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**Emily Logan, Ombudsman for Children**

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**Children's Rights and the Constitution**

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In January 2005, in my first year as Ombudsman for Children, I called for the strengthening of the position of children's rights in the Irish Constitution. I was not the first; Justice Catherine Mc Guinness posed the question in 1993 in the context of the Kilkenny Incest Inquiry, the Constitution Review Group in 1996 and the UN Committee on the Rights of the Child in 1998. Therefore in 2005 it had been seven years since the notion was given any credence. It was thought to be such a significant step at the time that it made front-page news on the broadsheets.

After the fall of the Fianna Fáil/Labour government over its handling of the Fr. Brendan Smyth case in 1994, Austin Currie, the first Minister of State with responsibility for children, found himself under considerable pressure to introduce mandatory reporting of child abuse.<sup>i</sup> In addition, the Irish government was soon to report for the first time to the UN Committee on the Rights of the Child on its progress on children's rights since ratifying the UN Convention on the Rights of the Child (UNCRC) in 1992. In response to these pressures, Austin Currie proposed the establishment of the Ombudsman for Children's Office in 1996.

Since that first public statement in 2005 I have witnessed extraordinary political change in this area, culminating in the publication by an Oireachtas Committee in 2010 of a proposal to amend the Constitution, a document that finally represented a political consensus on this issue.

It is impossible to isolate a single catalyst for this change. It resulted from an amalgam of occurrences dating back years in Ireland's shameful history of mistreating children, as well as the more recent collapse of the legislative framework relating to statutory rape in 2006, as a result of the decision of the Supreme Court in the CC case.<sup>ii</sup> However, central to the shift in the public psyche about children, in my view, is the chronicling of egregious breaches of the fundamental human rights of thousands of voiceless children in Ireland in

a number of reports published over the last few years.

I wish to reference in particular the report of the Commission to Inquire into Child Abuse, which documents gross, systemic, and widespread violations of the rights of children placed in institutions in Ireland during the period 1936 to 2000. For me, as Ombudsman for Children, I see it as illustrative of the breadth of power that exists to this day over children's lives by adults and how the arbitrary use and abuse of that power has and can destroy the lives of many children.

Measured against human rights standards today, there are several core human rights principles that were ignored for these children: the right to have decisions made in their best interests; the right not to be subject to discrimination; the right to family life and survival; and the right to express ones views freely.

Other violations included torture; inhuman and degrading treatment; rape; sexual assault; slavery; physical assault; neglect; and emotional abuse. The scale of the abuses suffered by the children is breathtaking in terms of its severity and apparent commonality. The report also records the extraordinary attempts made by some children to tell others about what was happening and the crushing response or deafening silence from those who should have done something to help them. Indeed, complete indifference to the voice of the child was one of the hallmarks of the exploitative, abusive and toxic environment which characterised the institutions examined by the Commission.

I was struck by the contrast between the treatment of children in these institutions and the treatment of children in an orphanage run by Janusz Korczak in the early 20th century. Korczak was a paediatric doctor and a pioneer in the area of children's rights who established an orphanage for Jewish children in Warsaw in 1912. The orphanage was unusual because the young people had a significant role in running it. It had a court and a parliament. It even had its own newspaper. This experiment in self-government drew the attention of many educators within Poland and subsequently across Europe.

During the Second World War, in spite of living in some of the most brutal and dehumanising conditions imaginable, Korczak was adamant that the children's rights should not be diminished. His commitment to the children even led him to refuse the opportunity to leave the ghetto and when the orphans were rounded up to be sent to the extermination camp at Treblinka, he chose to go with them and share their fate.

In reference to Korczak's philosophy and approach, the contrast with what was happening at the same time to children in Irish institutions, ostensibly set up to care for them, was stark.

The degradation of children chronicled in the Ryan Report was total. This was accomplished not just by the appalling material conditions, but also by the assault on the self-worth of the children. They were made to feel worthless. Whatever meagre comforts or maimed charity they received were to be regarded as gifts. For many of them, this was compounded by systematic physical and sexual abuse, which represented the final extirpation of dignity and annihilation of their most basic human rights.

It was no coincidence that the vast majority of children who suffered in this way came from marginalised backgrounds. It is self evident that it is easier to violate the human rights of people who are not socially powerful. Indeed, one of the core characteristics of human rights is that they act as a bulwark against the arbitrary exercise of power by those who have it over those who don't. A society that is fully committed to promoting and protecting human rights is one that establishes systems of accountability and redress, preventing anyone from exercising power in this way.

