

Submission of the Ombudsman for Children to the  
Joint Committee on the Constitutional Amendment on Children

**February 2008**

Submission of the Ombudsman for Children to the  
Joint Committee on the Constitutional Amendment on Children

**February 2008**

Published by Ombudsman for Children's Office

© Ombudsman for Children's Office

ISBN 978-1-907074-10-3

# List of contents

1.	Introduction	4
2.	Recommendations for amendment of the Constitution	7
	I Express rights	
	II The best interests principle	
	III Support for families and duty to act proportionately	
	IV Soft information	
	Conclusion	24
	Appendix 1	26
	Strict liability and the protection of children from harmful court proceedings	
	Appendix 2	28
	Thematic breakdown of complaints received	
	Appendix 3	30
	Letter from Thomas Hammarberg – Council of Europe Commissioner for Human Rights	

# 1. Introduction

## Submission

On 13 December 2007, I received an invitation from the Chair of the Joint Committee on the Constitutional Referendum on Children, Mary O'Rourke TD, to make a written submission to the Committee. The Committee's Orders of Reference include examining the Twenty-Eighth Amendment of the Constitution Bill 2007 and making such recommendations as seem appropriate to the Committee.

This document sets out my submission.

## Background

Constitutional change aimed at enhancing the protection of children's rights has been called for by many, including the following:

1993	The Kilkenny Incest Investigation Committee <sup>1</sup>
1996	The Constitution Review Group <sup>2</sup>
1998	The UN Committee on the Rights of the Child <sup>3</sup>
2005	The Ombudsman for Children and other organisations in submissions to the All-Party Oireachtas Committee on the Constitution
2006	The All-Party Oireachtas Committee on the Constitution <sup>4</sup>
2006	The UN Committee on the Rights of the Child <sup>5</sup>
2006	An Taoiseach <sup>6</sup>
2006	The Oireachtas Joint Committee on Child Protection <sup>7</sup>
2007	The Council of Europe Commissioner for Human Rights <sup>8</sup>
2007	Report of the Special Rapporteur on Child Protection <sup>9</sup>

---

<sup>1</sup> Kilkenny Incest Investigation, Report presented to Mr Brendan Howlin TD, Minister for Health by the South Eastern Health Board, May 1993.

<sup>2</sup> Report of the Constitution Review Group, 1996.

<sup>3</sup> UN Committee on the Rights of the Child Concluding Observations on Ireland, 1998, CONVENTION/C/15/add.85.

<sup>4</sup> The All-Party Oireachtas Committee on the Constitution, Tenth Progress Report, The Family, 2006.

<sup>5</sup> UN Committee on the Rights of the Child Concluding Observations on Ireland, 2006 CONVENTION/C/IRL/CO/2.

<sup>6</sup> Speech of An Taoiseach on the eve of 70th Ard Fheis in City West, Dublin, 3 November 2006.

<sup>7</sup> Report of the Oireachtas Joint Committee on Child Protection, November 2006.

<sup>8</sup> Statement by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, at conclusion of assessment visit to Ireland, 30 November 2007.

<sup>9</sup> Report by Mr Geoffrey Shannon, Special Rapporteur on Child Protection, to the Oireachtas, December 2007.

In a speech on 3 November 2006, An Taoiseach announced his intention to hold a referendum on children's rights and that he had requested the then Minister for Children to initiate a process of consultation and discussion with the other Dáil parties and with all relevant interest groups.<sup>10</sup> As part of this consultation process, and at his invitation, I met with the Minister for Children and submitted written advice on the proposed referendum on children's rights to the Minister in December 2006.<sup>11</sup>

During the first two weeks of February 2007, I responded in writing to two briefing documents circulated to me by the Minister for Children. I also met with the Minister to discuss my views on the first briefing document. Subsequently, on 19 February 2007, the Twenty-Eighth Amendment of the Constitution Bill 2007 was published. My Report on the Twenty-Eighth Amendment of the Constitution Bill was then submitted to the Oireachtas on 6 March 2007.

The Twenty-Eighth Amendment Bill lapsed when the 29th Dáil was dissolved on 29 April 2007. The incoming Dáil then established the present Joint Committee on the Constitutional Referendum on Children with a mandate to examine the Twenty-Eighth Amendment Bill and to make such recommendations as seem appropriate to the Committee.

In parallel with this process, the Oireachtas Joint Committee on Child Protection was established on 6 July 2006. The Committee examined many of the issues under consideration by the present Committee and it reported in November 2006. I made a written submission to the Committee in August 2006 and met with the Committee in October 2006. Also in 2006, two Special Rapporteurs on Children were appointed. Their reports were submitted to the Oireachtas in December 2007. The reports of these bodies have an important contribution to make to the matters under consideration by the Committee.

