



## **Human Rights Commission**

### **Preliminary Observations on the Proposed Referendum on Citizenship and on the 27<sup>th</sup> Amendment to the Constitution Bill 2004**

**27<sup>th</sup> April, 2004**

## **Background**

On April 7<sup>th</sup>, the President of the Human Rights Commission wrote to the Minister for Justice, Equality and Law Reform to express concern regarding a number of aspects of the proposed referendum, emphasising the short timeframe that was available for consideration of the matter, the potential impact of the referendum on race relations and the potential impact of the proposed constitutional changes on the Belfast Agreement. The President went on to request:

“In order that the Commission can fully discharge its statutory responsibility under Section 8(a), 8(c), 8(d) and 8(i) of the Human Rights Commission Act 2000, we would be obliged if we could have the earliest possible sight of the proposed referendum wording and any accompanying legislation.”

On April 13<sup>th</sup> 2004, the Private Secretary to the Minister replied to the President requesting that the Commission should consider the draft Irish Nationality and Citizenship (Amendment) Bill, in accordance with the HRC’s function under section 8 (b) of the Human Rights Commission Act. The Commission welcomes the referral by the Minister of the proposed draft legislation. However, the Commission reiterates its initial view, as expressed in the President’s correspondence of April 7<sup>th</sup>, that the proposed referendum and the associated legislation may in themselves raise issues relating to the protection of human rights and on a closer analysis of the detail of the proposed amendment, the Commission believes this initial view to be justified.

The Commission intends to publish a comprehensive analysis of the human rights issues that are raised by the proposed referendum in the coming week. In the interim, these preliminary observations set out the Commission’s main points of concern in relation to constitutional and international human rights law, and examines the justifications that have been advanced for the proposed amendment. There has also been considerable discussion of the possible implications of the amendment for the Belfast Agreement. This matter is to be discussed by a meeting of the Joint Committee of the two human rights commissions on the island in Belfast on tomorrow, April 28<sup>th</sup>, and the Commission will reserve its views on that aspect of the matter pending that meeting.

### **1. Citizenship and the Irish Constitution**

Under Irish constitutional jurisprudence, there is a prevailing lack of clarity as to which rights under the Constitution are guaranteed exclusively to citizens, and which rights are protected in respect of all persons within the State. This uncertainty as to the constitutional protection of the rights of non-citizens is evident in our constitutional jurisprudence and has been noted in the analysis of the leading

academic authorities in the area. The proposed exclusion of children of non-nationals from the right to citizenship will, therefore, create a new category of persons born in Ireland whose protection of legal rights and social rights and services will be uncertain at best.

The proposed amendment would insert a new Article 9.2 to the Constitution, which would provide that, “notwithstanding any other provision of the Constitution,” children of non-nationals are to be excluded from citizenship except as may be provided by legislation. Of particular importance is the possible impact of the amendment on Article 2 of the Constitution, which sets out that all persons born on the island have an ‘entitlement and birthright to be part of the Irish Nation’. The courts may in the future have to decide on the entitlements and rights of persons who are part of the Irish nation, but not considered under statute to have any entitlement to Irish citizenship or nationality, thus adding further confusion to an already uncertain area of law.

The “notwithstanding any other provision of the Constitution” aspect of the proposed amendment may also override all other constitutional provisions, including the fundamental rights provisions contained in Articles 40-44 and may apply to subsequent legislation which might provide for rights to citizenship from some category or categories of children of non-nationals. The significance of this point is that should future citizenship legislation provide for qualification for citizenship on a basis which might be deemed to be unreasonably discriminatory, the rights of those excluded to challenge that legislation might be frustrated.

A wider issue than the discrete issue of citizenship is the question of how any significant area of constitutional change should be approached. In the view of the Commission, the principles of human rights law provide standards against which any proposal for constitutional change should be considered. Any proposal for constitutional change which might lead to a significant restriction of rights should be accompanied by a serious and comprehensive consideration of the likely impact of the proposed change on the enjoyment of constitutional rights by the persons affected.

It is not apparent to the Commission that such a consideration of the human rights consequences of the proposed referendum has taken place. In this regard, the Commission is concerned that the Government chose not to consult with the Commission in advance of publishing the proposed Twenty-seventh Amendment to the Constitution Bill or in advance of taking the decision to proceed with a referendum on this issue.

