

The **Women's** Health Council  
*Comhairle Shláinte na mBan*



## **The Women's Health Council**

### **Submission to the Joint Committee on the Constitutional Amendment on Children**

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## The Women's Health Council

The Women's Health Council is a statutory body established in 1997 to advise the Minister for Health and Children on all aspects of women's health. Following a recommendation in the Report of the Second Commission on the Status of Women (1993), the national Plan for Women's Health 1997-1999 was published in 1997. One of the recommendations in the Plan was that a Women's Health Council be set up as 'a centre of expertise on women's health issues, to foster research into women's health, evaluate the success of this Plan in improving women's health and advise the Minister for Health on women's issues generally.'

The mission of the Women's Health Council is to inform and influence the development of health policy to ensure the maximum health and social gain for women in Ireland. Its membership is representative of a wide range of expertise and interest in women's health.

The Women's Health Council has five functions detailed in its Statutory Instruments:

1. Advising the Minister for Health and Children on all aspects of women's health.
2. Assisting the development of national and regional policies and strategies designed to increase health gain and social gain for women.
3. Developing expertise on women's health within the health services.
4. Liaising with other relevant international bodies which have similar functions as the Council.
5. Advising other Government Ministers at their request.

The work of the Women's Health Council is guided by three principles:

- **Equity** based on diversity – the need to develop flexible and accessible services which respond equitably to the diverse needs and situations of women
- **Quality** in the provision and delivery of health services to all women throughout their lives
- **Relevance** to women's health needs

In carrying out its statutory functions, the Women's Health Council has adopted the WHO definition of health, a measure reiterated in the Department of Health's 'Quality and Fairness' document (2001). This definition states that

**'Health is a state of complete physical, mental and social well being'.**



## ***Summary***

The Women's Health Council believes that to adequately protect the well-being of children, it is important to recognise children as individuals with constitutional rights. The proposed Twenty-Eighth Amendment of the Constitution Bill, 2007, is a welcome and necessary attempt to do this.

The Women's Health Council (The Council) has the following comments with respect to the proposed amendments:

***Article 42 (a) 1*** – The Council welcomes the recognition of children with individual rights at a constitutional level, though the Council argues that the proposed amendment does not protect children's rights strongly enough. The Council believes it is necessary to include an express statement of children's rights, set out in accordance with the rights and principles enshrined in the UN Convention on the Rights of the Child.

***Article 42 (a) 2.1*** – The Council welcomes the move to eliminate differential treatment between children of marital and non-marital families. However, given that Article 41 is to remain unchanged, the Council is uncertain as to how the proposed amendment will have its intended effect. The Council believes that to protect children from differential treatment on the basis of their families' marital status, it is necessary to include in the express statement of children's rights, the right of all children to non-discrimination and a statement that the best interests of the child will be of paramount consideration in all cases affecting the child.

The Council believes that it is necessary to clarify whether the parent's or the children's rights will take precedence in the event of a clash between these sets of competing rights. This is especially important in the context of consent to medical treatment.

***Article 42 (a) 2.2, Article 42 (a) 3 and Article 42 (a) 4*** - The Council welcomes these proposed amendments.

***Article 42 (a) 5.1*** - The Council welcomes this proposed amendment.

***Article 42 (a) 5.2 and Article 42 (a) 5.3*** – The Council welcomes these proposed amendments to the extent that they provide for the restoration of the offence of statutory rape. However, The Council is concerned about the broad ambit of these provisions as they are currently drafted as legislation can be enacted to criminalise consensual sexual activity between children. The Council believes that it is crucial that children who engaged in consensual sexual activity are not criminalised and should be excluded from the offence of statutory rape. The Council believes that the Oireachtas, when drafting legislation, should have regard to the age-band framework, which acknowledges that not all sexual activity below the age of 17 is necessarily exploitative and can be part of the normal process of growing up.



## ***Introduction***

The Women's Health Council (The Council) welcomes the opportunity to make a submission to the Joint Committee on the Constitutional Amendment on Children. The Council believes that to adequately protect the well-being of all children, it is necessary to ensure that the rights of children as separate social entities are strongly declared in the Constitution.

The Irish Constitution, *Bunreacht na hEireann*, is the fundamental law of the State. It sets out society's fundamental values and the rights of all citizens. Under the Constitution, children's rights have been assessed within the familial framework, with little reference being made to children with individual rights.

