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CHAIRPERSON'S FOREWORD

On behalf of the Joint Committee on the Constitutional Amendment on Children, I am pleased to present this report to the Houses of the Oireachtas for consideration and debate.

This is the final report of the Committee. It builds on the first interim report published in September 2008 and the second interim report published in May 2009.

This final report considers and makes recommendations in relation to the proposed constitutional amendment concerning the acknowledgement and protection of the rights of children, the best interests of the child, the power of the state to intervene in the family, and adoption.

Since it began its work just over two years ago, the sole objective of the Committee has been to ensure the strongest protection of the rights of children and to further their best interests. As the work progressed, the Committee gave careful and thorough consideration to the many constitutional and legal matters that arose in the course of examining the detail of the proposed amendment and whether it would work as intended. It is in everyone's interest, and most particularly that of children, that the recommended approach to constitutional reform set out in this report is considered and appropriate.

The Committee's key recommendation is that a proposal for an amendment to the Constitution, to enshrine and enhance the protection of the rights of children, is submitted by Referendum to the decision of the people. The Committee also presents a wording for the proposed amendment.

I am most grateful to the many individuals and organisations who took the time to contribute their views and expertise to the Committee in the form of written submissions and briefings at meetings. These have been most helpful in informing our deliberations.

I would like to express my appreciation to the Legal Advisers to the Committee, Mary O'Toole S.C. and Ann Kelly B.L., whose legal opinions and advice greatly assisted the Committee in its deliberations on the matters addressed in this report. I would also like to record my thanks to Mr. Shane Murphy S.C. and Mr. Seán Guerin B.L. for assisting the Committee in the earlier phase of its deliberations.

Finally I would like to express my thanks to the Vice-Chairman, Deputy Michael Noonan, and members of the Committee for their dedication and wholehearted commitment to our work.

On behalf of the Committee, I look forward to the acceptance and implementation of the recommendations set out in this report.

Mary O'Rourke T.D.
Chairperson
16 February 2010

1. Introduction

1.1 Establishment and Terms of Reference

The Joint Committee on the Constitutional Amendment on Children was established by resolutions of Dáil Éireann and Seanad Éireann of the 22 November 2007. The Orders of Reference of the Committee are, *inter alia*, to:

- (a) examine the Twenty-eighth Amendment of the Constitution Bill 2007; and
- (b) consider the text set out in the Schedule to that Bill with regard to the following:
 - (i) the acknowledgement and affirmation of the natural and imprescriptible rights of all children;
 - (ii) the restatement and extension of the existing provision in relation to children and parents contained in Article 42.5 of the Constitution to include all children;
 - (iii) the provision of legal authority for the adoption of children who have been in care for a substantial period of time if it is in the best interests of those children;
 - (iv) the provision of legal authority so that all children may be eligible for voluntary adoption;
 - (v) the provision of legal authority so that the courts shall be enabled to secure the best interests of a child in any court proceedings relating to adoption, guardianship, custody or access of that child and to ensure that such interests are taken into account in all other court proceedings in relation to that child;
- (c) make such recommendations, including recommendations in relation to amendments to the text in Schedule 1 of the Bill, as shall to the Committee seem appropriate.

1.2 Membership of the Committee

Deputies



Mary O'Rourke (FF)
Chairperson



Michael Noonan (FG)
Vice-Chairperson



Thomas Byrne (FF)



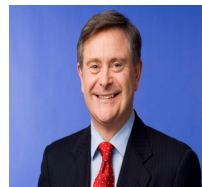
Margaret Conlon (FF)



Olwyn Enright (FG)



Paul Gogarty (GP)



Brendan Howlin (Lab)
Leas-Cheann Comhairle



Dan Neville (FG)



Tom Kitt (FF)



Caoimhghín Ó Caoláin
(SF)



Seán Ó Fearghail (FF)



Alan Shatter (FG)



Michael Woods (FF)

Senators



Maria Corrigan (FF)



Geraldine Feeney (FF)



Frances Fitzgerald (FG)



Alex White (Lab)

Ministers



Dermot Ahern T.D.
Minister for Justice, Equality and Law Reform
(*ex officio*)



Barry Andrews T.D.
Minister of State for Children and Youth Affairs
(*ex officio*)

1.3 The Work of the Committee

The Committee has been engaged in a detailed consideration of the provisions of the Twenty-eighth Amendment of the Constitution Bill 2007. In September 2008 the Committee presented a *First Interim Report* to the Houses of the Oireachtas on the proposal to give legal authority for the collection and exchange of information concerning the risk or the occurrence of endangerment, sexual exploitation or sexual abuse of children (proposed Article 42(A).5.1°).

In May 2009 the Committee presented a *Second Interim Report* on the proposal to give legal authority to create offences of absolute or strict liability in respect of sexual offences against or in connection with children (proposed Article 42(A).5.2°).

In this final report the Committee considers and makes recommendations in relation to the proposed Article 42(A).1-4. These provisions deal with children's rights, the best interests of the child, the power of the state to intervene in the family, and adoption.

The Committee sought submissions from interested bodies and members of the public and decided to advertise publicly for such submissions. Over 175 written submissions were received dealing with some or all of the issues arising within the Committee's Orders of Reference. Many of these submissions expressed particular views in relation to the issues concerned in the present report, and those submissions have been of considerable assistance to the Committee in its work. The Committee wishes to express its gratitude for the assistance provided to it by the authors of the submissions. The Committee has attempted to summarise the most frequently discussed themes in the submissions in section 8 of this report.