---

<sup>10</sup> Speech of An Taoiseach on the eve of the 70th Ard Fheis in City West, Dublin, 3 November 2006.

<sup>11</sup> Advice of the Ombudsman for Children on the proposed referendum on children's rights, 22 December 2006.

My views on the proposed constitutional referendum on children and on the Twenty-Eighth Amendment Bill in particular, have been set out in my advice to the Minister of December 2006 and in my report to the Oireachtas of March 2007. These documents have been submitted to the Committee together with this submission.

In this submission, I return to the first principles which I consider should underpin change to the Constitution aimed at enhancing children's rights. I hope this submission will be of assistance to the Committee and I remain at the disposal of the Committee should I be in a position to assist further in its work.

## 2. Recommendation for amendment of the Constitution

The proposed constitutional referendum on children presents a real opportunity to enhance the protection of children's rights in Ireland.

It is rare that such an opportunity presents itself and the outcome of this process could shape the legal landscape in which children's rights are vindicated for the foreseeable future. I appreciate that the Committee's task is not an easy one. The issues which it must consider are varied and complex. However, the opportunity to revisit the manner in which the fundamental law of the land treats children and young people has been a long time coming and it is imperative that we make the most of this opportunity.

**My recommendation for amendment of the Constitution is:**

- (i) the inclusion of an express statement of the rights of the child;
- (ii) the inclusion of the best interests principle;
- (iii) the inclusion of a State duty to support families while responding in a proportionate manner; and
- (iv) the inclusion of a provision to enable the sharing of soft information.

It is my view that the Constitution is the place for setting out first principles. I consider that the inclusion of these four items in the Constitution will enable decision makers to deal with the specific problems which have persisted for many years. In other words, if the first principles are right in the Constitution, more detailed matters can be dealt with in statutory law and practice guidelines.

It is important that we get the message right in the primary legal document in the State. Unlike in other countries where a written Constitution can be an abstract document, our Constitution has a real impact on every day decision-making in the State. It reflects who we are as a society, what we value and how we operate. The rules and principles it contains define our cultural values about children, our legal framework and they provide direction to decision makers in public life.

In the experience of my Office, the absence of the principles mentioned above in the Constitution has had an adverse effect on children across a wide range of areas. While it might be argued that discrete legal lacunae can be dealt with by means other than a constitutional amendment, the breadth of instances in which the same problems recur demands a more global response which I feel only a constitutional amendment can



provide. Enshrining those first principles in the Constitution would give guidance to the Oireachtas, the Courts and those who provide services to children, encouraging a consistency of approach that is often lacking.

In addition to my Office's own experience, a piece of baseline research commissioned by my Office on the obstacles to the realisation of children's rights in Ireland identified the lack of a child-focused, rights-based platform on which policy, practice and decision-making can be based, as a major barrier to guaranteeing that children's rights are respected<sup>12</sup>. The report pointed out that certain vulnerable groups – including children in the care system, the criminal justice system, Traveller children, homeless children, immigrant and asylum seeking children, children in poverty, and children at risk of abuse or neglect – face multiple barriers to the realisation of their rights, cutting across areas such as family, health, education and material deprivation. I believe that, when faced with such multiple barriers, we should be able to rely on the basic principles animating our legal system to address them. This requires a strong articulation of children's rights at a constitutional level.

Moreover, I believe that such a change could facilitate a change of culture with regard to how our society views children and young people. Addressing this reality last February, An Taoiseach stated:

*"It appears increasingly clear that the inadequate recognition in our constitutional law of the rights of children as individuals has to be addressed. That is an essential first step in creating a new culture of respect for the rights of the child."*

I have dealt with the substance of my recommendation for amendment of the Constitution in my advice on the proposed referendum on children rights and in my report on the Twenty-eighth Amendment of the Constitution Bill 2007. I would refer the Committee to those documents for my detailed recommendations for amendments to the Constitution. In this submission, I will address each part of my recommendation from the point of view of the experience of my Office.

---

<sup>12</sup> Ursula Kilkelly, *Barriers to the Realisation of Children's Rights*, 29 August 2007. Available at [www.oco.ie](http://www.oco.ie)

## I The inclusion of an express statement of the rights of the child

I recommend the inclusion in the Constitution of an express statement of the rights of the child.

Specifically, I recommend the inclusion of a provision setting out express rights for children to include: the right to participate in matters affecting the child, the right to freedom from discrimination, and the right to family or appropriate care. My recommendation is that, at a minimum, these rights should be expressly provided for.

My advice of December 2006 notes the current deficiencies in Constitutional protection for children and makes the case for the inclusion of an express statement of rights. It also sets out information about each of these rights as set out in the UN Convention on the Rights of the Child (hereafter the Convention) and why these rights in particular have been highlighted.