## **2. Nature of the State’s Human Rights Obligations under International Law**

A foundational aspect of human rights theory, which finds general expression in international human rights treaties, is that human rights are universal and grounded in a belief in the inherent dignity of every human person. On this principle, the human

rights obligations of the State apply not only to the State's own nationals or citizens, but to all those within the territory of the State, and even in some cases to persons outside the State. The Commission wishes to emphasise that, while certain rights may be restricted at the national level to citizens, many of the State's international human rights obligations apply to both citizens and non-citizens within the jurisdiction of the State. Where distinctions between citizens and non-citizens result in unreasonable differential human rights protection for non-citizens, the State may be in violation of its international human rights standards. Similarly, the creation of a new category of non-citizens may have a detrimental impact on those persons' human rights under international law.

Two international human rights treaties are of special relevance. The Convention on the Rights of the Child imposes duties on the State to base all policy and legislative initiatives, including constitutional changes, on the best interests of the child and on the principle of non-discrimination. The Government's Proposals Paper does not indicate that these principles have been considered in drafting the proposed amendment.

The International Covenant on Civil and Political Rights guarantees to all persons in the State the protection of the rights set out in the Covenant without discrimination. On the face of it, the proposed removal of the right to citizenship by birth of children born in Ireland on the basis of the nationality of the child's parents would appear to be an exclusion and restriction of rights based on the nationality status of one or both of the child's parents.

The Human Rights Commission is already concerned at the current level of protection of the rights of non-citizen children in Ireland and of citizen children of non-national parents, particularly with regard to those children's rights to family life and to a range of economic and social rights, including rights of access to education, health and social welfare. Given the uncertain constitutional protection of non-citizens' rights outlined in section 1 above, the proposed creation of a new category of non-citizen children is likely to exacerbate this problem and expose a new group of children to the difficulties associated with attempting to vindicate children's rights as a non-citizen.

The possible discriminatory nature of the proposed restriction of citizenship is of particular concern. The Commission notes that, while the Government has referred to the importance of preserving the integrity of Irish citizenship with respect to persons who have little or no historical or familial connection with Ireland, the proposed restrictions are targeted only at one such group. Irish citizenship will continue to be available to other groups who, in the wording of the Government's Proposals Paper, also have "no other claim to be present in the European Union and no substantial connection with Ireland", such as persons who qualify for Irish citizenship through descent. The Commission submits that there may be a significant number of such citizens who have availed of Irish citizenship for legal or other reasons without displaying any fidelity or loyalty to the State, or perhaps even without having ever visited Ireland. We give the example of this other category of citizens to make the

point that the selection of one particular category of citizens for restriction of their rights requires some objective justification.

### **3. Justifications for the Proposed Amendment**

Under international law, any regression on existing protection of human rights should be justified by “reasonable and objective” standards, be aimed at “legitimate objectives”, and be applied in a non-discriminatory fashion. An analysis of the Government’s Proposals Paper and Information Note suggests that the current proposals do not meet these standards.

The Commission believes that the data provided by the Government to justify the proposed amendment is weak and is concerned that much of the evidence and rationalisation for the proposed amendment seems to be vague or anecdotal in nature. In particular, the data provided in the Information Note does not sufficiently support the assertions contained in the Proposals Paper as to the motivation of non-national mothers for giving birth in Ireland.

As a further point of principle the Commission believes that any restriction on the human rights of children within the State must be guided by the principle of proportionality set out in international human rights law. Therefore, if there is a matter of public concern which needs to be addressed, the State may only address the matter with a restriction of human rights where all other, less restrictive, means of addressing the difficulty have been explored.

### **4. Summary**

1. It is the view of the Human Rights Commission that the proposed amendment to the Constitution aimed at removing a category of persons, notably children born in Ireland of non-national parents, from qualification for Irish citizenship raises significant issues relating to the human rights of those persons and their families.

2. A notable feature of the Irish Constitution is that some of the rights contained in the Constitution are explicitly linked to citizenship whereas others are not. Therefore, the proposed amendment will have the effect of creating a new category of non-citizens who are likely to be subject to a lower and more uncertain level of protection of rights than currently prevails for children previously born in the State in equivalent circumstances.

3. Under a number of the international human rights treaties to which the State is a party, Ireland has accepted obligations to guarantee rights equally to all persons, and specifically all children, within its territory without discrimination on the basis of nationality, race, ethnic background or other status. The differential

treatment which is likely to result between citizen and non-citizen children may constitute unlawful discrimination under international law in respect of a new category of non-citizen children.

4. Any restriction of the protection of the rights set out in international human rights law must be justified by a demonstrated reasonable and objective need to further a legitimate purpose. The Commission is not convinced that such a need or such a legitimate purpose has been demonstrated in the present context, nor that other means of addressing any purported social need have been adequately explored which would not have the same detrimental effect on human rights.

5. In the view of the Commission, the Government has not demonstrated any justification for singling out one category of citizens with “no substantial connection to Ireland” upon which to impose restrictions as to citizenship entitlements.