The Ryan Report did not close the chapter on the State's failings in caring for vulnerable children – it explained where we have come from and how the legacy of those institutions has yet to be fully addressed. We can never protect every child from harm, nor can we guarantee that their rights will always be respected. It is our duty, however, to make sure that the systems of accountability and the legislation that protects them recognises the inherent value and humanity of any child, irrespective of their environment.

This cannot be achieved without moving to an understanding that public policy and service provision in this area must be underpinned by a respect for children's rights, in particular respect for the voice of the child. In my view it is a fallacy to argue that a child's welfare can be guaranteed in the absence of such an understanding. It is too easy for the gap between the intention to secure the welfare of children and the reality of children's experience to widen.

Since the Kilkenny Incest Investigation Committee recommended that the Constitution include a clearer and stronger articulation of the rights of the child in 1993, the call for constitutional change has been repeated by national and international bodies.

The wording produced by the Oireachtas Committee in 2010 stimulated lively debate and will no doubt continue to do so. I think it is important that a number of points should be borne in mind regarding the context in which such debates are taking place.

The first is that change has been a long time coming. Efforts to amend the Constitution never bear fruit quickly and the circumstances which prepare the way for a referendum are always subject to an uncertain political alchemy. Opportunities to effect positive change in this way therefore do not present themselves very often and they should be seized when they do appear. You can never tell when the currents of change are going to gather pace and when significant events – such as the publication of the Murphy (Dublin), Ryan and Cloyne Reports – will accelerate them. Now, with the appointment of a Minister for Children with executive powers and a coalition government that has committed to amending the constitution to strengthen children's rights, it is imperative that its supporters maintain that momentum.

The wording published by the Oireachtas Committee in 2010 is very different from the original wording published by the Government in February 2007. The difference relates not only to the substance of the proposed amendment but also to its provenance. The 2007 wording did not enjoy political consensus and was only the starting point for the Oireachtas Committee's deliberations. It took the Committee over two years and sixty

four meetings to produce its own wording and settle on agreed language that enjoys the unanimous support of the members of the Committee. The current Government has again referred the matter to the Attorney General and has committed to a referendum in Spring 2012.

While I hope in my tenure as Ireland's first Ombudsman for Children to see a strengthening of children's rights in the Constitution I know that it is not a panacea. Constitutional change is not in and of itself sufficient to bring about the fundamental change of culture that is required. That takes time and effort. It is not only about changing the framework in which laws affecting children are drafted or children's services are delivered – it is about changing mental habits. While constitutional change cannot achieve that goal, it can certainly alter the legal and policy landscape and lay the foundations for the cultural change we need. Giving life to the principles enunciated in the proposed amendment will require a concerted effort on the part of the Oireachtas, government departments, statutory bodies, the judiciary, service providers and others in order to make sure that the State fulfils the promises it makes to all children living in Ireland.

This would allow Ireland to further align its law and practice with the international human rights instruments to which it is party and could give guidance to the Oireachtas, the Courts and those who provide services to children, encouraging a consistency of approach that is often lacking.

In the experience of my Office, the absence of clearer protection for children's rights in the Constitution has had an adverse effect on children across a wide range of areas. The organs of the State with which my Office deals most regularly are the Oireachtas, Government departments, civil and public administration, local authorities, the HSE and schools. 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 greater response that constitutional change can provide.

We need to move from the concept of families 'failing' to one of family support,

where the state acknowledges its responsibility to those who are unable to care for their children. I have never been a proponent of disproportionate State intervention. I would like to see an approach that obliges the state to support families in a proportionate manner, limiting more extensive interventions into cases where such action is clearly required. We have seen the human cost of state inaction. Only intervening when a family is in crisis is, in the crudest possible terms, a false economy.

It is important that we get the message right in the primary legal document of 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 also provide direction to decision makers of every level in public life.

It is now time to demonstrate that Ireland as a society is fully committed to recognising children's human and inherent dignity. We need to promote and protect their human rights by enhancing systems of accountability and redress which prevent anyone - state actor or otherwise - from exercising power in ways we have seen in the past.

While there is much that the State and we as community must do to improve children's lives, we must never forget their strength, resilience and capacity to be part of shaping their own future. In Korcak's words 'it is fortunate for mankind that we are unable to force children to yield to assaults upon their common sense and humanity'.

- i The Fianna Fail/Labour Coalition Government collapsed as a result of controversy over the failure to extradite Fr Brendan Smyth to Northern Ireland on charges of child sexual abuse.
- ii In the 2006 "CC" case, the Supreme Court ruled the 1935 Criminal Law (Amendment) Act unconstitutional as it failed to afford a person the opportunity to defend a statutory rape charge by pleading that he had made a reasonable mistake as to age.