

Submission to the
Joint Committee to the Constitutional Amendment on Children
by
Barnardos CARI Dublin Rape Crisis Centre ISPCC
One In Four Rape Crisis Network Of Ireland



INTRODUCTION

We are a group of organisations that work, day in and day out, with and on behalf of children and families, and with adult victims of childhood abuse. We offer a range of services to people who need support – services that are universally accessible, like Childline and 24-hour helplines; services that are more targeted and focused on specific needs in the lives of families and children in disadvantage; services designed to respond to people who have suffered a traumatic and life-changing event. We advocate for children and their rights to the best of our ability.

We work with children who have suffered terrible trauma, who are in pain, and whose lives have gone awry. We meet children who have suffered from abuse and neglect, and who believe in their hearts that no-one cares. We know children who desperately need intervention in their lives, and can find no-one to help. Daily we fear for children whose lives have taken a wrong direction, and whose future can only be bleak without the necessary help and intervention.

Our on-the-ground experience teaches us that children's rights are not fully respected in Ireland. Even during the years of economic growth, tens of thousands of children lived in grinding poverty in Ireland, often in communities that were (and are) themselves blighted by disadvantage, and many others lived in family situations that simply didn't work for them. The ending of that period of growth has only compounded the sense of hopelessness that is the lot of too many children.

For far too long we have lived with the assumption that Ireland has been a great place to raise children. But this assumption does not stand up to scrutiny. There is a dark side to all this, as we know. It is illustrated nowhere more starkly than in the pages of the recent Report of the Commission to Inquire into Child Abuse.

The American psychiatrist Judith Lewis Herman, in a seminal work called *Trauma and Recovery*, has written:

“Remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of individual victims. The conflict between the will to deny horrible events and the will to proclaim them aloud is the central dialectic of psychological trauma. People who have survived atrocities often tell their stories in a highly emotional, contradictory, and fragmented manner that undermines their credibility and thereby serves the twin imperatives of truth-telling and secrecy. When the truth is finally recognised, survivors can begin their recovery. But far too often secrecy prevails, and the story of the traumatic event surfaces not as a verbal narrative but as a symptom.”

The Commission has laid bare a truly terrible period in recent Irish history. Its revelation of unspeakable acts, which were banished from our consciousness for so long, have in one sense enabled a process of recovery to begin. But the Commission’s Report, and our reaction to it as a people, has also revealed that in many ways Ireland is a traumatised society, frozen in a painful dynamic which swings between brief periods of remembrance and long periods of denial of the reality that we live with inequality, injustice and the abuse of power, including sexual abuse.

The Commission’s Report tells us many things about our country – and it is important to reflect that these things happened in our own lifetimes.

- Ireland was an authoritarian society displaying an obsequious deference to the Catholic Church and the State. These powerful institutions lacked transparency and any sense of accountability.
- Society was characterised by disempowerment and exclusion on the basis of class, gender and age – children raised in poverty were neither seen nor heard. Their needs simply didn’t matter, when set against the needs of powerful institutions.
- Abuse was systemic within the institutions.
- Dissent was not tolerated and indeed vigorously suppressed.
- Irish people assumed the stance of silent witness, complicit and collusive in our denial of terrible events.

There were some questions the Commission’s Report was unable to answer: and they remain critical. Why did it happen? How did we get to be the way we were? How can we ensure that nothing like this can ever happen again?

The people of Ireland have been truly shocked by the revelations of the Commission’s Report. No-one believes that the terrible things that happened in our name really reflect the spirit and ethos of the Irish people. There is a space where we can remember and mourn, and through this process use what we have learnt to inform and shape the society we wish to create.

The challenge for civil society is to steadily hold up a mirror that reflects reality and to resist the inevitable and compelling pressure to retreat back into denial and amnesia.

And out of all this a real commitment to children and families must become a tangible central value of Irish society.

WHY CHANGE THE CONSTITUTION?

