Adoption and the Irish Care System: Context and Drivers for Change?

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Abstract

Long-term foster care ("LTFC") is the predominant permanent option for children who are likely to remain in care in Ireland. The Adoption Bill 2012 (the "2012 Bill), published at the time of holding the Children's Referendum but not progressed since, seeks to ease existing legal restrictions in respect of adoption of children living in foster care. Against a backdrop of overall adoption trends in Ireland, this paper explores the 2012 Bill. It unpacks the concept of "permanency", discusses the incentives and disincentives involved in moving between foster care and adoption, and identifies key questions needed to shape the debate.

How the passing of the Children's Referendum and its revision of the Constitution play out in the Irish legislature and court systems remain to be determined.

Introduction to Ireland's Childcare System

LTFC provides a permanent home for a foster child until he/she reaches adulthood. This gives the young person a stable psychological base, but the foster parents do not have full legal responsibility for the young person in their care.[1] For some children, LTFC, which is regarded as the workhorse of the Irish care system,[2] may be the level of "permanency" in which they feel comfortable.

At the end of December 2014, there were 6,463 children in the care of the Irish state, 93 per cent of these (n = 6,011) were in foster care placements, with 64 per cent (n = 4,137) in general foster care and 29 per cent (n = 1,874) in foster care with a relative.[3] In 2011, 43 per cent of the care population were in care for between one and five years and 33.5 per cent were in care for over five years.[4]

Adoption adds another option for children in Irish foster care and may provide an alternative for those who cannot be re-united safely with their birth family. According to the Department of Children and Youth Affairs (the "DCYA"), the change is not intended for children who have contact with and have a strong beneficial relationship with their birth parents and wider family, unless that child's parents have voluntarily placed the child for adoption.[5]

Adoption policy has many competing elements at play, and the proposed policy shift needs careful handling. The extent to which child welfare costs and savings are involved, who will benefit and who will carry the cost are issues for deliberation. It is intended that this paper will contribute to this debate.

The Irish Constitutional Amendment and the Adoption Bill 2012

Constitutional Amendment

The 2012 Children's Referendum was passed by a majority of 57.4 per cent to 42.6 per cent, with a turnout of 33.5 per cent.[6] The new article inserted into the Constitution states:

> 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. (Art.42A.1)

This article recognises that all children have rights, and pledges to protect and vindicate those rights by its laws, in so far as practicable. Further articles allow the courts to identify rights for children on a case-by-case basis and there is provision for children's views to be established. Their views will be given due weight "having regard to the age and maturity of the child".[7]

Article 42A.2.1° provides that provision may be made by law for the adoption of any child where the parents have failed in their duty towards the child for such a period of time as may be prescribed by law and where the best interests of the child so require.

Article 42A.2.3° outlines how provision shall be made by law for the voluntary placement for adoption of any child and the subsequent adoption.

The 2012 Bill was published at the same time as the referendum. It provides in s.54(2) that, before making an order, the child should have been in care continuously for a period of 36 months, there are no reasonable prospects that the parents will be able to care for the child, and that the adoption is a "proportionate" means by which to supply the parental presence. An order is to be granted only if the child has had a home with the applicants for not less than 18 months preceding that time.

It has been estimated that up to 2,000 children[8] in the care system fit the time criteria, but the extent to which this cohort fit with all the remaining criteria is unclear. There are a number of children in care who have lost any meaningful interaction with, or connection to, their natural family and, while they may be an integral part of their foster family, they are without legal status and are, by and large, adrift in care.[9] These children have been referred to as living in a "twilight zone".[10]

Historical Legacy and the Changing Landscape of Adoption

Adoption: non-marital and marital children

Since 1952, over 44,158 domestic adoption orders have been granted in Ireland.[11] The Adoption Act 1952 (the "1952 Act") was the first piece of adoption legislation in Ireland, and permitted non-marital children only to be adopted. The 1952 Act was amended several times—in 1964, 1974, 1976, 1988,

1991, 1998, and 2010.