My report of March 2007 sets out my view that the current proposal to refer to the rights of children falls short of what is required. The proposal states:

*“The State acknowledges and affirms the natural and imprescriptible rights of all children” [Article 42(A)<sup>1</sup> of Twenty-Eighth Amendment Bill]*

I do not propose to re-visit these issues here and would refer the members of the Committee to my advice and report for further information and my detailed recommendations. Instead I would like to focus on my Office’s experience to illustrate why an express rights provision is required.

## A Right to participate and to be heard

Article 12 of the Convention states:

*“1.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.*

*2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”*

My Office's experience of working directly with children and young people has made us aware of the value which they attach to being afforded opportunities to voice their concerns and wishes. Our experience suggests that, for children and young people, being heard is in part about being included in processes that are important to them, and about being afforded the opportunity to contribute their perspectives in the context of decision-making processes whose outcomes have or will have the potential to affect their lives, possibly profoundly.

In the context of our complaint handling work, my Office has been contacted by many children and young people, normally via parents on their behalf, who have been denied the right to participate in decisions affecting them. In some instances, children have not been afforded an opportunity to be included in Court proceedings directly affecting them. In other cases, children in care have not been involved in meetings where their care plans were discussed or decisions taken regarding their care provision.

Since Christmas last year, I have been contacted by a number of children who have felt excluded from decisions taken or to be taken concerning them in the context of family separation. The children expressed a desire to participate in some way, some wanted to have their voice heard in court, others wanted a chance to express their views in other settings. Not one of them has suggested that they be involved in any decision about custody or access and all of them simply wanted to be recognised and to have their voice heard.

In some instances, (for example, in the court room setting), there is legal provision for children to be heard. The problem is often that practitioners have not been provided with the necessary guidelines, training or support to enhance their competence and/or confidence to facilitate children to make their views known and understood. I would refer the Committee to the report of 'The Children's Court; a Children's Rights Audit,' Dr. Ursula Kilkelly, (2005) for additional detail on the experience of children before the courts.

I consider that the lack of provision in the Constitution for the child's right to participate in relevant areas of decision-making affecting him/her is preventing the development of a culture and official practice which respects the child's right to be heard and recognises this right as a potential contributor in determining children's best interests. Hearing a child's perspective and wishes can deepen our understanding and so improve decision-making.

This view is shared by the UN Committee on the Rights of the Child, which, having comprehensively reviewed the situation of children's rights in Ireland in September 2006, recommended that the child's right to participate and be heard be included in our Constitution.

There is an additional consideration that must be borne in mind here. There is a new EU regime for the recognition of the decisions of national courts across the EU. It is provided for in the Brussels II Bis regulations.<sup>13</sup> The regulations provide that a court decision in one EU court on a family law matter (for example a custody or access order) shall be recognised and respected in all other EU Member States.

However, the EU rules also provide that children shall be heard in court cases concerning them, and it has come to our attention that, where a child had not been heard in one EU jurisdiction, the courts in another jurisdiction might refuse to recognise the judgment. In other words, we are faced with the prospect that other EU states might not recognise the decisions of Irish Courts where the participation rights of the child concerned were not respected.

The opportunity to provide for the participation rights of children in the Constitution can and should be taken now. If we do not do so, we may be endangering respect for our court judgments now and into the future.

Aside from legal proceedings, there is a large range of other settings in which decisions are made concerning children and in respect of which they are all too often excluded.

**I have visited the four Children Detention Schools and St Patrick's Institution. I have also visited residential care centres for children and young people. In those settings, I found that the pattern of involvement of children in care planning and decisions concerning them is very inconsistent. In many instances, children were not involved in care planning. In others they were involved in some aspects of decision making, but often sporadically and a consistent approach was lacking.**

On a final note, concerns are sometimes voiced about children's right to be heard and to participate in decisions affecting them. For example, there is a risk of this right being

---

<sup>13</sup> Council Regulation No 2201/2003 Concerning the Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters Relating to Parental Responsibility Repealing Regulation (EC) No 1347/2000 [2003] O.J. L338/1. The Regulation applies to all Member States of the European Union with the exception of Denmark.

misunderstood as having the potential to empower children disproportionately and, by virtue of so doing, to undermine the rights of children's parents. It is important to emphasise that this is not the case. Article 12 of the Convention states that a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, with due weight being given to his or her views in accordance with his or her age and maturity. In particular, the Convention stresses the importance of this right in the context of judicial and administrative proceedings. It does not provide for the exercise of full autonomy by children, the displacement of adult responsibilities to children onto their shoulders. Nor does Article 12 afford children the right to determine decisions. Rather, it places an obligation on the State to ensure that due consideration is given to children's wishes. My Office recognises that:

- respecting children's right to be heard does not mean that it is always necessary or appropriate to hear all children and in all circumstances;
- giving effect to children's right to be heard involves giving consideration to different degrees of participation and which will be most appropriate in specific circumstances; and
- the process of determining what weight should be given to a child's wishes should have regard to a range of factors.