We congratulate the Government, and in particular the Minister for Children and Youth Affairs, for developing a genuine and far-reaching response to the recommendations of the Commission's Report. The legislative, structural and resource proposals made, if implemented, will go a long way towards helping all of us to protect and care for children in the future, and will help to serve as a fitting memorial to those who have suffered in the past.

But the Minister has himself acknowledged in interviews that there is unfinished business about his proposals, and that unfinished business is the work of the Joint Committee on the Constitutional Amendment on Children.

This is of course not the first time that this issue has come up for consideration. The demand for change has been articulated over many years by members of the legal profession, by academics and others working professionally with children, as well as by political parties and non-governmental organisations.

Constitutional change has been repeatedly called for in a series of official reports, including:

- √ In 1980 by the Task Force on Child Care
- √ In 1993 by the Kilkenny Incest Investigation report
- √ In 1996 by the Constitution Review Group
- √ In 1998 by the Commission on the Family
- √ In January 2006 by the All-Party Oireachtas Committee on the Constitution, and
- √ In November 2006 by the Joint Committee on Child Protection.

At an international level, the UN Committee on the Rights of the Child in 1998, and again in 2006, added its voice to these cumulative calls to strengthen the position of children's rights in the Constitution.

And many other reports have highlighted in graphic terms what can happen to children who are "seen and not heard". These include:

- √ The Kennedy Report, from as far back as 1970
- √ Kelly – A Child is Dead (1995)
- √ The Madonna House Inquiry (1996)
- √ The West of Ireland Farmer Case (1998)
- √ Protection of Children in Sport (1998)

Against that overwhelming background it now falls to this Committee to ensure, once and for all, that the children of Ireland can never be ignored again, and that they can never again be made the objects of abuse without adults who are aware of the

abuse reporting it and intervening to prevent it from happening again. The only way in which our children can be guaranteed that their rights will never again be trampled on is if we write them down, and if we write them down in the only place that fundamentally matters, the Constitution of Ireland.

By asking the people to change the Constitution in this way, we would be offering them an opportunity to make a strong and powerful statement about the future of all our children. And we would be offering the people a chance to give a gift to future generations of children – a gift that could never be taken away by any autocratic institution or any unfeeling bureaucracy.

We believe that this Committee has already decided in principle that the people should be given an opportunity to make that statement. In the work you have done to date, in dealing with issues like vetting and strict and absolute liability offences, you are in effect narrowing down to their core the issues that need to be enshrined in the Constitution.

And you have been advised already by leading experts in children and the law about what the core issues are. Geoffrey Shannon and others have advanced powerful and persuasive arguments about the UN Convention on the Rights of the Child, the European Convention on Human Rights, and other international instruments. Legal expertise has been available to the Committee about the complexities of child protection, adoption, and other specific issues.

On the other hand, we are approaching the Committee not as legal experts (although we have consulted as widely as possible), but as people and organisations for whom the rights, welfare and protection of children are central to our purpose.

The Irish Constitution was adopted in 1937. It is the most important document in the Irish legal system. As such it is central to the administration of Government and the relationship between the State and its citizens. Fundamentally, the Constitution recognises the personal rights of the citizen: and it sets limits on what the State can do and how it can do it.

Although it contains strong protection for the family, the Constitution is virtually silent on children's rights. This has made it difficult to protect and promote children's rights adequately in practice.

Articles 40 to 44 of the Irish Constitution set out the rights to which all citizens are entitled and can be summarised as follows:

- Article 40 recognises that every citizen has personal rights including equality before the law, the right to have one's life, property and good name protected and the right to liberty. (While of course children share these rights as citizens, access to many of them comes only with adulthood.)
- Article 41 concerns the rights of the family and recognises its status as the fundamental unit in society. The State guarantees to protect the family and guard the institution of marriage, on which the family is founded, from attack.