There are five strands of adoption in Ireland currently: step-parent adoption, relative adoption, stranger adoption, adoption from foster care, and inter-country adoption. Non-family adoption has declined steadily over the years as there are better support systems for parents now to assist in the rearing of children. In 1999, there were 120 non-family adoptions[12]; in 2012 there were only 16.[13] Step-family adoptions are the most common form of adoptions, accounting for 86 of the total of 116 domestic adoptions in 2013. There has been a steady decline in overall adoption since its initial enactment in 1952, from 1,493 in 1967 to 39 in 2011.[14]

Adoption by long-term foster carers
The Adoption Act 1988 (the "1988 Act") set out to address, in part at least, the consent issue by providing for adoption of children against the wishes of the natural parents, regardless of their marital status. A high threshold was set for abandonment. Abandonment was termed as a complete failure of duty up until the child reached 18 years of age. In practice, this meant the right of the family unit trumped the right of the child to be adopted. However, case law reveals non-uniform approaches by the courts to what constitutes abandonment and failure of duty on the part of the birth parents.[15] Adoptions by long-term foster carers are one of the smallest categories of adoption in present day Ireland,[16] but it is growing. In 2012, 13 children were adopted from long-term foster care; this figure rose to 17 children in 2013 and to 18 in 2014. The Adoption Authority of Ireland ("AAI") Annual Report for 2014 is not yet published, but draft reports indicate a total of 23 children were adopted from foster care in 2014.[17] Statistics for 2014 (n=23), relating to the age of foster children when adopted, show that some LTFC parents pursue adoption just prior to their foster child's 18th birthday, a pattern that is indicative of the desire for legal permanence from both foster parents and the fostered child. Figure 1 shows that, in 2014, 65 per cent of adoptions from LTFC occurred when teenagers were 17 years old.

Figure 1: Percentages Shown for Age-range of Adoptions from LTFC in 2014
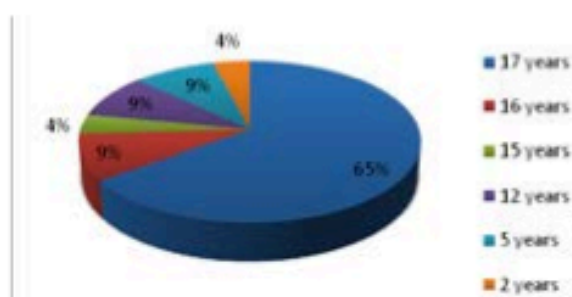
Source: Adoption Authority of Ireland.

The 2012 Bill, in setting out a less complicated route for domestic adoption, could result in an increase in the number of stranger adoptions and adoptions from foster care within Ireland.

Historical legacy and changing family affairs landscape
Ireland has a fractured history, both in its treatment of vulnerable children[18] and its relationship with adoption.[19] The publication of the Kennedy Report in 1970 brought a new era in child welfare,[20] and the subsequent media coverage brought about the closure of reformatory and industrial schools in Ireland. The progression to foster care began.[21] In 1973 the "unmarried mothers" payment was introduced,[22] and this was followed in 1987 by the abolition of the status of illegitimacy.[23] Since the early 1990s, the legacy of the past has been uncovered across Irish society, through reports such as the Ryan Report from 2009 and the Inter-Departmental Committee on the Magdalen Laundries. The Commission of Investigation into Mother and Baby Homes set up by the DCYA earlier this year will lead, in all likelihood, to further anguish at a societal level about how we treated children.

Thus, the landscape of family affairs can be seen to have changed dramatically over the past few decades in Ireland. The social stigma associated with birth outside marriage has evaporated, with greater numbers of couples starting their families before marriage. The recorded trends for the past 50 years in Ireland show larger numbers of people giving birth without marrying. At the same time, the adoption of children of non-married couples is becoming less common. In 1954, 68 per cent of the 1,310 children born out of wedlock were adopted. In 1967, 97 per cent of the 1,540 non-marital children were adopted. By 2013, only a tiny percentage (0.00072 per cent of a total of 24,393 children) of non-marital births were adopted.[24] Indeed, if a parent chooses to place a child for adoption, it is generally frowned upon more in the modern day than if he or she reared the child as a single parent or as an unmarried couple.[25] The values underpinning the role and obligations of the parent within the family remain strong in Irish society, but the rules governing the family structure have changed.