In determining the weight due to a child's views, the following factors need to be considered:

- To what extent are the child's or young person's wishes consistent with his or her best interests?
- To what extent does the child or young person understand the implications of his or her wishes and the process within which these wishes are being expressed?
- Have the child's or young person's wishes been expressed freely, without influence having been exerted on him or her by another party?
- To what extent, if any, do the child's or young person's wishes impose obligations on others and what is the nature of any such obligation imposed?
- To what extent, if any, do the child's or young person's wishes interfere with the rights of others and what is the nature of any such interference?

My Office has undertaken research on what the right to participation means in practice and also has extensive experience of consulting children and young people on matters which affect them. I would be happy to provide the Committee with further detail on this point if it feels such information would be useful.

## **B Non-discrimination**

### *Article 2 of the UN Convention on the Rights of the Child*

- "1. 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.*
  
- 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."*

It is my view that all children should be treated equally and that no child should be discriminated against. Whether a child is an Irish national or non-Irish national, a child with a disability, a member of an ethnic minority or child of a marital or non-marital family, their rights as set out in the Convention should be guaranteed equally and without distinction.

**My Office recently received a number of complaints from non-Irish nationals who considered that their child was being denied their right to an education. The authorities had informed the parents that, due to conditions set out in their visa, their children could not avail of public education. We contacted the authorities, highlighting the fact that all children have the right to education and that a child cannot be denied this right due to their or their parents' immigration or other status. The matter is being resolved in respect of the present school year and the children involved are attending a public school.**

My Office has received complaints on a range of issues which appear to indicate that children are treated differently or discriminated against for a range of reasons or simply because public authorities act in an inconsistent manner when dealing with children. For example we have received complaints from parents relating to the enrolment of their children in schools on the basis of what they perceive to be differential treatment.

The experience of my Office in relation to these matters illustrates the need for a strong anti-discrimination statement at the heart of our Constitution. We do have robust equality legislation in the State and, in relation to the case mentioned above, a constitutional right to education. However, in some instances which have come to our attention, these protections have proven insufficient. It is my view that, a clear message about the prohibition of discrimination is required to assist administrators and decision makers at every level in guaranteeing the rights of all children.

An additional consideration is the current content of our Constitution. It is recognised that, under our Constitution and in the jurisprudence developed by our courts, children of marital and non-marital families can be treated differently. My understanding is that Article 41, which makes special provision for the institution of marriage, is not under consideration at this time. As such, a constitutional non-discrimination provision is required to ensure that, notwithstanding Article 41, all children will be protected from discrimination.

In my report of March 2007, I stated that I was unclear as to how the current wording set out in Article 42 (A) 2.1. of the Twenty-Eighth Amendment Bill could achieve the effect of ending discrimination given that Article 41 will remain unchanged.

Accordingly, I recommend that the right to non-discrimination be expressly provided for in the Constitution in a manner which will ensure that no child in this jurisdiction will be subject to discrimination of any kind.

For more information on this point, please see my advice of December 2006.

## C Right to family or appropriate care

### *Article 5 of the UN Convention on the Rights of the Child*

*“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”*

It is my experience as Ombudsman for Children that parents and family are often the principal advocates for the rights of their children. Parents come to my Office with complaints about a lack of service provision or about actions taken by public bodies which they feel may have infringed their child’s rights. They often want to know where they can go to get assistance to ensure that those rights are respected. Providing for the right to family or appropriate care in the Constitution would assist parents and families in their efforts to assist their children in the exercise of their rights. Article 5 of the Convention, as set out above, is a very important provision because it recognises the key role parents and families have in ensuring that their child can access the rights to which they are entitled.

It is important to recall that the Convention is consistent with the Constitution in terms of its presumption that the family environment is the optimal environment for a child’s growth and wellbeing. The Preamble to the Convention states:

*“Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.*

*Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”*

I consider that making express provision for the right to family or appropriate care, together with an express duty on State to support families (see III below), is something that families in Ireland would welcome.



Since my Office was established in April 2004, we have received 1710 complaints. The vast majority of those complaints have come from the child's parents (69%) and an additional 6% from the child's extended families. In total, 75.1% of complaints coming to my Office come from the immediate and extended families of the children concerned. In these cases, it is the parents and families who act as the principal advocates for children's rights and welfare.

A thematic breakdown of the complaints received by my Office is attached at Appendix 1. This document illustrates the range of issues families have raised with the Office in the attempts to secure the rights of their children.