- Article 42 deals with education and recognises that the family is the primary educator of the child. It effectively guarantees every child the right to free primary education (this is the only express right that children have in the Constitution). The right to education must have “due regard for the rights of parents, especially in the matter of religious and moral formation”.
- Article 42 also provides that the State shall endeavour to supply the place of parents in exceptional cases where the parents fail in their physical or moral duty towards their child. It says the State must do this with “due regard for the natural and imprescriptible rights of the child” (although it doesn’t say what these rights are).
- Article 43 sets out the right to property, and
- Article 44 recognises freedom of conscience and the right to practise religion.

Although they make express reference to the rights of the family, these provisions make little express provision for the rights of the child. Accordingly, it is clear that the child’s existing constitutional rights are inextricably linked to the rights of the family. Indeed, the Supreme Court over the years has summarised the rights that children as family members enjoy under the Constitution as:

- The right to belong to a family and the right to have the family protected (Article 41)
- The right to be educated by the family (Article 42)
- The right to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42).

In one case, for instance, Chief Justice O’Higgins said that “the child has 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”.

Despite the value of this protection, the Constitution currently provides little protection for the independent rights of the child. According to the Supreme Court, Article 41, which sets out the rights of the family, recognises only the family based on marriage and only the marital family and their children are thus entitled to the protection and guarantees of Articles 41 and 42.

CHILD PROTECTION, THE FAMILY AND THE CONSTITUTION

In our view, the interaction between child protection, the family and the Constitution is of critical importance. Article 41 recognises that the family, defined by the Supreme Court as the family based on marriage, occupies a superior position in society, which requires that its integrity and its authority must be respected. In reality, this means that any rights which the child enjoys under the Constitution or in legislation must be interpreted in line with the rights of the marital family.

Under Article 42.5, the State must endeavour to supply the place of parents who have failed in their physical or moral duty towards their child but only “in exceptional circumstances”. According to the Supreme Court, this operates as a presumption that the welfare of the child is to be found within the family (based on marriage) unless there are compelling reasons to the contrary.

This is a high threshold for state intervention in the family, which has made it difficult to ensure that children at risk are adequately protected. Together, these provisions mean that the constitutional emphasis on the marital family has led to the rights of children being ignored or underplayed in favour of the rights of married parents. It also means that there are significant differences in the way in which unmarried families and their children can be treated.

If we are to take child protection seriously, there must be a rebalancing here. We know now about the history of child abuse in Ireland, especially in residential institutions. And we know too that the State was complicit in that abuse. Some commentators have already asked how it could ever be possible to trust the State again with the welfare of children.

But there is a harsh reality. The *SAVI Report*¹ told us that one in five women and one in six men experienced contact sexual abuse in childhood. That report confirms that the abuse was by no means confined only to institutions. For example, a quarter of perpetrators against girls were family members, while a further half were non-family but known to the abused girl. One in seven perpetrators against boys was a family member with two-thirds known to the abused boy. 5.8% of boys, and 1.4% of girls, reported their abuser as a member of the clergy. In sum, in four-fifths of cases of child sexual abuse, the perpetrator was known to the abused person.

We start from the position that the best possible place for a child is in a happy family home. We believe that in any conflict over where the best interests of a child lie, the parents of that child will, in the great majority of cases, have the right answer.

But consider these questions, for example. Right now, today, where are more children abused than anywhere else? Where do more children live in fear than anywhere else? Where are they more likely to be hungry, cold, lonely than anywhere else, often because of the complete absence of family support?

¹ SAVI Report: Sexual Abuse and Violence in Ireland. A National Study of Irish Experiences, Beliefs and Attitudes concerning Sexual Violence. Prof H. McGee et al 2002.)

Where are they more likely to witness drug or alcohol addiction, and be affected by it, than anywhere else? Where are they more likely to be caught up in the usually dreadful repercussions of domestic violence?

The answer to all those questions is the same. At home. Despite all the emphasis on the terrible things that happened in residential institutions in the past, the truth is that for a lot of children, home is not always a safe place to be.