The economic landscape has also changed dramatically in the past two decades. Families are dealing with increased pressure as Ireland went from boom to bust within a relatively short period of time. Since the government began cutting back the public sector,[26] family support services have been subject to significant cuts,[27] increasing the stress and pressure on lower income families. This increased stress within families is captured by data that shows an increase in both referrals into the child protection system and in the numbers entering care.[28] This information exacerbates an already known picture: that children from poorer sections of society are over represented in the care system. Thus, if children are to be freed by the courts for adoption, it raises societal issues about children flowing from poorer to wealthier cohorts of the

population. This, in turn, raises questions about the State's commitment to family support and family preservation and the possible link to termination of parental rights.

Key Issues for Participants

Birth parents: mistrust of the system
Adoption of a child, regardless of the circumstances, is a painful experience for any parent. The birth parents of fostered children may be concerned that adoption will take precedence over family reunification within the Irish court system, despite the principle of "proportionality" contained in the draft legislation. Parents, whose children have been removed by the child protection system and through court orders, may be especially fearful. Those who have asked for care or agreed to the voluntary placement of their child in the care system may also be concerned about what the proposals may mean. A knock-on effect of this is that families in need of help may not seek it for fear their children may be drawn into a system in which they are ultimately adopted.[29] Outcomes which include marginalising families and eroding their trust base in services would be a major step back in terms of government policy initiatives in the area of family support.[30] Such developments could have serious and damaging consequences for the welfare of vulnerable children in Ireland.

If the care agencies are of the view that adoption is in the child's best interest, then birth parents should be made aware of their entitlement to representation in dealing with the agency and their options for complaint, grievance and judicial procedures.[31] At the same time, there is a need to enable parents to understand, as far as possible, the child-centred nature of decision-making. However, complications and struggles in birth parent's lives often make this difficult to realise. The needs of the parents involved in consenting to the adoption of their child may be slightly different. However, both sets of parents should have access to support services before and after any adoption is finalised.[32]

Children's rights and their involvement in planning
Adoption is no longer perceived as a single event but a lifetime process.[33] Thus the decision about adoption has major implications not only for the child but for the generations that follow.[34] Any policy move toward increasing adoption needs to learn from past mistakes.[35] The manner in which the provisions in Art.42A, regarding children's rights, play out in practice has yet to be determined. Who will be responsible for assessing the child's capacity to form his or her own views? Is this to be determined by the courts or social work practitioners? Will it involve the child actually speaking as part of court proceedings, or will their opinions be noted in reports, or both?

A level of experience has been gained over the years in consulting children in respect of adoption as, since the 1952 Act, children over the age of seven had to be consulted.

This experience should inform future practice developments. Children will need clear explanations and information about adoption, covering each individual stage of the adoption process. There is a need to seriously consider the circumstances in which children themselves should have the right to choose adoption over LTFC, and to determine if, and how, social workers can or should advocate for this to happen.

Ongoing support services are required also post-adoption, including counselling, should this be required at any stage after finalisation. To date, there are very limited post-adoption services developed in Ireland, and this aspect also poses a major difficulty.

Foster carers: possibility of changing roles or a threat to placements?
Post-placement supports are critical to enable best outcomes to be realised. Yet, little is known of the demographics of the 2,417 general foster families and the 1,366 relative foster families in Ireland.[36] A small-scale study conducted with a cohort of foster carers showed that many were reluctant to consider the provision for adoption under the 1988 Act. They were fearful their foster child would be removed from their care and placed elsewhere by social services[37] if they were seen to be more interested in adoption than fostering. The complicated provisions laid down in the 1988 Act were a further disincentive.[38] An extension of Cregan's original research shows that additional factors, including a lack of information regarding adoption of foster children and a belief that adoption was never a possibility, are also important.[39]

The 2012 Bill, if passed, will certainly enable a cohort of long-term foster carers and their foster children to become legal families. However, will this same legislation serve to destabilise other existing relationships between foster parents and children in their care? Situations may arise where a child wants to be adopted, but his or her long-term foster parents do not wish to adopt. Foster parents may not be psychologically ready to adopt, or on a more practical level may not be in a position to forgo the financial assistance which fostering provides. Furthermore, what if the child is required to undergo an additional placement from foster parents to adoptive parents? How will this impact the foster child's sense of stability? These are key considerations that need to be factored into any change.