The proportion of complaints coming from families also demonstrates the vulnerability of children when they do not have a family or when the family cannot play, for any reason, this advocacy role. Where children do not have this family support, Article 5 of the Convention provides that the State shall respect the responsibilities, rights and duties of other persons legally responsible for the child to assist the child in the exercise of their rights.

I recommend that express provision for the right of children to the support of their family or other appropriate care be inserted into the Constitution.

## II Best interests principle

### *Article 3 of the UN Convention on the Rights of the Child*

*"1. 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.*

*2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

*3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."*

I recommend the inclusion in the Constitution of a provision stating that, in all actions concerning children, the best interests of the child shall be a primary consideration. I refer the Committee to my advice of December 2006 and report of March 2007 for further detail regarding my recommendation.

This is a recommendation to incorporate the essence of Article 3 of the Convention. The best interests rule is a procedural rule; it governs how we go about decision-making with regard to children. The rule does not state that children's interests always come first. The aim of the rule is not to encroach on the rights of others, but to facilitate an examination of the interests of a vulnerable group. A child's best interests should be considered in relation to all actions concerning them, that is when the action directly affects them.

My advice of December 2006 sets out further information about the best interests principle. My report of March 2007 welcomes the intention set out in the Twenty-Eighth Amendment Bill to allow the Oireachtas to provide for consideration of the best interests of the child in specific defined circumstances. However, as stated in my report, I do not consider that the current proposal goes far enough and I reiterate my recommendation, as set out in that Report, that the best interests principle be provided for in the Constitution itself.

I do not propose to re-visit the material about best interests covered in my advice and report here, and would refer the members of the Committee to those documents for further information. Instead, I would like to focus on why, from the experience of my Office, the inclusion of the best interests principle Constitution is required.

My Office can examine complaints against public bodies where I consider that a child has or may have been adversely affected and where there may have been maladministration on the part of the public body concerned. In examining the complaints we receive, very often we learn that a child's best interests have not been considered during the administration process by the public body concerned.

For example, in 2007 my Office published the results of an investigation into an application for housing made on the basis of a child with a disability.

We found that the local authority concerned had not considered the best interests of the child when processing the housing application made by his mother. However, review of policies and legislation guiding the decision makers indicated no obligation on the part of the local authority for such consideration.

In that case, we met with the mother and child concerned and what the child spoke about was his dignity, his desire to live in a home which accommodated his needs and enabled him to live with dignity. What he had missed out on in the administration process employed in this case was his procedural right to have his best interests considered as a primary consideration in the process. A strong constitutional provision directing that, in all actions concerning them, a child's best interests shall be a primary consideration would require positive change within our public administration systems and other public sectors. It would require them to consider the best interests of children.

Given the very important decisions that are taken concerning children, particularly those without parental care, a requirement that their best interests be considered is an essential step that should be taken in the context of this constitutional amendment.

As mentioned above, since April 2004, my Office has received 1710 complaints. In none of these complaints has a conflict between the best interests of the child and the rights of parents been the subject of the complaint. When we consider the nature of parents' rights, this is perhaps not so surprising. The rights that parents are vested with are all to do with assisting children in the exercise of their rights and protecting the rights of children. Parents and children are therefore natural allies in efforts to ensure that the rights of children are guaranteed.

The best interests principle is often misunderstood as a possible way for children to dictate the outcome of decision making. This is not the case. With the exception of child protection cases where the principle is more robust, the principle requires that the best interests of the child be a primary consideration. Therefore, it is not the only consideration. What the principle requires is that, during decision-making, the best interests of the child be put into the frame, together with all the other considerations at play.

It is also important to note that a child's wishes are not always systematically in line with their best interest. In a recent case, my Office heard a child's concerns regarding the placement found for him by the HSE. After examination, my Office upheld the decision of the public body and found that the professionals had acted in the child's best interests by finding a placement which could provide for a therapeutic intervention to address his complex behavioural needs.

As noted by Justice Catherine McGuinness in the Baby Anne case, the Courts still do not enjoy a constitutional framework which enables them to consider the best interests of the child in all situations.<sup>14</sup> I consider that this needs to change and that all public bodies in the State should be in a position to and should be required to consider a child's best interests.

### III Support for families and a duty to act proportionately

I recommend the inclusion in the Constitution of a State duty to support families and a duty to act in a proportionate manner.

Specifically, I recommend that 42 (A) 2.1. of the Twenty-Eighth Amendment of the Constitution Bill be reformulated to include a duty on the State to support families and to act in a proportionate manner. I also recommend that the current references to parental failure set out in 42 (A) 2.1 be removed.

Article 42 (A) 2.1 of the Bill reproduces current Article 42.5 of the Constitution (with the exception of 2 minor changes). In my Advice of December 2006 I set out my views regarding this Article and the basis for the recommendations I made. I reiterated these points in my report of March 2007. I would refer the Committee to those documents for further information on my recommendations regarding this article.

