

STRICT EMBARGO: 12 NOON

CHECK AGAINST DELIVERY

Speech by Brian Lenihan TD, Minister for Children  
**Publication of the Bill to Amend the Constitution in Relation  
to the Rights of Children**  
Monday 19 February 2007  
Government Buildings, Dublin

Since the Taoiseach made his announcement last November proposing a referendum on the place of children in our Constitution, I have been struck by the bemusement with which the idea has been greeted in some circles. The questions have been asked: why do we need a referendum on this issue now and who says there is anything wrong with the place of children in our constitution?

That attitude is not surprising because the vast majority have the very good fortune to live in the security of happy families where children are cherished and nurtured. In that context, the suggestion that there is a need for greater constitutional protection for children might be bewildering if not a little threatening.

That is why, at the very outset I want to stress that this amendment in no way changes or undermines the constitutional position of the family based on marriage as the fundamental unit of our society. This Government is in total agreement with Mr Justice Hardiman who, in a recent much publicised Supreme Court decision, said the

welfare of the child is best secured in his or her natural family. Nothing in this amendment seeks to change that position.

In general, our Constitution strikes balances between personal rights, the status of the family, the rights and duties of parents, and the powers of the State as guardian of the common good. The aim of the Government is simply to include children in this equation. Our amendment proposes the insertion of a new Article in our Constitution dedicated to children.

The need for constitutional change was first voiced by Judge Catherine McGuinness. Her Report on the Kilkenny Incest Investigation found that “*the high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving higher value to the rights of parents than the rights of children*”. Judge McGuinness presented her report to the then Minister for Health, Brendan Howlin in 1993: that is over 13 years ago.

The matter was then addressed by the Constitution Review Group which reported in 1996. The 1997 to 2002 Programme for Government contained a commitment that the issue be referred to an all-party Committee on the Constitution. That Committee reported just a year ago and recommended an amendment to Article 41 to include a new section on the rights of children. That recommendation did not find favour among those who have been concerned with this issue. It was in this context that I undertook in my Office an article by article review of the Constitution to examine how it impacts on children. The decision of the Taoiseach to propose a referendum on children is the natural culmination of this work.

Since that announcement, I have had a series of consultations with political party representatives, the Ombudsman for Children, non-governmental organisations (represented by the Children's Rights Alliance) and faith-based groups. I have circulated two detailed briefing documents and just last week, following the Government's approval of the wording published here today, I circulated a summary of the propositions contained in the amendment.

The consultations aimed at finding consensus on an appropriate wording have been carried out in good faith by all sides. I would like to thank all of the participants, including those of my colleagues on the opposition benches who made a valuable contribution to the formulation of the final wording which I believe, represents a real advance for all children in this country.

Our intention of strengthening the position of children has to be balanced with other important principles already contained in the Constitution and which, we believe, are as important in protecting and safeguarding children. These include the duties of parents and the regard in which the family is held by the Irish people. Ensuring that there is no dilution of these equally important concepts has been our principal challenge in the preparation of an appropriate wording.

The new Children's Article explicitly affirms the natural and imprescriptible rights of all children regardless of the marital status of their parents. It does so without

interfering with the primacy of the family under the Constitution as the unit within which the best interests of the child are best exercised and met.

There are those who have argued that the amendment should contain an explicit list of rights. The Government's view and the advice of the Attorney General is that the existing rights set out in Article 40 apply equally to children. Therefore, these rights which relate to equality and the vindication of personal rights do not need explicit or exhaustive restatement.

The Supreme Court has found that "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 the 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".

Other important rights are provided for in legislation. Significant legislative milestones in Ireland which have strengthened children's rights include: Status of Children Act, 1987, Child Care Act, 1991, Children Act, 1997, Criminal Law Act 1997, Non-Fatal Offences against the Person Act 1997, Education Act, 1998, The Education (Welfare) Act, 2000, The Equal Status Act, 2000, The Children Act 2001, and The Education for Persons with Special Educational Needs Act, 2004.

Section 2 restates the existing Article 42.5 which provides the constitutional basis for the State to intervene in the case of family failure. The Attorney General has advised that it is difficult to improve upon the current formula in the Constitution. However the current provision applies only to the children of a marriage. It is essential that there is a uniform standard of protection for all children. The change proposed ensures that the benefits of this provision are extended to all children. . I want to stress that the amendment makes no change in the circumstances where the State can intervene in the family. The test for family failure remains unchanged. If this amendment is passed, it will be neither easier nor more difficult for a child to be taken into care.

Section 2 also empowers the Oireachtas to bring in legislation to allow for the adoption of children in long term care if it is in their best interests. At present, there are approximately 5,000 children in care. Almost 85% of them are in foster care and of that figure about a third are in long-term care (for over five years). In some cases, children are taken into care at birth, raised by foster parents with their parents contacting them or expressing an interest in contacting them only sporadically. For such children, the possibility of adoption represents a second chance for a stable and secure family life. The period of time in care after which adoption will be allowed will be prescribed by law.