The impact of changes for agencies and professionals
To date, adoption work has been viewed as the "cinderella"[40] of the service as it resided in a more peripheral position within general child welfare service delivery. Training and resources are two major challenges. Currently, social work practice in the field of adoption and social work practice in the field of fostering are carried out by different teams. If the use of adoption is to be extended, there will be a need for a more integrated service.

It is likely that prospective parents will be assessed as both foster carers and adopters. Social workers, although

generally committed to reflecting on their practice, will now need to reflect on their ideological and value judgments regarding adoption as a care option. Social workers, who are influenced by their social and cultural time in practice, will now be asked to work with a child care option which has been shunned in the legislative, political and practice arena for many years. Social workers need to be alert to the possibility of forthcoming changes which may impact on the profession's identity and practice development. Such considerations may provide opportunities for the profession, but will also pose major challenges.[41]

Incentives and Disincentives for Adoption Reform

Adoption and the concept of "permanency"
In child welfare, permanence can be achieved either through long-term fostering, adoption or forms of special guardianship. Permanence can be defined as:

> "To provide children with a foundation from which to develop their identity, values and relationships, not only through childhood, but into their adult lives."[42]

Tracing the development of adoption policy in other jurisdictions highlights issues faced and lessons learned. These lessons should have an important place in the Irish debate regarding the meaning of "permanence". It is important, however, not to let a pre-occupation with permanence generate a policy that fails to connect with the important realities in childcare services and individual children's lives. The push for adoption out of fostering originated in initiatives by politicians in the US and the UK, and exploration of these jurisdictions may hold important lessons for Ireland.

Adoption and permanency planning: the UK and US model
Permanency planning was first introduced in the US in the 1980s. Within this concept, LTFC had no place. In 1997, the US Government passed the Adoption and Safe Families Act (the "ASFA"), which moved public resources away from reunification towards adoption. The US model of concurrent planning—where reunification and other permanency options are sought for the child simultaneously—has been criticised for showing a preference for adoption over reunification,[43] with tight timelines for termination of parental rights and permanency hearings.[44]

In the UK, the Adoption Act 1976 introduced freeing orders to make it easier to terminate parental rights.[45] The UK Adoption and Children Act 2002 made the welfare of children paramount in the adoption process,[46] and included new provisions for dispensing with parental rights if this was in the best interest of the child's welfare.[47]

Some argue that these policy shifts favour the child's right to adoption over the parents' right to a family life,[48] and prioritising the child's safety has led to parental rights being terminated earlier.[49] Both the US and UK established performance targets—financial incentives often accompany government-set targets. However, this places a most significant ethical question mark over the whole adoption process. Is it part of a political ideology? Financial incentives can lead to a loss of trust between the courts and child protection authorities with regard to what is in the best interests of the child,[50] and should have no place in child welfare policy. The practice of keeping up numbers in Irish institutions for their monetary reward comes to mind, as evidenced in the Ryan report.

After nearly three decades emphasising the importance of permanency in American child welfare policy, nearly 40,000 children and young people leave foster care each year without permanency.[51] Guggenheim characterises these children as "legal orphans",[52] a situation which is more likely to undermine rather than increase any sense of permanence for the young people involved.[53] There is a difference between the emotional and relational aspect of permanency, as distinct from the legal aspect.[54] Those served by the child welfare system want permanency options to be defined more broadly, on an individual basis, and not to be exclusively confined to the legal definition.[55] Children are expressing the opinion that they feel child protection proceedings are happening without their input, and they are helpless in relation to what is happening to them and the decisions being made.[56] It is to be welcomed that the constitutional referendum on children's rights in Ireland will entitle Irish children to have an input.

Ideologically, Ireland resides currently more with the Nordic countries, New Zealand and Australia in its regard of LTFC as a permanent placement option. Will a policy shift that legislates for easier termination of parental rights in place of family preservation align Ireland more in the American "permanency planning movement"? The American concept of permanence—and the way it has been interpreted as a legislative mechanism, as well as evidence that children who have been freed for adoption are not finding an alternative family[57]—may not fit easily within an Irish cultural and historical context.