The Committee has also had the opportunity to hear the views of a number of expert persons and bodies whose expertise included child protection, criminal law, psychology, children's rights, child welfare, and other fields of direct relevance to the

matters considered by the Committee. The assistance provided by these experts has been of great value to the Committee in all aspects of its work.

These expert views have been shared with the Committee over a series of public meetings and have supplemented and informed the ongoing deliberations of the Committee in private session. The Committee has met on 62 occasions since its appointment – in public session on 15 occasions and in private session on 47 occasions.

1.4 Structure of Report

The present report considers the current law relating to the rights of children under the Constitution, and the statute and case law concerning adoption, guardianship, care proceedings, custody and access to children.

The report also considers the impact on the current law of the proposed amendment and whether any of its provisions can be implemented by legislation.

The report then presents an alternative wording for the proposed amendment and the Committee's reasons for proposing this alternative wording.

A list of the submissions received by the Committee is set out in Appendix C of this report. Listed in Appendix D are the witnesses who appeared before the Committee and addressed the proposed amendments under consideration. The official reports of the Committee's public meetings and the submissions received are available on the Committee's page on the website of the Houses of the Oireachtas: www.oireachtas.ie

2. Background and Context

Articles 41 and 42 of the Constitution are centrally important to any consideration of children's rights as they comprise that part of the Constitution dealing with the rights of the family and the right of the parents to educate their children.

2.1 The Family

Article 41 (The Family) provides as follows:

1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.
3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that

- i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years,
- ii. there is no reasonable prospect of a reconciliation between the spouses,
- iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- iv. any further conditions prescribed by law are complied with.

3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

2.2 Education

Article 42 of the Constitution (Education) provides as follows:

- 1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
- 2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.
5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, 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.

3. The Twenty-eighth Amendment of the Constitution Bill 2007

In February 2007 the Government presented the Twenty-eighth Amendment of the Constitution Bill 2007 to Dáil Éireann. The Bill proposes the insertion of a new Article 42(A) in the Constitution dedicated to children. The proposed new Article provides, inter alia, as follows:

Children

Article 42(A)

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

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

In order to assist its analysis and deliberations, the Committee invited the Minister for Children and Youth Affairs to set out the Government's policy objectives of the Twenty-eighth Amendment of the Constitution Bill 2007. The Committee is grateful for the Minister's response which is set out in Appendix B of the report.

4. Text for a Proposed Constitutional Amendment on Children's Rights

Having deliberated on the proposed Article 42(A).1–4, the Committee recommends an alternative approach. The Committee proposes that the existing Article 42 of the Constitution is amended as set out in the following section.

4.1 Amendment of Article 42 of the Constitution

Article 42 of the Constitution is proposed to be amended as follows—

- (a) existing sections 1 and 5 to be deleted,
- (b) new sections 1 – 6 set out below to be inserted, and
- (c) existing sections 2 – 4 to be rearranged and numbered as sections 7 – 8.

Children

Article 42

1. 1° The State shall cherish all the children of the State equally.

2° The State recognises and acknowledges the natural and imprescriptible rights of all children including their right to have their welfare regarded as a primary consideration and shall, as far as practicable, protect and vindicate those rights.

3° In the resolution of all disputes concerning the guardianship, adoption, custody, care or upbringing of a child, the welfare and best interests of the child shall be the first and paramount consideration.
2. The State guarantees in its laws to recognise and vindicate the rights of all children as individuals including:

- i the right of the child to such protection and care as is necessary for his or her safety and welfare;
 - ii the right of the child to an education;
 - iii the right of the child's voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child's age and maturity.
- 3. The State acknowledges that the primary and natural carers, educators and protectors of the welfare of a child are the child's parents and guarantees to respect the right and responsibility of parents to provide according to their means for the physical, emotional, intellectual, religious, moral and social education and welfare of their children.
- 4. Where the parents of any child fail in their responsibility towards such child, the State as guardian of the common good shall, by proportionate means, as shall be regulated by law, endeavour to supply or supplement the place of the parents, regardless of their marital status.
- 5. Provision may be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their responsibility towards the child and where the best interests of the child so require.
- 6. Provision may be made by law for the voluntary placement for adoption and the adoption of any child and any such law shall respect the child's right to continuity in its care and upbringing.
- 7. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

- 2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.
- 3° Parents shall be free to provide education in their homes or in private schools or in schools recognised or established by the State.
8. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.¹

¹ It was not within the remit of the Committee to address or consider the provisions relating to education which are set out in Articles 42.2 - 42.4 inclusive of the Constitution. However, because the Committee has proposed the deletion of the current Article 42 and its replacement with a new one, it is necessary to re-state the retained Articles 42.2 - 42.4. They now appear essentially unaltered in Articles 42.7 and 42.8 of the Committee's proposed Article 42. These retained sections are in a different order to that which pertains in the Constitution. They are numbered together at the end of the Committee's proposed amendment to set them apart from the new sections proposed by the Committee. There is only one very minor amendment to the wording of these sections, namely the deletion of the word "this", which appears in the current article 42.2. This is merely a technical alteration as this provision in its new position in the proposed Article 42.7.3 would otherwise not make sense.