There has been a gradual shift away from a family based approach towards recognition of children as separate entities with individual rights beginning with the adoption of the Child Care Act, 1991, ratification of the UN Convention on the Rights of the Child (UNCRC) in 1992 and the publication of the National Children's Strategy (2000). The Office of the Minister for Children was established in 2005 to oversee the implementation of this strategy.

Poverty and social disadvantage can adversely affect a child's ability to reach their full potential and adversely affect their short and long-term health. While Ireland has enjoyed unprecedented economic and employment growth over the past decade, with a significant increase in living standards, in 2006, almost 33% of all those in consistent poverty were children under the age of 14 (Central Statistics Office, 2006). Najman (2004) found that children from socio-economically disadvantaged families begin their lives with a poorer platform of health and a reduced capacity to benefit from the economic and social advances experienced by the rest of society. In 2006, the United Nations Committee on the Rights of the Child expressed concern about the level of access to healthcare for vulnerable children in Ireland as well as concerns that teenagers have insufficient access to information on reproductive health (United Nations Committee on the Rights of the Child, 2006). Moreover, many health problems that women experience in adulthood, including obesity, heart disease, cancer, psychological stress, musculoskeletal diseases and reproductive illnesses, can be traced back to events in childhood and adolescence (Women's Health Council, 2004).

## ***Comments on Twenty-Eighth Amendment of the Constitution Bill, 2007***

### ***Article 42(A)1***

*The State acknowledges and affirms the natural and imprescriptible rights of all children.*

The Council welcomes the intention to insert children's rights into the Constitution. It believes, however, that the proposed amendment as it is currently worded, does not enshrine the rights of children strongly enough.



Under this provision, what constitutes the 'natural and imprescriptible rights' of children is not defined. Enumerating what such rights are is to be one of judicial interpretation.

While children's rights are not expressly provided for in the Constitution (apart from the right to primary education in Article 42), the courts have found such rights to exist under the general personal rights provisions in the Constitution.<sup>1</sup>

More recently, however, the Supreme Court has moved away from declaring further rights for children under the Constitution. This new approach is evident from the Supreme Court decisions in *Sinnott v Minister for Education*<sup>2</sup>; *T.D. v Minister for Education*<sup>3</sup> and *Lobe and Osayande v Minister for Justice, Equality and Law Reform*<sup>4</sup>. These cases involve the most vulnerable of children in Irish society who are most dependent of the State for their education, health, welfare and citizenship (Shannon, 2005). According to Shannon, these judgements signals 'a shift to conservatism by the Supreme Court both legally and in terms of social policy' but could also indicate a judicial desire to respect the doctrine of the separation of powers (Shannon, 2005:6). In light of this new approach by the Supreme Court, the Law Society Reform Committee has argued that it is necessary to have express and clear rights for children as the 'alternative is to maintain the status quo and allow the courts approach fundamental issues concerning children on an ad hoc basis' (Law Society Reform Committee, 2006:55).

The inclusion of children's rights in the Constitution has been sought for many years. The Kilkenny Incest Investigation Committee, in 1993, proposed that the Constitution include a statement of the constitutional rights of children and suggested that in drafting such a statement regard should be had to the UNCRC (Kilkenny Incest Investigation, 1993). The Constitution Review Group, in its report in 1996, recommended the inclusion of an express statement on children's rights in the Constitution (The Constitution Review Group, 1996). The United Nations Committee on the Rights of the Child, in its concluding observations (on Ireland's implementation of the UNCRC), in both 1998 and in 2006, urged that the recommendations of the Constitution Review Group be accelerated as this would reinforce 'the status of the child as a full subject of rights' (United Nations Committee on the Rights of the Child, 1998).

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<sup>1</sup> See *G v An Bord Uchtála* [1980] IR 32, where the Court held that children have the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being (as per O'Higgins C.J).

<sup>2</sup> [2001] 2 IR 598 In this case, the Supreme Court held that the State was under no obligation to provide life long primary education to a 23 year old man who was autistic. The State has only a constitutional duty to provide free primary education to children aged 18 and under.

<sup>3</sup> [2001] 4 IR 259 This case concerned the State's obligation to provide high support units for children with special needs. The Supreme Courts decision placed clear limitations on the court's power to intervene to protect the rights and welfare of children (See Shannon, 2005:129).

<sup>4</sup> [2003] 1 IR 1 This case concerned children born in Ireland to non-national parents and whether they were entitled to reside in the State, in the care of his/her parents. In its decision, the Supreme Court restricted the almost automatic residency rights for non-national parents of Irish-citizen children and found that the Minister could deport the non-national parents of an Irish citizen even if this resulted in the de facto removal of the Irish citizen from the state (Ryan, 2005).



