted by the courts to include the interdependent health and psychosocial well-being rights referred to above by the Committee on the Rights of the Child.

40. The IHRC recommends that express reference to the rights of the child to survival and development be included in the proposed Article 42A.1.

(d) Right to Participate Principle (Article 12 CRC)

41. Article 12(1) of the CRC of the Child provides:

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

42. The Committee on the Rights of the Child in its Concluding Observations on Ireland's second periodic report recommended that Ireland:

*"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 those views given due weight in particular in families, schools and other educational institutions, the health sector and in communities."*²⁵

43. The current text proposed for the Thirty first amendment of the Constitution incorporates a provision expressly providing for the procedural right of the child to express his or her views in accordance with the child's capacity, but only in those issues covered by the second part of Article 42A, namely safety and welfare, adoption, guardianship, custody, or access, rather than all matters affecting the child as required by the CRC. Thus, in other areas impacting on child rights no provision is made for the right of the child to participate and a question arises as to whether the inclusion of a reference to Article 12 of the CRC in Article 42.2 will render it less likely that the courts would interpret the provisions of Article 42A.1 in a manner consistent with Article 12. Again, this doubt leads to the recommendation that the CRC be expressly referred to in Article 42A.1.

V. Constitutional provisions: practical implications

44. Under the current constitutional provisions in Articles 41 and 42 of the Constitution there is an automatic presumption that the "*best interests of the child*" lies with the marital family.²⁶ Accordingly, the best interests of the individual child may not be specifically examined by the courts as it is presumed that the child's rights are best met within the marital family unit. The inclusion of the "*best interests of the child*" principle as an overriding principle of Article 42A.1 would ensure that there is legal certainty that the interests of the child will be protected

²⁵ Concluding Comments of the Committee on the Rights of the Child on Ireland's 2nd Periodic Report, 2006, CRC/C/IRL/CO/2, para. 25 (emphasis added).

²⁶ This presumption has been affirmed by the courts in the following cases; North Western Health Board v. H.W. [2001] 3 IR 622; N. v. Health Service Executive [2006] ("Baby Anne" case): see below.

above all other considerations. Normally the best interests of the child will correspond with the best interests of the family as is made clear by the Committee on the Rights of the Child in its observation that:

“Article 18 of the Convention reaffirms that parents or legal guardians have the primary responsibility for promoting children’s development and well-being, with the child’s best interests as their basic concern (arts. 18.1 and 27.2). States parties should respect the primacy of parents, mothers and fathers. This includes the obligation not to separate children from their parents, unless it is in the child’s best interests (art. 9).”²⁷

45. One manner in which the child’s rights under Article 42A and parental rights under Articles 41 and 42 may be resolved, in those rare cases where they conflict, would be to include direct reference to the CRC in the provisions of Article 42A.1. This would ensure conformity with the provisions of the CRC (which as noted are in broad terms supportive of parental rights), which include the proviso that the best interests of the child shall be the primary consideration in all actions taken concerning children.

46. In order to give a practical illustration of the concerns of the IHRC in relation to the limitations that appear inherent in Article 42.A.1. we examine below two case scenarios which do not involve abuse, adoption, access or custody, and consider whether the proposed new Article 42A.1 would lead to a different interpretation by the courts.

Case Scenario One: health tests

47. The first case scenario examines the vaccination of infant children. In *Northwestern Health Board v H.W. and C.W.* [2001] 3 IR 622 an issue was whether the parents of a 14 month old child could refuse to submit their child to a phenylketonuria (PKU) test,²⁸ which was established by experts to be in the child’s best interests.²⁹

²⁷ Committee on the Rights of the Child General Comment No. 7 (2005) *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1 20 September 2006; at para 18. Article 18 of the CRC provides: “1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. 3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.”

²⁸ A phenylalanine level build up in the baby’s blood can cause brain damage, seizures, and intellectual disability. As noted by the Supreme Court “The four metabolic conditions are phenylketonuria, galactosaemia, homocystinuria and maple syrup urine disease. The endocrine condition is hypothyroidism. All the conditions in question cause either mental handicap or life threatening illness unless they are detected early”; at para 2.

²⁹ Keane CJ (dissenting) noted: “the test to which the plaintiffs wish Paul to be subjected to is one which is required in order to establish whether he is suffering from biochemical or metabolic

48. In this case, Keane CJ for the minority argued that the child's parents had refused to protect and vindicate, so far as practicable, his constitutional right "*to be guarded against unnecessary and avoidable dangers to his health and welfare*" and that the courts should in those circumstances intervene.