5. Summary of the Committee's Recommendations

The following is a summary of the Committee's recommendations based on its deliberations, advices and consideration of the various submissions received by it.

1. The Committee recommends that a proposal for an amendment to the Constitution, to enshrine and enhance the protection of the rights of children, is submitted by Referendum to the decision of the people.
2. The Committee recommends that a revised Article 42 be introduced into the Constitution to replace the current Article 42 and that this provision contain within it an express recognition of children's rights while also expressly recognising that the primary and natural carers, educators and protectors of the welfare of a child are the child's parents.
3. The Committee recommends that the proposed wording specifically states that in its laws and actions the State shall cherish all the children of the State equally and believes that the State should not discriminate as between children.
4. The Committee recommends that the proposed wording specifically requires the State by proportionate intervention to support the family so as to ensure that a child is only removed from his or her family where no other appropriate action can be taken which will ensure the protection of a child at risk and/or protect the child's welfare and best interests.
5. The Committee recommends that the proposed wording is amended to specify that the threshold for intervention is identical for children of marital and non marital families.

6. The Committee recommends that the proposed wording requires that in any case where it is necessary for the State to intervene in the family, the welfare of the child or children concerned is the paramount consideration.
7. In relation to adoption, where parents fail for a prescribed period of time in their responsibilities towards their child, and where the child's welfare so requires, the adoption of such child should be permitted. The Committee also recommends that marital parents should be able to voluntarily place children for adoption. In this regard the Committee recommends that the proposed adoption legislation is published in advance of the referendum to be put to the people.
8. The Committee recommends that the proposed wording provides that the State recognises and acknowledges the natural and imprescriptible rights of all children including their right to have their welfare and best interests regarded as a primary consideration in all matters concerning the child.
9. The Committee recommends that the proposed wording provides that in the resolution of all disputes concerning the guardianship, adoption, custody, care or upbringing of a child, the welfare and best interests of the child shall be the first and paramount consideration.
10. The Committee recommends that the proposed wording is amended to include a specific guarantee that, in any judicial and administrative proceedings affecting the child, he or she shall be given an opportunity to be heard subject to the child's age and maturity and that every child has the right to have his or her welfare regarded as a primary consideration.
11. It is the view of the Committee that our laws and services for children should be in accordance with the State's obligations under the United Nations Convention on the Rights of the Child ('the UNCRC').

12. The Committee endorses the fundamental principles of the UNCRC as identified by the UN Committee on the Rights of the Child. These are:

- (i) Non discrimination in enjoyment of convention rights;
- (ii) That the best interests of children are a primary consideration in all actions concerning children;
- (iii) The right of the child to life, survival and development; and
- (iv) The right of the child to be heard in all matters concerning him or her.

13. In order to implement these recommendations, the Committee recommends that Article 42 of the Constitution is amended as proposed by the Committee in this report.

14. During its deliberations the Committee noted that there is a lack of access to source information relating to cases under the Child Care Act 1991. These cases are heard in the District Court where Judgments are rarely written and there is no facility for recording such Judgments. The Committee did not have access to any records that could assist in ascertaining how these cases are decided in normal situations. The Committee therefore recommends that facilities are established to enable reporting of District Court cases on the same basis as is available in general family law cases. On this point, the Committee noted that reporters are permitted to sit in and take notes of family law cases, so that a general picture of how they are determined can be presented to interested bodies and persons. This information can be disseminated without putting in jeopardy the anonymity and privacy of the parties involved. The Committee believes that a similar arrangement could and should be put in place for District Court cases and, in particular, cases under the Child Care Act 1991. The Committee believes that such a facility

would be helpful for any future consideration by the Houses of the Oireachtas of issues relating to children.

6. The Current Law

The Committee has carefully considered the existing law relating to children in order to understand the effect of any proposed amendment on the current position. In this context, the Committee directed its legal advisers to prepare for its consideration a detailed audit of the law relating to children. The audit reviewed the principal areas of statute and case law concerning children's rights and analysed the likely impact of the proposed amendment set out in the Twenty-eighth Amendment of the Constitution Bill on those rights. The Committee considered the audit in detail over a number of meetings.

The main areas of law relevant to children's rights, and considered by the Committee in this report, are set out as follows:

1. Articles 41 and 42 of the Constitution: The rights of the Family;
2. Article 42.5 of the Constitution: The right of the State to intervene in the Family;
3. The 1988 Adoption Act;
4. The 1952 Adoption Act (as amended);
5. The constitutional rights of the child under the current case law;
6. Custody disputes;
7. Care proceedings;
8. Education;
9. The right of a child of un-married parents to financial provision.

6.1 Articles 41 and 42 of the Constitution: The Family and Education

Articles 41 and 42 of the Constitution have been described as the most innovatory of the Constitution's provisions. There is a large body of case law concerning the meaning and effect of Articles 41 and 42. The Supreme Court has held on numerous

occasions that these Articles, when they refer to “the family”, only refer to a family based on marriage.