The Council believes that in order to recognise the importance that the State gives to the protection and well-being of its children, an express statement of children's rights, set out in accordance with the rights and principles enshrined in the UNCRC, be stated in the Constitution.

In particular, the Council believes that effect should be given to Article 24 of the UNCRC, which recognises the right of children to enjoy the highest standard of attainable health and to ensure that no child should be deprived of the right to access health care services.

### **Article 42 (A) 2.1**

*In exceptional cases, where the parents of any child for physical or moral reasons fail in their duty towards such child, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*  
(Emphasis added to highlight difference in wording from current Article 42.5)

This provision will replace the current Article 42.5, which provides that the State, as guardian of the common good, can intervene and replace the role of the child's parents in exceptional circumstances. The proposed amendment seeks to end the different treatment between children from married and non-married families by providing that with respect to all children, the State will only be able to intervene to replace the role of parents in exceptional circumstances.

Historically, children's rights have been assessed within the familial framework set out in the Constitution. Article 41 and Article 42 are the principle sources of fundamental rights in family law. The rights guaranteed by both these articles are viewed as being attached to the family- a family based on marriage- as a whole. The rights of married parents in relation to their children are inalienable by virtue of Article 41 and 42.

Article 41 has been used to uphold discrimination against children born outside marriage.<sup>5</sup> Such discrimination can have emotional and psychological affects on the members of non-married families, including children. It is important that differences in family forms are not perceived and understood as deficient. Hayes argues that 'children are more than able to evaluate whether their family is 'different' from the model promoted by the public consent, and translate this convert discrimination into a negative perception of their family and themselves' (Hayes, 2002:11).

Article 42.5 plays a crucial role in child protection. According to Shannon, 'it has been interpreted as being confined not just to a failure by the parent of a child to provide education to him or her, but it may in exceptional circumstances extend to failure in other duties necessary to satisfy the personal rights of the child' (Shannon, 2005:3). However, the State can only intervene in exceptional circumstances, as there is a constitutional presumption that the best interests of the children lie within the marital family.

There is no proposal to change the threshold for State intervention under the current Article 42.5. If the proposed amendment has its intended effect and ends differential

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<sup>5</sup> See *O'B v S* [1984] IR 316



treatment, it may place children from non-marital families at a disadvantage. This is because in cases involving guardianship, custody or the upbringing of children from non-marital families, their welfare will be of paramount consideration (under Section 3 of the Guardianship of Infants Act, 1964). Therefore, as the Ombudsman for Children notes, 'if different treatment of children of marital and non-marital families is ended without reformulation of Article 42.5, the courts could be further restricted from specifically examining the best interests of a child' (Ombudsman for Children, 2007:8).

The proposed amendment must be viewed in conjunction with Article 41, which, in its present form, lacks a child focus and continues to act as an impediment to the effective implementation of children's rights under the UNCRC (Shannon, 2005:474).

Family law experts have stated that the development of conflict is now likely between the Irish definition of the family under Article 41 and the meaning given to the family under the European Convention on Human Rights (ECHR). By guaranteeing the rights of both children and parents, it will be necessary to make clear which of these rights should take precedence in the event of conflict. Under the ECHR, where there is conflict between family law and child law, it will be necessary to balance the rights of family members, 'with the interests of the child being decisive where the way is not clear' (Shannon, 2005:474).

The Council accepts that it may be difficult at times to find the appropriate balance between the rights of the family as a unit and individual members. Nonetheless, where the family unit cannot protect the rights of individual family members, especially children, ensuring the protection of such rights must take precedence over the status quo.

The Council welcomes the move to eliminate differential treatment of children from marital and non-marital families. Given that Article 41 is to remain unchanged, the Council is uncertain how the provision, as it is currently drafted, will have its intended effect.

The Council recommends that in order to protect children from differential treatment on the basis of their families' marital status, it is necessary to include in the express statement of children's rights the right to non-discrimination. In addition, the Council believes that a statement that the best interests of the child would be of paramount consideration in all cases affecting the child is necessary. This would be in line with the findings of the Constitution Review Group, which recommended that in all actions regarding children 'the best interests of the child shall be the paramount consideration' (1996) and the recommendations of the United Nations Committee on the Rights of the Child (1998, 2006).

### ***Consent to Medical Treatment***

The Council believes that in the event of conflict between parental and children's rights, there is a need to clarify which will take precedence. This is particularly important in the context of consenting to medical treatment.