49. However, a majority of the Supreme Court upheld McCracken J's finding in the High Court that because the blood test was an invasive technique, the child's consent through his parents had to be obtained. This was because the rights of the family under Article 41 and the current Article 42.5 provided that the State could intervene only in exceptional circumstances and in the view of the Court the current case "*could not be said to constitute an exceptional case, even though the general medical opinion would be quite clear that such decision was wrong.*"³⁰

50. One commentator has suggested that in light of this case, it may be preferable "*to move towards replacing the language of parental rights with 'parental responsibility, which places the parents, in consultation with their children, in the position of educating and maintaining them, not because of an authority conferred on parents, but in the interests of the child. This would recognise children as persons to whom duties are owed, as opposed to possessions over which power is wielded ...*"³¹

The Supreme Court in *Northwestern Health Board* thus recognised parental authority over their children.³² The question arises whether the proposed Article

disorders which can cause death or brain damage, some of which are relatively common and all of which are treatable if identified at an early stage. It is also the case that any risk to the child of having the test is so minimal that, in medical terms, it can be wholly disregarded. It follows inevitably that if this case is to be determined by what is in the best interests of the child, the order sought should have been granted by the High Court"; at para 119.

³⁰ Per Denham J at para 142, citing her fears of "stepping towards the Brave New World in which the State always knows best"; *ibid.* Article 41 provides: "1.1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State...

3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

³¹ Dr Deirdre Madden, *Medicine, Ethics and the Law* (2nd Ed) at 485 (2009).

³² Another case that has been decided in this line of jurisprudence is *N & N v Health Service Executive* [2006] IESC 60 at issue was whether the rights of the biological and subsequently married parents meant that they were entitled to the return of their child from the proposed adoptive parents. McGuinness J for the majority in the Supreme Court noted how the expert medical evidence in the case "agreed that an immediate or summary change of custody is virtually certain to cause severe psychological damage to the child." The learned judge also stated that she was "uncertain and apprehensive about the effects of a transfer of Ann's custody, and about her future in general", holding however that "the unequivocal wording of Articles 41 and 42 of the Constitution" as interpreted by the Supreme Court in *In The Matter of the Adoption (no 2) Bill, 1987* [1989] IR 657 meant that the rights of the married parents should prevail. In the same case Hardiman J strongly supported parental autonomy in relation to children thus: "*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*

42A would lead to a different process of interpretation by the Courts in such a case. The answer to this question centres on the interpretation to be afforded to Article 42A.1 when considering “the natural and imprescriptible rights of all children” which is far from clear in the absence of any provision in that formulation that the best interests of the child should be a primary or paramount concern in all actions concerning children. Even if such text were inserted, it would likely fall to the courts to balance the competing parental autonomy rights under Article 41 with the new provision of Article 42A.

Case Scenario Two: detention of children

(a) Imprisonment

51. In 2006, in its Concluding Observations on Ireland's last report to it, the Committee on the Rights of the Child commented thus on child detention:

“While noting with appreciation the intention of the State party to provide for all detained children up to the age of 18 to be held in separate detention facilities – so-called Children Detention Schools – the Committee is deeply concerned that children aged 16 and 17 years are detained in St. Patrick Institution which is a closed, medium security detention centre for males aged 18 to 21 years, with no facilities for education...”³³

52. Under current Irish law and practice, detaining children in institutions such as St Patrick's – which continues 6 years after the Committee's Observations, is permitted.

53. It is likely that such detention would still be permitted under the proposed Article 42A.1. However, if reference to the CRC were included in that provision, both the courts and juvenile detention authorities would be obliged to take account of the provisions of the CRC when reviewing whether any such detention in an institution such as St Patrick's should be permitted

(b) Adult psychiatric institutions

54. Similarly, under the provisions of the Mental Health Act 2001, it is permissible for a child to be detained in a psychiatric institution. This is on the basis that under section 25 of that Act the procedure for the involuntary

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.”

³³ Committee on the Rights of the Child. CRC/C/IRL/CO/229 September 2006; at para 72.

admission of children is that children are deemed to lack capacity until they reach eighteen years of age. Thus the HSE has competence to make an application to the District Court for an Order authorising the detention of a child in an approved centre for treatment for a period up to 21 days. Such an application is made on the basis of a psychiatric assessment that the child is suffering from a mental disorder. In the event that the child's parent or other person acting *in loco parentis* refuses or is not available to consent to such an examination of the child, an application may be made for an Order under the section and the Court may make directions as to the examination of the child and the furnishing of a report on foot of the examination to the Court. There is provision for the Order to be extended by the Court for a further period of three months after the initial 21 days, and thereafter for a period up to six months. In addition an Order can be made in urgent circumstances on an *ex parte* basis, and it is unclear whether such an Order can be revoked within the initial 21 days period. Children, irrespective of their stage of maturity or capacity also fall outside the strict definitions of "voluntary" and "involuntary" patient in the Act. In its 2010 *Policy Paper concerning the Definition of a "voluntary patient" under s.2 of the Mental Health Act 2001*, the IHRC recorded how 223 children were admitted to adult units in 2008.³⁴

55. In its 2006 Concluding Observations on Ireland's report, the Committee on the Rights of the Child also stated that:

"46. While welcoming the Mental Health Act of 2001 and noting that the State party has recognized the lack of adequate programmes and services related to the mental health of children and their families, the Committee is concerned that children with mental health difficulties still do not access existing programmes and services for fear of stigmatization, and that some children up to 18 years of age are treated with adults in psychiatric facilities.