The Supreme Court has recently reiterated this view in *McD v L and others* (10 December 2009). Denham J. in her judgment in the case rejected the contention that Irish law recognises “de facto” families. In that case, the de facto family under consideration comprised a lesbian couple and the child of one of the couple, conceived by sperm donation, who lived together as a family. Denham J. said that under the Constitution “family” means a family based on marriage, the marriage of a man and a woman.

In other cases, when considering the rights of children, some members of the Supreme Court have said that article 42.5, insofar as it refers to children, refers to both marital and non marital children.

In practice in Irish law the marital status of a child’s parents will often have a significant, if not decisive, bearing on the nature and extent of the rights of the child and his or her parents. This is especially so if the case concerns whether or not the child should remain in the custody of his or her married parent or parents or should be adopted by, or remain in the custody of, third parties. Thus, the distinction between marital and non marital children arises by virtue of the definition of the family in Articles 41 and 42 of the Constitution.

Articles 41 and 42 of the Constitution have been interpreted by the courts as permitting legislative discrimination in favour of marital families. In particular Article 41, which pledges to protect the institution of marriage, has been found to protect such legislation from challenge. For example in *O.B. v. S* [1984] IR 316, the Supreme Court rejected a challenge to the constitutionality of the Succession Act 1965 and held that the word “issue” in that Act did not include non marital children. The Supreme Court held that the discrimination against non marital children in matters of succession was justified by Article 41 of the Constitution and therefore the

provisions of the Succession Act were not invalid. Walsh J. who gave the Judgment of the Court said that the 1965 Act was enacted specifically to strengthen and protect the family as required by the Constitution, and was designed to place members of the marital family in a more favourable position than others in relation to succession and property. After the *O.B. v. S* case the Oireachtas enacted the Status of Children Act 1987 which removed this distinction.

The words “inalienable” and “imprescriptible” used to describe family and parental rights in Articles 41 and 42 have been considered judicially. See for example *Ryan v. The Attorney General* [1965] IR 294, and *Fajujonu v. Minister for Justice* [1992] IR 151. An inalienable right has been defined as one that cannot be transferred or given away and an imprescriptible right has been defined as one that cannot be lost by the passage of time or abandoned by non exercise.

Family rights however are not absolute under the Constitution. The courts have found that the State may enact legislation to curtail the rights of the family under Articles 41 and 42 of the Constitution. In particular, in *Fajujonu v. Minister for Justice* [1990] 2 IR 151, the Supreme Court held that a marital family, where the children were Irish citizens, could be deported if the exigencies of the common good required it. In *Murray v. Ireland* [1985] IR 532, the Supreme Court confirmed that the exercise of family rights under Article 41 of the Constitution may be restricted by the State. In that case the applicants who were a married couple were serving life imprisonment for murder. They unsuccessfully claimed they had, inter alia, a constitutional right to marital privacy and should be granted conjugal rights.

On the other hand where the Oireachtas, by its laws, does not restrict the authority of the family, interference in family rights is much less likely to be permitted by the courts. (See *North Western Health Board v H.W.* [2001] 3 IR 623).

Right of Parents to Access Information concerning their Children

An example of how legislation which may impinge on the authority of a parent is to be interpreted arises in *McK v. The Information Commissioner* [2006] 1 IR260. That case arose under the Freedom of Information Act 1997. That Act does not permit the release of records which will involve disclosure of personal information. However, an exception is created in respect of personal information of a minor where the requesting party is a parent or guardian of that minor and access to the records would be in the best interests of the minor.

The case concerned an applicant father, a widower, who had been separated from his late wife. During the course of their separation an allegation was made that the applicant had sexually abused his daughter. He denied this allegation which was investigated by the Gardaí. They concluded that there was no evidence to warrant prosecution against him. After the death of his wife the children, by agreement, went to live with their maternal uncle. While living with her uncle the applicant's daughter was hospitalised. The applicant sought information about his daughter's medical condition but the only information given was that she had been admitted for an unspecified viral infection. He was unable to obtain any further medical information. He then made a request under the Freedom of Information Act 1997 for his daughter's medical records.

The Information Commissioner's interpretation of the Act was that the applicant had to provide tangible evidence that access to the medical records was in the best interests of the minor before he could release the information requested. The Information Commissioner concluded that the applicant had failed to provide such evidence and therefore refused the request.

The Supreme Court held that this approach was incorrect. The Court held that there was a fundamental presumption that a parent would act in accordance with the best interests of the child. As a consequence there was a presumption, albeit not absolute, that a parent was entitled to access information about the medical care of his or her

child as this would serve the best interests of the minor. However, the Information Commissioner may then proceed to consider any evidence available in addressing the issue of whether it would be in the minor's best interests that the parent should be furnished with such information. The Supreme Court remitted the matter to the Information Commissioner for review in accordance with the correct test.

Thus the legislation, while it provides that information in respect of a minor can be given to a parent if it is in the best interests of the minor to do so, must be interpreted as importing a presumptive right of parents to have access to the information and it is in the light of that presumption that best interest can be considered.