In this submission, I would like to focus on why provision for a State duty to support families and a duty to act in a proportionate manner is required.

The vast majority of complaints received by my Office (730 out of 742 in 2007) are about the lack of State action or support or the adequacy of the State support provided to children and their families. The complaints cover a wide range of issues and themes and I refer to the thematic breakdown of complaints appended to this report at Appendix 1.

---

<sup>14</sup> See my advice of 2006 for more information on this point.

In addition to the complaints function of my Office, we also engage in participative work with children. Last year 74,000 children took part in our Big Ballot project; voting on the issues that matter most to them 'Family and Care' came first in twenty one counties. There is also academic evidence that the family is the most important consideration for children in their lives, and international human rights standards provide a framework for the promotion of this optimal environment.<sup>15</sup>

In light of the experience of my Office, I recommend that a duty to support families be inserted into the Constitution.

Another key element in my recommendation is that the principle of proportionality be included in the Constitution. As noted in my report of March 2007, the former Minister for Children did propose the inclusion of the concept of proportionality in Article 42.5 in his first briefing document on the proposed constitutional referendum. I welcomed this proposal in my written response to the briefing document. I would very much welcome a return to the earlier position. Proportionality would extend a safeguard to children and families. There would be a duty on the State to support, but the State could only provide such support and intervention as would be proportionate in all the circumstances. The twin approaches of a duty to support and proportionality would encourage the provision of appropriate, early and consistent support to families in line with their needs and requirements.

The experience of my Office is that, sometimes, practitioners feel that what they perceive to be the high threshold for the delivery of State support and intervention prevents them from delivering early and appropriate support. The outcome of such hesitation and delay can be that problems worsen necessitating the delivery of more intrusive support at a later stage.

For example, my Office has been contacted by a number of families of children with disabilities living in chronic and stressful situations needing supports from a range of agencies to meet their children's extensive needs. These families have reported to my Office their struggles in accessing services for their children and the negative impact this has on their mental health and well-being. They have expressed deep concerns and fear that the State would only intervene in a pro-active but disproportionate

---

<sup>15</sup> See Overview of Children's Understanding of Well-being, NicGabhainn and Sixsmith, 2005.

manner when the situation has become so critical that the State may deem that they have 'failed' as parents. Such late interventions are not in the best interests of the children and may be avoidable if adequate and proportionate supports are provided by the State to those families at an early stage.

It is my view that the best approach is the delivery of early support in a proportionate manner with a view to limiting more extensive interventions to cases where such action is clearly required. A constitutional provision to this effect would assist practitioners in their decision making.

My Office is not aware of any current widespread concerns from families in need of additional support that the State is over-zealous in its actions. On the contrary, our experience is that families experience a lack of support. As regards the change I am recommending, this includes the concept of proportionality which would guard against any development of inappropriate State action.

Underlying all of this proposed change is the UN Convention on the Rights of the Child which, as noted above, is consistent with the Constitution in terms of its presumption that the family environment is the optimal environment for a child's growth and wellbeing.

The Convention emphasises the primary responsibility of parents, and places strict limits on State intervention and any separation of children from their parents. This approach is carried through in the other substantive provisions of the Convention. The Convention notes that the parents or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. Article 18 states that States Parties must ensure recognition of the responsibilities of parents and that the State must assist parents. The obligation to assist goes further than raising the child; the State must assist parents in providing guidance in the exercise by the child of his or her rights. Indeed, one of the aims for education is the development of respect for the child's parents.

As regards other international standards, the European Convention on Human Rights (ECHR) also recognises the right to family life (Article 8). There is a right of parents to be with their children and a right of children to be with their parents. Both the Convention and the ECHR recognise that family rights can be limited where necessary to protect the rights of the child. However, the State's role is to supplement rather than supplant the

family. See for example Article 27 (3) of the Convention which talks about the role of the State to support families. International recognition of the importance of the family was again set out in the recently adopted Recommendation of the Council of Europe's Committee of Ministers to Member States on policy to support positive parenting.<sup>16</sup>

It needs to be said that there will be some instances when children must be removed from families in order to ensure their protection. These are very extreme cases and involve a small but very significant number of children in the State. For instance there are just over 5,000 children in care in Ireland and this number includes those who have been placed in care voluntarily, that is with the consent of their families.

What we need to do is develop a system of State care and support where families are supported from the first moment that the need for such support is evident. We need to respond immediately and adequately to families who request support and services. Ultimately, we need to be able to respond proportionately to families in crisis, to take action to help families stay together and to take action to protect children when there are concerns for their safety and welfare.