At present, there is much confusion in relation to consent for medical treatment for young people. This is especially true when considering the prescription of



contraception to a person, most likely female, under 17 years of age, the legal age of sexual consent, and more especially to those under 16 years of age, the legal age of medical consent. A difficulty arises if the doctor has to balance the patient's right to confidentiality against the requirement to inform a parent/guardian if the patient is under 18 years of age, i.e., still legally a minor, and particularly if s/he is under 17 years.

Article 41 and 42 renders the rights of married parents in relation to their children 'inalienable' and could be taken to prohibit the provision of contraceptives to minors as an unconstitutional interference with parental rights and duties. If the proposed amendment is passed, would the natural and imprescriptible rights of children, include the right to medical treatment? If so, would such rights take precedence over the inalienable rights of parents?

This situation is unsatisfactory and is bound to lead to confusion. The Council believes that reform of the law is needed to ensure there is no confusion in relation to the right of teenagers, 16 years of age or older, to access sexual health services. The adoption of consent guidelines for teenagers younger than 16, such as the Gillick Competence framework, should be considered. This framework provides guidance to healthcare providers working with people under 16 in that they can give valid consent for medical treatment and examination- depending upon the nature and seriousness of the decision to be made, in conjunction with the child's emotional maturity, intelligence and comprehension of the information they have been given.

#### ***Article 42 (A) 2.2***

*Provision may be made by law for the adoption of a child, where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child, and where the best interests of the child so require.*

And

#### ***Article 42 (A) 3***

*Provision may be made by law for the voluntary placement for adoption and adoption of any child.*

And

#### ***Article 42 (A) 4***

*Provision may be made by law that in proceedings before any court concerning the adoption, guardianship or custody of, or access to, any child, the court shall endeavour to secure the best interests of the child.*

At present, under Article 41 and 42, there is a constitutional presumption that the welfare of children is best provided for by parents, as a family based on marriage. This approach is evident from the recent Supreme Court's decision in the Baby Ann



case.<sup>6</sup> In its judgement, the Supreme Court placed strong emphasis on the child's welfare being best served in the care and custody of their natural parents. The Court was influenced by the decision of the natural parents to marry as they now formed a family unit under the Constitution. The decision of the natural parents to marry meant that the foster parents would not be able to adopt Baby Ann. This is because the test for parental failure under the Adoption Act, 1952 makes it almost impossible to adopt a child from marriage (Kelly 2007).

The Baby Ann case highlighted the virtually invisible nature of children's rights in the Constitution. Supreme Court Justice, Ms McGuinness, noted that the 'only person whose particular rights and interests, constitutional and otherwise, were not separately represented' was the child herself.

The Council believes that it is necessary to ensure that the welfare of the child is of paramount consideration in cases of adoption, guardianship or access and welcomes these proposed amendments.

**Article 42 (A) 5.1**

*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.*

The Council welcomes this provision as necessary to ensure that children are protected from sexual predators by providing for the use of soft information. Soft information includes information that has come to the attention of the State authorities but falls short of conviction of a relevant offence, such as an allegation of abuse (Shannon, 2007). The Council acknowledges that the drafting of legalisation to govern the use of soft information is fraught with difficulties. In particular, cognisance must be had of the right of all individuals to earn a livelihood, the right to privacy, and the right to their good name. Great care must be taken when drafting the legislation to ensure that it is harmonious with other provisions and rights in the Constitution and the European Convention on Human Rights. In this regard, the Council believes that the Oireachtas should have regard to the recommendations of Mr Shannon in his special rapporteur report on child protection (Shannon, 2007) (See Appendix 1 for list of Mr Shannon's recommendations).

**Article 42 (A) 5.2**

*No provision in this Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.*

And

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<sup>6</sup> *N & Anor v Health Service Executive* [2006] IEHC 278: This case concerned a 2 year old girl, who had been living with her perspective adoptive parents since she was 3 months old, having been put up for adoption by her unmarried, biological parents. The Supreme Court directed that she be returned to her natural parents.



### **Article 42 (A) 5.3**

*The provisions of this section of this Article do not, in any way, limit the powers of the Oireachtas to provide by law for other offences of absolute or strict liability.*

The Council recognises the paramount importance of ensuring that children are protected from exploitative sexual experiences. The Council welcomes these provisions to the extent that they allow for the restoration of the offence of statutory rape. However, it is concerned about the broad scope of the provisions. In their present form, legislation could be enacted to provide for the prosecution of children in relation to offences of absolute or strict liability.