6.2 Article 42.5 of the Constitution: The Right of the State to Intervene in the Family

Article 42.5 of the Constitution permits the State to intervene in the family in certain circumstances, notwithstanding the inalienable and imprescriptible rights of parents and the family. The Supreme Court considered how and in what circumstances the State could intervene in the family pursuant to Article 42.5 of the Constitution in *North Western Health Board v. H.W.* [2001] 3 IR 623. In that case the defendant parents who were married had refused to give their consent to the carrying out of a blood test, known as the *P.K.U. test*, on their baby. To be effective the test must be carried out in infancy as it confirms whether a child is suffering from certain extremely serious but treatable biochemical or metabolic disorders. There was no statutory provision governing the administration of the test or obliging parents to submit their children to it. The Health Board applied to the High Court for declarations that it was in the interests of the child to have the test carried out, and that the refusal of the defendant parents to consent was a failure to vindicate the rights of the child. The Health Board was concerned in the light of its statutory duty under the Child Care Act that in the event that the test was not carried out, and the child developed one of the discoverable illnesses by the test, it could be held to have failed in its duty, and may also have a liability to the child.

The Supreme Court held that in the absence of legislation the court had to consider the basis, if any, for the State to intervene. The Court considered whether the decision of the parents amounted to a failure of their constitutional duty to the child within the meaning of Article 42.5. The majority of the Court agreed that a child has personal rights under Article 40.1 of the Constitution but that those rights must be construed in accordance with Article 41 which acknowledges the family as the fundamental group of society. While the authority of the family was not absolute, there was a constitutional presumption that the welfare of the child was found within the family. The State was entitled to intervene only in exceptional cases pursuant to Article 42.5.

The majority of the Court agreed that in this case the State was not entitled to intervene and to insist on the test being carried out. The right of the parents to make decisions in relation to their children was not to be ousted by any personal right held by the child. This was because in a case where there was no failure of duty on the part of the parents and no jurisdiction conferred by statute, the presumption in favour of the child's welfare being found within the family could only be rebutted where there were exceptional circumstances. The Court found that no such exceptional circumstances existed.

6.3 The Adoption Act 1988

There is currently no specific constitutional provision providing for the adoption of any child, either marital or non marital.

Given the inalienable and imprescriptible rights of the family and parents under Articles 41 and 42 of the Constitution, questions arose as to whether and in what circumstances a child could be adopted. This was a particular difficulty in respect of children who had been abandoned at birth, or who had spent most of their infancy with foster parents. The 1988 Adoption Act was passed to deal with such circumstances. Prior to its enactment, it was referred by the President to the Supreme Court under Article 26 of the Constitution to have its constitutionality tested. The Supreme Court upheld the constitutionality of the Bill.

The 1988 Adoption Act provides for adoption of a marital or non marital child against the wishes of parents in certain specific circumstances. They are:

- That for a continuous period of at least twelve months prior to the making of the application for adoption, the parents failed in their duty towards the child for physical or moral reasons;
- That it is likely the failure will continue uninterrupted until the child is 18 years;
- The failure constitutes abandonment by the parents of all parental rights in relation to the child whether under the Constitution or otherwise;
- By reason of that failure the State should supply the place of the parents.

Having satisfied the above criteria the court must also be satisfied that the child has been with the prospective adopters for twelve months, that adoption is the appropriate way for the State to supply the place of the parents, and that it is in the best interests of the child having regard to his or her imprescriptible rights.

The Supreme Court found the following:

- Article 42.5 refers not only to a failure to educate, but also a failure to cater to the other personal rights of the child;
- The Court rejected the argument that allowing marital children to be adopted was a direct attack on the family. The Court confirmed that the guarantees enjoyed by the family remained in place, and that it was only in the event of a total failure by the parents that a child could be adopted against their wishes;
- The right to intervene could be considered under both Article 42.5 and Article 40 of the Constitution, and in each case such intervention would have to have due regard to the natural and imprescriptible rights of the child;
- The Court also held that under the legislation, it is not sufficient to show that there was a failure of duty which was likely to extend until the child reached 18 years. It is also necessary to show that the failure of duty amounted to total

abandonment. Failure of duty alone may not be sufficient evidence of abandonment.

It is therefore of interest to consider the body of case law under the 1988 Act which provides guidance as to how the constitutional rights of parents and children are to be interpreted and applied under the legislation. We set out hereunder the leading cases decided under the Act.

Western Health Board H.B. and N.B. v. An Bord Uchtála [1995] 3 IR 179

In this case the child was born to a married woman who had separated from her husband. She believed the child to be that of a man with whom she had been having a relationship. It transpired that the child was born as a result of a sexual encounter with the husband to which she had not consented. The child had been living with foster parents who wished to adopt the child. After some prevarication and delay the husband sought custody of the child. The Court held that those actions were sufficient to establish that he had not abandoned his parental rights. Therefore the test under the Act was not satisfied and accordingly the child could not be adopted.

Southern Health Board v. An Bord Uchtála, MOD Notice Parties [2000] 1 IR 165

This case involved married parents of a Traveller family and their child. There was evidence that the child had been appallingly physically abused by his parents. The child was also found to be suffering from post traumatic stress disorder as a result of the conduct of his parents towards him. The parents had never consented to the child going into care and strenuously resisted the application for his adoption. The Court however found that they had abandoned him. The Supreme Court held that abandonment within the meaning of the Adoption Act 1988 did not require an intention to abandon, but could arise where the failure of duty of the parents was such that they could be deemed to have abandoned the child. Keane J. said in the course of his Judgment that there may be circumstances where parents have failed in their duty, which failure does not amount to abandonment. He gave examples such as parents who suffered with psychiatric illnesses or parents who had been imprisoned.