Permanency and guardianship
Guardianship involves foster parents having legal parental responsibility without the rights of the birth parents being severed.[58] There is a need for research into why so few foster carers have availed of the existing legislative provision for special guardianship enacted in 2005, as virtually no research or data exists on this issue. As the psychological processes and the effects of claiming children are gaining greater emphasis in the literature,[59] questions remain about the issue of guardianship. Would a shorter time period than the five-year rule currently required for special guardianship increase its use? Does the use of guardianship stabilise placements and are there other effects? Finally, what are the processes that surround decision-making in applying for

guardianship? How do the knowledge, skill and values of child welfare professionals impact on its use? What role do financial supports play? Research shows that access to allowances and services need to be available for carers, irrespective of legal relationship.[60]

Contact, identity and open adoption
A significant shift towards a more open model of adoption has been noted in the US,[61] the UK,[62] Australia, New Zealand[63] and Ireland.[64] It is widely recognised that, although the importance of ongoing contact is consistently highlighted to aid identity information,[65] the legal, procedural and practice frameworks sometimes lag behind. The Adoption Act 2010 and the 2012 Bill do not make provision for a contact order to be attached to an adoption order. This is despite an increased level of openness in practice between adoptive and birth parents through letters, face-to-face meetings, etc.[66] Will existing practices of contact that are an integral part of LTFC continue into a future scenario of adoptions facilitated by the 2012 Bill? The facilitation of contact as part of the child's complete care plan remains unclear in the overall legislative picture. Contact is of importance to many long-term foster children who often desire permanence but also wish to retain a sense of identity and connection to birth family.[67] Contact plans should be something the child desires and are in his or her best interest.[68] Legislative and practice aspects of this element of the work will require very considerable attention.

Future challenges of LTFC: retention and recruitment of carers
The international trend in respect of the challenges of recruiting and retaining foster carers is very much evident in Ireland.[69] Research shows that recruiting carers to provide secure placements for children in care continues to be challenging.[70] The difficulties are amplified further as the child gets older. Retaining existing carers is an ongoing issue in services. Leaving the foster care system is associated with a life cycle stage for some. For others, it is a result of feeling unsupported in the task. So while it is recognised that the relationship between motivation to foster, recruitment, support and retention, is indeed complex and needs to be better understood,[71] there are a number of questions that need to be addressed in a consideration of this balancing act. As a starting point, important questions include: First, if adoption is in the future plans for some children in the care system, will this impact the motivation of long-term foster carers to remain as carers? Secondly, what are the implications if carers add adoptive parent status to only some children in their care, and not others? How will this impact the family dynamics?

It is suggested that implementation of domestic adoption reform, while welcome in some respects, may have an impact, as yet unknown, on a group of essential long-term foster carers whose retention is essential for the maintenance and stability of multiple care options for children in care. Stability in foster care is crucial, and it is well recognised

that the foster carer role is complex.[72] The work can often engender enormous conflict, while at other moments provide great reward and personal satisfaction.[73] Therefore, urgent analyses of these issues are needed.

The adoption of children in care: a family for a child or a child for a family?
If adoption is seen to be giving children a second chance, how will this impact on those children who, for whatever reason, either choose or are destined to remain in LTFC? Given the large numbers of children residing in LTFC in Ireland, it will be important that adoption is pursued and represented as only one choice in a number of equally important child welfare placement options. For adoption reform to be successful in Ireland, the state must be cognisant of the need for stability for all children in the care system, not just those adopted.

The impact of the 2012 Bill might only affect a small number of the total children in the care of the state. Indeed, adoption is a "proportionate" response where the child has suffered or is likely to suffer extensive abuse or neglect if reunified with birth parents; and the evidence of such is subject to rigorous examination in the courts, with the natural parents and child represented legally.[74] Domestic adoption policy in Northern Ireland has resulted in only 2 per cent of the population being adopted from care; LTFC remains the placement where most children are located.[75] Adoption is a situation where there is no foreseeable future of the child returning to his birth family. As Conway[76] puts it: "Adoption is a good choice for *some* children, *some* birth parents and *some* prospective adoptive parents." The challenge will be in knowing who these children are and what decision-making processes are needed to ensure that the best decisions are made.