#### IV Soft information

In my report of March 2007, I welcomed Article 42 (A) 5.1. which states:

*"Provision may be made by law for the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law."*

I welcome this provision which could facilitate the adoption of legal measures providing for the exchange of so-called 'soft information'.

Any legal measures providing for the exchange of such measures would need to be tightly drafted and include adequate protection for the rights of those in respect of whom information is shared. Such protections would be required in order to ensure compliance with relevant international and domestic human rights standards including the Constitution and/or the European Convention on Human Rights (ECHR).

---

<sup>16</sup> Recommendation Rec (2006)19 of the Committee of Ministers to member States on policy to support positive parenting, 13 December 2006.

I have considered the report of the Special Rapporteur on Child Protection, Mr Geoffrey Shannon, which considers this matter in some detail and I fully support the recommendations set out in his report.



## Conclusion

As set out above, my recommendations for amendment of the Constitution are:

- an inclusion of an express statement of the rights of the child;
- an inclusion of the best interests principle;
- an inclusion of a State duty to support families in a proportionate manner; and
- a provision to enable the sharing of soft information.

I consider that, should the Constitution be amended along the lines recommended above, the need for the enabling provisions set out in Article 42 (A) 2.2, 3, and 4 of the Twenty-eighth Amendment Bill would no longer apply.

An explanation follows.

The Bill does not propose the inclusion of the best interests principle in the Constitution and it does not propose any substantive change to Article 42.5. Consequently, in order to deal with the discrete issues of the adoption of children from marital families in long-term foster care and the consideration of a child's best interests by the courts, the Bill specifically provides that the Oireachtas may pass laws to deal with these discrete issues.

It is my view that the Constitution is not the place to deal with such specific issues. To do so is to treat the symptom rather than the problem. Let us take this opportunity to enshrine express rights, the best interests principle and a duty to support families in a proportionate manner in the Constitution. Let us do this now for all children and for all families and not confine ourselves to specific selected topics.

To clarify, I fully support the proposal that provision be made for the adoption of children in long-term foster care, but we must not assume that this is in the best interests of all children in this situation. I consider these measures can be achieved by the implementation of my recommendations for amendment of the Constitution. All children should benefit from the best interests principle and express rights.

As I mentioned at the outset, I feel that the aim of this amendment should be to set out first principles. It should establish a sound framework which will support the development of good law and practice. Indeed, when the wording of the proposed constitutional amendment was published, An Taoiseach commented on the first provision of the amendment relating to the express statement of children's rights by saying that it is essentially a global protection. The intention of the provision is for it to be developed by the Oireachtas and by the Courts over time to keep pace with new developments and

challenges. In addition, the Taoiseach stated that putting this onus on the State would ensure that Ireland would be to the forefront among its international peers and that we should have standards of protection for children that are as strong and effective as those possessed by any country in the world.<sup>17</sup>

I believe that in its current form, the constitutional amendment does not provide children with such a global protection and does not provide the Oireachtas and Courts with the guidance required to meet the challenges they currently face in relation to children's rights and those they may face in future.

I urge the Committee to give strong consideration to the recommendations included in this submission so that this aspiration can be achieved.

---

<sup>17</sup> Speech by An Taoiseach, Mr Bertie Ahern TD on the publication of the 28th Amendment of the Constitution Bill 2007, 19 February 2007.

# Appendix 1

## Strict liability and the protection of children from harmful court proceedings

The Twenty-Eighth Amendment Bill proposes the re-introduction of strict liability for offences committed against or in connection with a child under 18 years of age.

The principal concern in relation to strict liability is the protection of children who may be exposed to damaging court room proceedings.

The Criminal Law (Sexual Offences) Act, 2006 was enacted in the aftermath of the CC case which struck down our statutory rape law. The 2006 Act re-introduced the crime of engaging in sexual relations with a child. There is no gap in the criminal law. The difference now is that a defendant can plead a defence of honest mistake. This means that children may be exposed to damaging court proceedings. We need to take action now to protect all children in the court room to prevent this.

The re-introduction of strict liability would not resolve all the issues.

It would limit the exposure of children to damaging court proceedings but would not end it completely. Under a strict liability regime, children may still have to give evidence about the facts of the case. In addition, under the current proposals, there is a possibility that children engaged in consensual sexual relations could be prosecuted for strict liability offences.

Moreover, strict liability is a blunt instrument. It can infringe upon the rights of others and, under the current proposal, could infringe upon the rights of children. As Ombudsman for Children I am concerned with the protection of children's rights. However, I seek to exercise this mandate without infringing upon the rights of others, be they parents or defendants in a criminal trial.