However, Keane J.'s remarks were not followed in subsequent 1988 Act cases, at least insofar as non marital children were concerned.

Southern Health Board M.D. and J.D. v. An Bord Uchtála (un-reported) O'Higgins J.
20 December 2001

This case involved an application to adopt a child of an unmarried mother. The mother initially placed the child in voluntary care, and thereafter placed the child for adoption. She changed her mind about the adoption and sought the return of the child approximately two years later. The Court found that her contact with the child was episodic. She had indicated that she would be satisfied with access a few times a year, rather than a return of the child to her. The mother had a mental age of an 8 year old at the time of the birth and was unable to form a bond with the child. The Court held that because of her learning difficulties she was unable to discharge her duty to the child for physical, rather than moral reasons. The Court held that because the mother had sufficient mental capacity to understand that she was the child's mother and to understand what was involved in mothering, her failure of duty amounted to abandonment of the child. The views of Keane J. in the Southern Health Board case (referred to above) were not relied on to defeat the argument of failure of duty.

Northern Area Health Board W.H. and P.H. v. An Bord Uchtála [2002] 4 IR 252

The child in this case was suffering from cerebral palsy and lived with her foster parents for 14 years before the case came on for hearing. The mother suffered with mild learning difficulties and a psychotic condition. She objected to the adoption of the child but was happy that she would continue to live with the foster parents. The High Court found that there was a failure of duty by the mother and that the failure amounted to abandonment. The Court also found that the failure was likely to continue until the child was 18 years of age. On appeal to the Supreme Court the order was upheld and McGuinness J. giving the Judgment on behalf of the Court confirmed that the mother in this case did not have the same constitutional rights as those of a married family. However, she did say that Article 40 was effective in protecting the rights of unmarried parents and also took full account of the

constitutional rights of the child. Judge McGuinness also defined failure of duty as involving the failure to have day to day care of the child. The exercise of access was not sufficient to satisfy this duty.

Thus, in the case law discussed above, there appears to be a trend towards a less restrictive interpretation of some of the provisions of the 1988 Act, particularly in relation to what conduct constitutes a failure of duty and what is required to establish abandonment.

The cases referred to above represent the development of the law in 1988 Act adoptions until *N. v. The HSE (Baby Ann case)* [2006] 4 IR 375. While this case did not arise out of a 1988 Act adoption application, it does have relevance for such cases, involving as it did questions about failure of duty, abandonment and best interests. The child in this case was placed for adoption by her natural mother. The mother withdrew her consent to the adoption after which the parents married and re-registered the birth of the child. They brought habeas corpus proceedings, claiming that there was no legal basis for the child to remain with the foster parents. The High Court found that the parents had failed in their duty by placing the child for adoption, not seeking her return for over a year and failing to attend for an assessment arranged by the Health Service Executive (HSE) during the course of the proceedings. The Judge concluded that the child's best interests were served by leaving her with the foster parents with whom she had developed a very close bond. The likelihood of psychological damage to the child by transferring custody amounted to the exceptional case envisaged by Article 42.5 of the Constitution, and was a compelling reason sufficient to displace the presumption in favour of the child being brought up in her natural family.

On appeal to the Supreme Court the unanimous Judgment was that the child should be returned to her parents. The foster parents relied on the 1988 adoption cases referred to above in support of their argument that the test of a failure of duty was satisfied where the parents consented to their child being placed in the care of others,

albeit as part of the adoption process. However, the Supreme Court rejected this argument, stating that such an interpretation of the authorities was incorrect. Placing a child for adoption did not amount to failure of duty. The Court found that the psychological risks to the child were not sufficient to rebut the constitutional presumption.

McGuinness J. in her Judgment pointed out that the constitutional presumption only applied to children of married families and while the other Judges did not specifically agree with this comment, they did accept that once the natural parents married, the entire case changed. There was some discussion in the Judgments about the importance of the biological link between the parents and the child but this did not form the basis of the decision.

The High Court had heard expert evidence on the effect on the child of a transfer of custody. The trial judge found that the expert evidence was that in the event of an abrupt transfer of custody, or one effected without co-operation, there was a probability that the child would sustain psychological or emotional damage. This factor, taken together with the failure of duty constituted a compelling reason sufficient to rebut the Constitutional presumption. The Supreme Court however, held that there was no failure of duty and that “compelling reasons” connoted that there had to be a coercive reason to believe that the proper nurturing of the child in the natural family was not possible. The view of the Supreme Court judges was that the psychiatric evidence did not meet that test. The majority of the Court emphasised that the biological link was an important factor in the welfare of the child, with Geoghegan J. saying that it was not to be minimised.

The Supreme Court applied the test in *In re J.H.* [1985] IR 375, which held that unless there were compelling reasons why reuniting the child with his or her parents cannot be achieved, or unless an exceptional case exists where the parents have failed to provide for the education of the child for moral or physical reasons, the court is not entitled to deprive the child of the right to be brought up in its constitutional family.

The Court found that there were no such compelling reasons and no failure of duty and directed a return of the child to her natural parents.

Thus it would seem that the effect of the *Baby Ann* decision will be that the trend towards a less restrictive interpretation of “failure of duty”, certainly as far as married parents are concerned, is reversed.