47. The Committee reiterates its previous recommendation (CRC/C/15/Add.85 para. 20 and 38), and recommends that the State party:

...

*Continue its efforts to ensure that children with mental health difficulties benefit from specific services designed for children under 18 years of age."*³⁵

56. As with imprisonment, it is likely that continued psychiatric detention in adult wards would still be permissible under the proposed Article 42.A1. However, if reference to the CRC were included in that provision, both the courts and the HSE would be obliged to take account of the provisions of the CRC when reviewing any such detention. At the very least, they would be obliged to have regard for whether the treatment in such institutions was of benefit and

³⁴ Mental Health Commission *Annual Report 2008*, at pp. 29-31. The Mental Health Commission believes that the provision of age appropriate approved centres for children and adolescents must be addressed as a matter of urgency.

³⁵ *Ibid* at paras 46-47, emphasis retained.

tailored to children. They would also be obliged to seek the child's views as to whether they genuinely wished to remain in the institution or rather whether they should be classified as involuntary patients (if they wished to leave), they needed in-patient care but would still be entitled to all the procedural rights which accompany such detention.

VI. Proposed Article 42A.2

57. Article 42A.2 seeks to address child protection and care. This provision is very much welcomed by the IHRC insofar as it addresses the protective guarantees to be secured under Article 19 of the CRC which provides:

1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
2. *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

58. The current situation regarding adoption is that Article 42.5 of the Constitution (in its current form) has been given further effect through the provisions of the Adoption Act 2010. Thus, if having heard submissions from all the parties under section 53 of the Adoption Act 2010, section 54(2) of that Act provides that the Adoption Authority may be authorised by the High Court to make an adoption order in limited circumstances only.³⁶

³⁶ Section 54(2) provides: "On an application being made under paragraph (a) or (b) of subsection (1), the High Court by order may authorise the Authority to make an adoption order in relation to the child in favour of the applicants, and to dispense with the consent of any person whose consent is necessary to the making of the adoption order, if- (a) having due regard for the rights, whether under the Constitution or otherwise, of the persons concerned (including the natural and imprescriptible rights of the child), the High Court is satisfied that it would be in the best interests of the child to grant the authorisation, and (b) it is shown to the satisfaction of the High Court as follows: (i) that- The courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which the organs of the State were subject and at no stage recognised the provisions of the natural law as superior to the Constitution. (I) for a continuous period of not less than 12 months immediately preceding the time of the making of the application, the parents of the child to whom the declaration under section 53 (1) relates, for physical or moral reasons, have failed in their duty towards the child, (II) it is likely that the failure will continue without interruption until the child attains the age of 18 years, (III) the failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child, and (IV) by reason of the failure, the State, as guardian of the common good, should supply the place of the parents; (ii) that the child- (I) at the time of the making of the application, is in the custody of and has a home with the applicants, and

59. Under section 54, the threshold for the adoption of a child born of married parents is thus extremely high. Not only must the parents of the child have failed, for physical or moral reasons, in their duty towards the child, this failure must be likely to continue indefinitely or until the child becomes an adult and the failure must constitute an abandonment by them *“of all parental rights”* to the child. A court must be satisfied that all these conditions have been met. Indeed, the Adoption Authority may decide not to bring the application before the court if it considers that not all these conditions are met.

60. The current wording seeks to avoid this situation by placing the best interests of the child (Article 3 CRC) and the right to be heard principle (Article 12 CRC) at the centre of such decisions. It is to be hoped that if passed the amendment will allow child abuse and neglect to be properly addressed. It should also ensure that families are properly supported so as to allow them to effectively nurture, care for and bring up their children with the full support of the State. The allocation of adequate resources and supports to this end will thus be key to realising the aspirations of proposed Articles 42A.2 to 42A.4 if passed by referendum. The IHRC welcomes the proposed wording in these Articles and does not make any recommendation regarding such wording.

VII. Conclusions

61. The IHRC considers that the proposed text goes some way towards recognising the rights of the child as set out in the CRC, particularly in relation to its provisions which focus on protection from abuse and neglect adoption and family law proceedings under Articles 42A.2 to 42A.4.

62. The IHRC recommends that the proposed Article 42A.1 be revised to include, in addition to the general recognition and vindication of the rights of the child, express reference to the CRC as a source of rights, and recognition that in all actions concerning children, the best interests of the child shall be a primary consideration, that the principle of non-discrimination will apply, that the right to development is recognised and that the right of the child to participate in decisions concerning them is included. The IHRC also recommends that the Article be phrased in more absolute terms regarding the obligations of the State.

(II) for a continuous period of not less than 12 months immediately preceding that time, has been in the custody of and has had a home with the applicants; and (iii) that the adoption of the child by the applicants is an appropriate means by which to supply the place of the parents.”