Section 3 of the Amendment permits the Oireachtas to legislate for the voluntary placement for adoption and the adoption of any child. It is not envisaged that widespread voluntary adoption of children of marriages will take place. However,

there are genuine cases where the constitutional ban on such adoptions is contrary to the interests of a child. For example, the adoption of a child by the new spouse of one parent in the case of the death of the other parent of the child or the adoption of a child at the request of parents due to their acknowledged long term inability to care for their child where there is a serious disability or terminal illness.

Section 4 will allow the Oireachtas to legislate for the best interests of children to be secured in any disputes relating to adoption, custody, guardianship or access. For the past forty years, the Oireachtas has provided guidance to the courts on these matters through the Guardianship of Infants Act. The relevant provision states that the courts shall regard the welfare of the child in any such disputes as the first and paramount consideration. This amendment will copper fasten the constitutionality of this provision. It will also empower the Oireachtas to provide that in any proceedings before any court concerning these specific matters, the court must endeavour to secure the best interests of the child.

Section 5 of the Article deals with the protection of children in the criminal law. It will empower the Oireachtas to pass laws providing for the collection and exchange of information concerning the risk or the occurrence of endangerment, sexual exploitation or sexual abuse of children or vulnerable adults.

Both the Ferns Report and the Report of the Joint Oireachtas Committee on Child Protection identified the importance of allowing for the collection and exchange of this type of information. The issue was also raised in the course of the consultations,

A core recommendation of the Ferns Report, accepted by Government, was the need to establish inter-agency groups comprising representatives of An Garda Síochána, the HSE and the relevant organisation in which there was suspicion of abuse. The envisaged purpose of the inter-agency group is to share information and to act on the basis of this information. A specific recommendation made by Ferns was that the High Court should have power to restrain any person from having unsupervised access where reasonable grounds exist for the belief that a person has abused or has the propensity to abuse children. As the Minister responsible, I told the Dail late last year that I intended to bring forward amendments to the Child Care Bill currently before the House to implement these recommendations. The Attorney General has advised me that the safest approach to the establishment of the inter agency groups is to give the necessary legislation a constitutional basis. The legislative implementation of the Ferns recommendations will be difficult, if not impossible, in the absence of the authority conferred by this amendment.

It is intended that the Child Care Act, 1991 will be amended to enable the HSE, An Garda Síochána, and any relevant organisation to share information about the risk or the occurrence of endangerment, sexual exploitation or sexual abuse of any child or vulnerable adult.

The change will also facilitate an examination of a more fundamental legislative reform of this area including the establishment of a designated statutory body with overall responsibility for collecting and sharing information with other agencies about the risk or occurrence of child sexual or other forms of abuse.

The amendment provides that laws which involve offences against children under 18 years of age may be offences of absolute or strict liability.

Prior to the Supreme Court decision on the CC case last Summer, a person charged with having sex with a minor could not claim the defence that he thought the girl was over 17. In effect, the offender was guilty of statutory rape and the victim did not have to endure cross-examination about her demeanor and deportment. The Supreme Court decision found that law to be unconstitutional and that the offender could claim the defence of honest mistake. We know from the DPP that, as a result of that judgement, there has been a decline in the number of complaints about underage sex offences.

We know from the Joint Oireachtas Committee on Child Protection that there is cross-party support for the proposition that it is unacceptable to subject young victims to the trauma of cross-examination about their age and appearance. The Government also believes that, as a community, we need to send out a strong message to would be sexual predators that there can be no defence for their actions.

In general terms, an offence of absolute liability is one for which a defence of mistake is not allowed. Offences of strict liability require proof by the accused of reasonable mistake. In the context of this amendment, the Government will bring forward legislation which will make sexual relations with a child under the age of sixteen an offence of absolute liability.

It is proposed to make sexual offences against a teenager between the ages of 16 and 18 offences of strict liability.

The age of consent does not arise in the context of the amendment. It is set by statute and is not a matter for the constitution. The current age of consent is 17 and the Government is not proposing any change in this. The Joint Oireachtas Committee on Child Protection made a majority recommendation that the age of consent be set at 16. The Government believes that a decision on that recommendation should be left to the next Oireachtas.

To his great credit, An Taoiseach has progressed the issue of constitutional reform in this area to the point of no return. For me, this amendment is the high point of the Government's reforming programme of action in relation to children. It is a natural development of the Government's landmark decision to establish the Office of the Minister for Children, with a seat at the Cabinet table. Those changes, which we introduced just a year ago, have focussed minds on children's issues in a manner unprecedented in this country which will be of lasting benefit to all our children into the future.

The power to change our Constitution rests with the people alone. Time and again the people of Ireland have demonstrated their strong attachment to our Constitution. We should not underestimate the huge onus that rests on all of us who seek to strengthen the position of the child in the Constitution. The burden of persuasion in any referendum is a heavy one. It is all the greater when the proposal relates to the delicate and intimate relationship that exists between child, parent, family and the state.

The People's constitution must protect the people's children. We need now to complete the process of reform that has been advocated by many over the last 15 years. This Bill can now be debated in the Houses of the Oireachtas where amendments can be made: as the Taoiseach has emphasised, we want to achieve all-party agreement on this issue.

This is an enormous opportunity to make a difference for children. I firmly believe that the time has come to move beyond oratory to ensure that the fundamental law of our land, the Constitution, properly reflects our commitment to value and protect childhood.

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