The proposed amendments can be viewed as a response to the Supreme Court's decision in the CC case<sup>7</sup>. In response to the decision, the Oireachtas introduced the Criminal Law (Sexual Offences) Act, 2006 (2006 Act). This introduced the defence of honest mistake in relation to sexual activity with children under the age of consent. A consequence of the introduction of the mistake defence is children can be cross-examined in court, an experience that could be very traumatising for the child. Moreover, the 2006 Act creates the possibility that teenagers engaged in consensual sexual activity/experimentation may be criminalised.

The All-Party Committee on Child Protection was established to examine the implications of the judgement in the CC case. In its report in November 2006, it recommended the Constitution be amended to allow the Oireachtas to adopt legislation providing for absolute criminal liability in respect of sexual activity with children, and that the defence of mistake as to age should not be available to the individual accused of an offence of sexual activity with a child under 16. The Committee recommended that the age of consent for sexual activity be set at 16 years of age (Joint Oireachtas Committee on Child Protection, 2006).

While the current age of legal consent has been set at 17 years, research by Rundle et al., (2004) has shown that the age of sexual initiation is now 15.5 years and decreasing. There are no provisions in the 2006 Act that protect young people who engage in consensual sexual activity from prosecution. According to McAuley, it is entirely inappropriate that consensual sexual experimentation between children could result in prosecution and conviction for a serious criminal offence (McAuley, 2007:20).

Criminalising teenagers' sexual experimentation will only serve to make teenagers less likely to engage in responsible contraceptive and sexual health behaviour for fear of recrimination. It will not stop teenagers' from engaging in consensual sexual activity. The government has invested considerable funds through the work of the Crisis Pregnancy Agency and the Relationship and Sexuality Education programme in schools to promote responsible sexual activity for young people in terms of contraception and other sexual health matters. Criminalising teenagers' who engage in consensual sexual activity may be undermining the government's own work in this area. Additionally, the current legislative position will discourage young fathers from playing an active role throughout the pregnancy and early childhood. At present,

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<sup>7</sup> *CC v Ireland* [2006] IESC 33 In this case, the Supreme Court held that Section 1 (1) of the Criminal Law (Amendment) Act 1935, which made it an offence to have sex with a girl under the age of 15 years, was unconstitutional as it did not allow for the defence of mistake with respect to the age of the girl.



where underage sexual intercourse results in pregnancy, the young father could now be liable for prosecution. This will discourage young fathers from playing an active role throughout the pregnancy and during the life of the child. It further exacerbates societal expectations of the women as the main carers (Women's Health Council, 2005).

The Council acknowledges that this is a complex area of law, seeking to protect children on one hand from sexual predators and exploitative sexual experiences while on the other, not criminalising children who engage in consensual sexual activity.

The Council welcomes the proposed amendments as it allows for the reinstatement of the offence of statutory rape in relation to sexual intercourse with children under the age of consent. This would strengthen the protection of children and would also significantly reduce the possibility that child victims would be cross-examined in court.

However, The Council believes it is crucial that children who engaged in consensual sexual activity are not criminalised and that children be excluded from the offence of statutory rape. A useful approach to adopt is the age-band framework, which acknowledges that not all sexual activity below the age of 17 is necessarily exploitative and can be part of the normal process of growing up. Professor McAuley, in his report on the legal protection of children, argues that the Constitution should be amended to allow the reinstatement of the offence of statutory rape with the important caveat that experimental sexual behaviour between children of comparable age should be excluded from the offence of statutory rape (McAuley, 2007).



## Appendix One

### **Recommendations for the drafting on legislation to govern the use of soft-information, by Geoffrey Shannon, Special Rapporteur for Child Protection:**

'Any legislation drafted must be clear, concise, limited in application, provide for procedural safeguards and take account of the constitutional doctrine of proportionality. With that in mind the following suggestions are offered:

- Only consider information that has led to investigations into alleged abuses or crimes;
- Consider the circumstances surrounding the offence;
- Clearly stipulate the class of persons who will be subject to such disclosure;
- Strictly limit the number of persons to whom such disclosure can be made on the basis of necessity;
- Put in place appropriate safeguards for such information to be furnished to vetted persons and corrected if this is appropriate;
- If used to decline employment, then provide the vetted person with the reasons for this;
- Ensure that the entire process is transparent and reasonable, attributing due weight to each charge considered;
- Provide a mechanism through which a person can appeal his/her entry onto a soft information register to an independent third party;
- Conduct periodic reviews of the status of those included on a soft information register.

Access to soft information should only be allowed in circumstances of necessity - both the occasion of access and the person accessing it must possess the required necessity.'

(Shannon, 2007:xii)



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