But because of the way the Constitution is written, the State cannot intervene effectively in a family – and especially a family based on marriage, where action requires one to prove that the parents have failed completely in their physical or moral duty towards their child. This threshold for intervention is too high. We believe it does not enable the state to intervene adequately where a child is at risk of harm.

Of course any such intervention must be appropriate and proportionate. The purpose of changing the Constitution is to protect children – not to undermine families. So any state involvement in the family must always be limited by what is required to protect the rights of the children involved, as well as governed by constitutional guarantees of fair procedures.

WHAT ELSE SHOULD WE DO?

The Taoiseach has said that the only appropriate response to the history of abuse uncovered by the Report of the Commission to Inquire into Child Abuse is to make the Ireland of the future a model where the treatment of children is concerned. Our Constitution can play a major role in that, by ensuring that children are at the heart of public policy. We believe in addition to the critically important rebalancing dealt with above, the Constitution should say the following things –

- That childhood is both special and fragile;
- That children do have rights, and those rights do not depend on the marital status of their family;
- That the rights of children include, for example:
 - the right to an identity,
 - the right to be reared as members of a family,
 - the right to be protected from abuse and exploitation and in times of armed conflict,
 - the right not to be detained except as a measure of last resort,
 - the right to have their voices heard and to be represented in any proceedings affecting their welfare,
- and that special regard should be had for the rights and interests of children in all matters of law and public policy.

We also believe that the State should be willing to pledge to guard with special care the interests of children who are disadvantaged by economic, social or cultural exclusion, or by disability.

A POSSIBLE MODEL

For all the reasons we have set out, and based on the absolute conviction that we must offer the Irish people the chance to make a fundamental statement about the future of our children, we believe the model set out below would achieve those objectives, and could be put to the people as one question in a referendum.

In suggesting a model, we are conscious that the Committee will receive advice from many quarters, and that the drafting work you face is no easy challenge. Indeed within our own organisations there are many views about how to achieve the objective of placing childhood, and our children, on a better footing for the future. In that spirit we make these suggestions, and look forward to the opportunity to engage with other ideas too, in the confident hope that ultimately the best model will emerge.

First we would envisage a new Article 40.7, to be inserted as part of the Constitutional guarantee of personal rights. Based on recognised international covenants, this Article would set out the rights of children, and would read as follows:

1° The State recognises that humanity owes its children the best it has to give; that childhood is fragile and children therefore need special care, assistance and safeguards for their protection; that all children are equal, regardless of their family background or status; and that a child's family is the natural and usual environment for his or her upbringing and development.

2° The State guarantees in its laws to respect and, as far as practicable, by its laws and actions to defend and vindicate the rights of children, as enumerated by the United Nations Convention on the Rights of the Child, ratified by Ireland on September 28th 1992.

3° Cherishing all its children equally and seeking to promote their welfare equitably, the State pledges itself to safeguard with especial care the interests of children who are disadvantaged by economic, social or cultural exclusion, or by disability, and to support parents who cannot meet their children's needs unaided.

The second change would rebalance the Constitution, and strengthen the protection of children, by deleting Article 42.5, and inserting a new Article 41.4, as follows:

4 Nothing in this Article shall be understood to weaken or undermine the primary responsibility of parents and in exceptional circumstances of the State, where it is necessary, to protect a child from physical, mental or emotional harm as far as is practicable. In any situation where the State has supplied the place of the parents, it will act proportionately and always with due regard to the rights and welfare of the child.

CONCLUSION

We believe changes along lines like these would send a powerful message to succeeding generations. We look forward, as we say, to engaging with other ideas with a view to bringing forward the best and most practical approach.

For us, the key thing is that we give the people of Ireland an opportunity to send a message to the future. In essence, that message would be that we are determined that the abuse and neglect of the past would never happen again. Instead, we are determined to make this a Republic that in word and deed cherishes all the children of the nation equally.