6.4 Adoption Act 1952 (As Amended)

The Constitution makes no reference to adoption, and formal adoptions did not exist before 1952. The 1952 Adoption Act deals only with the adoption of non-marital children. The case law under the Act therefore shows how the constitutional rights of unmarried mothers and non marital children are interpreted and applied.

The 1952 Adoption Act allows an unmarried mother to place her child for adoption. The effect of an adoption order is that the child becomes a member of the adoptive family. Under the Act only married people can adopt a child.

The Adoption Act 1998 amended the 1952 Act to provide that the father of a child may give notice to the Adoption Board of his wish to be consulted in relation to any placement for adoption by the mother. It also provides that an adoption agency must, if the identity of the father is known, notify him of the proposed adoption. If the adoption agency receives notification from the father that he intends to apply to be appointed the child’s guardian, then the adoption cannot proceed until that application has been decided. If the father is appointed guardian or is granted custody of the child, then the adoption order will not be made unless the father consents.

The 1952 Act was also amended by the Adoption Act 1974 which states that after placing the child for adoption, if the mother either refuses to give her final consent, or withdraws her final consent before the adoption order is made, then the prospective adopters can apply to the High Court for an order dispensing with her consent. Since 1952, adoption has always been a two step procedure. The first step is that the

mother signs a form agreeing to place the child for adoption. At a later stage she signs a final consent, after which the adoption order is made.

Prior to 1974 there was no procedure to complete an adoption process in circumstances where a mother failed to give her final consent. Under section 3 of the 1974 Act, if the High Court finds that the mother did freely agree to placing the child for adoption, then the Court can dispense with her consent to an adoption order. The Court decides that issue on the basis of what is in the best interests of the child (section 3(2) of the 1974 Act). If the Court so concludes, it authorises the Adoption Board to make an adoption order.

The first significant case relating to a voluntary adoption after the 1974 Act was *G. v. An Bord Uchtála* [1980] IR 32. The mother placed the child for adoption having had a number of interviews with the director of an adoption society. The majority of the court was satisfied that the legal implications and consequences of her actions had been explained to the mother and that she understood them. Within approximately three months the mother sought the return of her child to her care. She brought proceedings under section 10 of the Guardianship of Infants Act (which facilitates applications by parents as against third parties), and the prospective adopters sought an order under section 3 of the 1974 Act.

All five Judges confirmed that children of unmarried mothers have personal constitutional rights, although they differed as to whether they fell under Article 40.3 or Article 42.5. The range of rights identified by the Supreme Court include the right to be fed, to live, to be reared and educated, to have the opportunity of working and realising his or her full personality and dignity, to have his or her welfare and health guarded and to be guarded against threats directed to his or her existence.

Three of the Judges in the case agreed that a mother has the constitutional right to the custody of her child. The Court did not specify whether the constitutional presumption arising from Article 42.5 applies to non marital children and, if so,

whether rebutting that presumption requires the same level of failure and/or exceptional circumstances, or compelling reasons as would apply in relation to married parents. Later cases, including *Baby Ann* and *In re J.H.*, suggest that the presumption does not apply to un-married mothers and their children.

The majority in *G v An Bord Uchtála* concluded that the mother had validly placed her child for adoption, and the question fell to be determined on the basis of the best interests of the child. Two of three Judges that held in favour of the mother said that there was a presumption in favour of returning the custody of the child to her. The third Judge, Walsh J., had already found that the mother did not validly consent to the placement. He also said that if she had consented he would have found that the rights of the child were not exposed to danger in the care of the mother.

The Court also discussed the nature of the consent that must be given by a mother, before she can be said to have validly placed her child for adoption. The Court held that the natural mother must understand the nature and effect of her consent. She must be made aware that once she validly places her child for adoption, the court can dispense with her consent to an adoption order being made even if she changes her mind about allowing her child to be adopted. One of the factors that the Court, particularly Walsh J., took into account in determining whether the consent to placement was freely given was the stress and anxiety of the mother, and her age and associated economic weakness. In a later case *McF. v. G and G* [1983] ILRM 2008, Mc William J. rejected this factor as a basis for finding that consent was not validly given. He pointed out that having an illegitimate child would automatically give rise to stress and anxiety and probably economic hardship.

In *D.G. and M.G. v. An Bord Uchtála* [1996] WJSC-HC 3348, the High Court again looked at the nature of the consent given by the mother to determine whether her consent to placement was valid. The evidence was that the mother, who was 18 years of age, was told by her parents not to come home with a baby. Her parents pressurised her into placing her child for adoption immediately, and returning home without the

child two days after the birth to avoid any scandal. Prior to the placement of the child for adoption, the adoption agency had fully explained to the mother the legal implications of her consent. She signed the initial consent approximately one month after the birth, although she did change her mind on a few occasions after that. She finally sought advice about how she could secure her child's return and informed a social worker of her change of mind. The Judge said that fear, anxiety, stress or economic deprivation would not vitiate consent. He concluded that the mother's will was so overborne by her parents that her agreement to place the child for adoption did not constitute a full free and informed consent.