Implications for Service Delivery Models
It is suggested that the implementation of adoption as a practice will involve additional resources and a different set of supporting infrastructure to the existing adoption and LTFC services.

International Irish adopters: an untapped cohort for domestic adoption?
If the route to domestic adoption in Ireland becomes easier to navigate, where will the presumed contingent of new adoptive parents come from? The number of inter-country adoptions declined from 307 in 2009 to 72 in 2013.[77] Will this group of approved adopters now avail of the domestic adoption option that may open? There is evidence that many people who would provide a permanent home for a child through adoptive parenthood would not engage in long-term fostering,[78] so there is a likelihood that there will be a cohort of adopters that will emerge outside existing foster carers already in the system.

Careful consideration will need to be given to providing

information as to what is involved in the adoption of children from the Irish care system, so that prospective adopters can be as fully informed as possible. The assessment and preparation model in place in adoption is designed to enable this exploration to happen. However, additional practice guidance will be required to enable prospective adopters to consider carefully the responsibilities involved in a decision to adopt from this cohort of children.

Assessment and approval

It is recognised that the fundamental elements of adoption and fostering service delivery have been largely different in Ireland. While there are overlaps in the role of foster and adoptive parents, it does not always follow that a good foster parent will automatically be a suitable candidate as an adoptive parent.

The assessment and approval process for adoptive parents involves distinctions depending on which type of adoption is being followed. If assessment is being conducted when the child is already in placement, then the parameters of the work are very different than conducting an assessment for an unknown child who will be placed at a future date. Matching children's needs with adoptive parents' capabilities, while recognising the importance of ongoing supports, is a crucial aspect. Similarly, matching the backgrounds of prospective adoptive parents and birth parents will need to be a consideration, especially if ongoing access is to occur. In providing the best adoptive environment, it is imperative to look at the child's needs on an individual basis and holistically, and thus avoiding a pre-determined set of rules.[79]

Post-adoption Supports: Who Will Carry the Cost?

Post-placement supports will be critical to enable best outcomes to be realised for children. The 2012 Bill makes no reference to the potential legal and other miscellaneous costs associated with the adoption process, nor indeed to any provision for ongoing financial help or support from the state. It has been shown that post-adoption supports and services need to be available long after the finalisation of the adoption.[80] A national adoption drive without sound provision for post-adoption services and supports runs the risk of only attracting adopters who are financially capable of sourcing

these services independent of state provision.

This, in itself, raises serious ethical questions. It also points to the need to question the financial analysis underpinning the policy change. Is there a danger that adoption is being pushed as a care option as it represents a cheaper alternative to the foster care system? The state of public finances is one of the determinants in the type of child welfare system that can be provided. In this instance, there is a need for transparency in how state funding implications are addressed. The provision of accessible, standardised post-adoption services and financial packages for adoptive families will be crucial to ameliorate claims that it is the financial incentive that is driving the change.

Conclusion: Key Considerations in Adoption Policy Reform

For a new adoption policy to have a positive impact on the lives of some of the most vulnerable children in Irish society, the platform for debating the main issues will need to encompass all those individuals affected by, and responsible for, policy formation and its implementation, including the legal profession.

It is important that we do not let emotions and value judgments cloud the fact that adoption should be about the welfare and best interest, of the child. Real fears around the government's adoption proposals will need to be handled with transparency and honesty. As a modern child care option, adoption should be implemented with an eye to the past, but it should not be restricted by past mistakes. How the policy is managed and implemented will determine its success ultimately.

How all these issues play out will depend on the opportunities offered to the different stakeholders to deliberate, discuss and debate. Child welfare policy is not a neutral subject and there are a lot of challenges to introducing and implementing adoption policy and related legislative change in Ireland.

It is imperative that the relationship between LTFC and adoption in the continuum of care is handled carefully within the broader spectrum of adoption policy reform. Central government has a key role to play in leading this process.

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