The real issue here is about protecting children in the court room. The issue is wider than protecting children who fall into the statutory rape category. We must remember that children have to give evidence for other types of sexual crime including familial abuse and rape. These are desperate cases. We need to protect all children coming before the courts. Some measures have already been introduced here to protect children including video evidence. We need to make sure these are available to all children.

I would refer the Committee to my previous submission to the Joint Committee on Child Protection which sets out in detail my views on special protection measures for children in such circumstances. I welcome the recommendations made by the Joint Committee on

Child Protection regarding children and the criminal trial process, particularly those relating to:

- the implementation of the Criminal Evidence Act, 1992;
- the application of a single age limit of 18 years for all special protective measures; and
- the establishment of a Child Witness Support Service.

These recommendations should be implemented in full and as expeditiously as possible.

The Committee may also wish to be aware that further developments have taken place in neighbouring jurisdictions regarding the use of intermediaries. An evaluation of six pilot projects in England and Wales published in June 2007 found that there was a number of emerging benefits from the use of intermediaries, including the potential to:

- assist in bringing offenders to justice;
- increase access to justice;
- contribute to cost savings;
- assist in identifying witness needs; and
- inform appropriate interviewing and questioning techniques.

The report recommended that the intermediary scheme be rolled out nationally over a two-year period. In addition, the Scottish Executive has launched a consultation on the use of intermediaries as a special protection measure for vulnerable witnesses in Scotland.

In addition to these measures, we need to improve the 2006 Act. Provision should be made that anyone asserting a defence of mistake must carry the onus of proof and must show their belief was honest and reasonable in all the circumstances. The Act should also be amended to provide that children cannot be prosecuted under it.

# Appendix 2

## Thematic breakdown of complaints received

Since its inception the OCO has received 1710 complaints. The themes of the complaints vary widely, but the three main categories regard the actions of the State in supporting families in meeting the child's education, health and housing needs.

While the breadth of the issues as illustrated below is wide, the cross-cutting themes in the complaints are:

- the lack of respect for the voice of the child;
- the child's best interests not being taken into consideration or not being given enough weight; and/or
- families not being sufficiently or proportionately assisted by the State.

Constitutional provisions as recommended in this submission could bring about the necessary culture and practice changes which will make a real difference to children.

Below is a list of the type of complaints commonly received by the Office related to the cross-cutting themes mentioned above:

### Voice of the child

- children's involvement in care planning and provision;
- children in care's access to siblings; and
- aftercare planning and provision.

### Best interests

- school transport;
- handling of grievances that involve children;
- procedures and policies of schools and/or the Department of Education and Science;
- inappropriate emergency placement (eg hospital);
- local authority/social housing allocation;
- local authority planning issues;
- special care; and
- bullying in school.

### Family support

- suitability of local authority/social housing;
- housing adaptation grant;
- lack of integration of services;
- access to health services;
- special needs resource allocation in schools;
- difficulties in the child protection system; and
- lack of nationwide out-of-hours social work service.

## Appendix 3

### Letter from Thomas Hammarberg – Council of Europe Commissioner for Human Rights



COMMISSIONER FOR HUMAN RIGHTS



COUNCIL OF EUROPE

Ref: CommHR/JAK/sf 023-2008

**Mrs. Emily LOGAN**  
Ombudsman for Children  
Millennium House  
52-56 Great Strand Street  
Dublin 1  
Ireland

Strasbourg, 12 February 2008

Dear Emily,

It was a pleasure to meet you again in Strasbourg and thank you for sharing with me your submission to the Joint Committee on the Constitutional Referendum on Children.

Enhancing the protection of the rights of children is a major priority for the Council of Europe and I greatly welcome efforts at national level to further the implementation of international standards. As you know, the Council of Europe has a long history of promoting and protecting children's rights. Over the recent year, the Council of Europe launched a programme "Building a Europe for and with children" aiming at further reinforcing children protection. I have personally taken concrete actions on supporting this programme and promoting children's rights through my constant dialogue with national authorities.

During my week long visit to Ireland last November, I gained a deeper understanding of the need to provide further protection for the rights of children in the Constitution. At the close of my visit, I welcomed the plan to hold a referendum and said it was essential that this opportunity be taken to establish the principle of the best interest of the child as a primary consideration in all decisions affecting children. This idea will be reflected in my assessment report on Ireland which I plan to publish in late spring this year.

I see from your submission that you are calling for the insertion of express rights for children and the best interests principle into the Constitution. I support your recommendations and, in particular, your view that the best interests principle should apply to all children and not be confined to the discrete situations envisaged under the current proposals.

Many Council of Europe member states have undertaken legal change, including at Constitutional level to guarantee children's rights and I hope that Ireland will use this opportunity to become a leader in the promotion and protection of children's rights.

I wish you well in your work and allow me to assure you that you enjoy my continued support in your endeavours.

Yours sincerely,

Thomas Hammarberg