A number of cases subsequent to *G. v. An Bord Uchtála* dealt with the situation where consent is validly given and the case falls to be determined on the basis of the best interests of the child. Unlike *G. v. An Bord Uchtála*, the courts in later cases have concentrated more fully on the psychological effects on a child of removing him or her from a family with whom he or she has been residing for lengthy periods, in some cases for a number of years. The Courts have also had the benefit of psychological evidence about the impact on the child of a change in custody, which was not available to the Court in *G. v. An Bord Uchtála*.

In *S. v. The Eastern Health Board and Others* (un-reported) 28 February 1979, the Court concluded, in circumstances where the placement was valid, that it was in the best interests of the child to remain with the adopters having regard to the psychological evidence. The Court accepted that the child had bonded and formed attachments with the prospective adopters and that removing the child from their care would detrimentally impact not only on the short-term but also the long-term welfare and development of the child. This case was determined by the High Court subsequent to the Supreme Court judgment in *G. v. An Bord Uchtála* in which no such evidence had been given. In this case, the Court determined that the best interests test required that the child remain with the adopters and not be returned to the mother. The best interests test applied by the Court did not incorporate a presumption in favour of the return of the child to the mother.

In *E.F. and F.F. v. An Bord Uchtála* (un-reported) Supreme Court [1996] W.J.S.C. – SC 3292, the child had been living with the prospective adopters for approximately three years before an application by the mother seeking custody of the child reached the Court. By the time the matter came to the Supreme Court the child had lived for approximately seven years with the prospective adopters. The psychiatric evidence presented to the High Court emphasised the importance of continuity in the child's parenting and was to the effect that to remove the child from the prospective adopters would have a gravely damaging affect on her. The Supreme Court held that under section 3 of the 1974 Act the court was expressly confined to the best interest of the child.

It would appear from a review of the case law therefore, that where a child is validly placed for adoption, on any application to dispense with the final consent and/or on an application by the mother for the return of her child, the test is now a purely balancing one. There is no presumption in favour of a return to the mother. Of significant relevance is the psychiatric or psychological evidence relating to the effect on the child of being removed from the prospective adopters and the breaking of the child's bonds of attachment with them.

6.5 The Constitutional Rights of the Child: The Current Case Law

There is no current constitutional provision that equates to the proposed amendment under Article 42(A). However children as citizens enjoy personal rights under Article 40.3.1 of the Constitution. Article 42.5 acknowledges the natural and imprescriptible rights of the child. However, the case law demonstrates that there is some uncertainty as to whether children's rights arise under Article 40 or Article 42.5.

Children's rights are not enumerated in the Constitution. However, rights specific to children have been identified in case law. Examples of rights so identified are the right to life itself, to be fed, to be reared and educated, to have the opportunity of working and realising his or her full personality and dignity as a human being (See *G v. An Bord Uchtála* [1980] Irish Reports 23). The courts have also held that a child

has a right to know the identity of his or her mother, but this right is not absolute and has to be balanced against the right to privacy of a natural mother (See *I.O.T. v. B* [1998] 2 IR 321). Children have a right to travel, guaranteed by Article 40, but that right is exercisable by the choice of the child's parent or legally recognised guardian and is subject always to the right of the court to deny that choice in the dominant interest of the child. A marital child has a presumptive right to be in the custody of his or her parents (See *J.H. & N. v. The HSE* [1983] IR 375). The courts have also held that a child has a constitutional right to have his or her welfare regarded as the paramount consideration in any dispute in relation to custody (See *P.W. v. A.W.* a decision of Ellis J., un-reported 21 April 1980).

Doubt has been cast on the correctness of the judgment in *P.W. v. A.W.* (above) in subsequent Supreme Court commentary, certainly in the case of a dispute between the married parents of a child and third parties. In *F.N. v. C.O.* [2004] 4 IR 311, decided by Finlay Geoghegan J., she held that children have a constitutional procedural right to have their views heard if they are of an age and maturity to be able to offer a view. She further held that children have a constitutional right under Article 40.3 to have their welfare regarded as a paramount consideration in disputes about their custody. Again, since *N. v. HSE* it is unlikely that this view is correct where the dispute relates to married parents and their children.

The High Court upheld the power of the District Court to issue directions to a Health Board in relation to a child who was in care pursuant to the Child Care Act 1991. The High Court held that such a power was part of the duty of the court to vindicate the right of the child under Article 40.3 (See *Eastern Health Board v. McDonnell* [1999] 1 IR 174).

In *F.N. v. The Minister for Education* [1995] 1 IR 409, Geoghegan J. followed the dicta in *G. v. An Bord Uchtála* and concluded that the rights identified in that case meant that where a child with very special needs requires special accommodation, there is an obligation on the State under Article 42.5 to cater for those needs in order

to vindicate the constitutional rights of the child. In *T.D. v. The Minister for Education and Others* [2000] 3 IR 62, some members of the Supreme Court expressed doubts as to whether there is in fact a constitutional obligation on the State to provide special accommodation for such children. Keane C. J. expressed doubts as to whether it was appropriate for the courts, as opposed to the Oireachtas, to declare rights for children, especially where those rights were socio-economic rights. Murphy J. in his Judgment held that there was no constitutional right to special accommodation. He was of the view that *F.N. v The Minister for Education* relied on passages in the judgment in *G. v. An Bord Uchtála*, some of which were not essential to the decision of the Court and may not have represented the views of the majority. Hardiman J. also expressed reservations about the function of the Court in declaring un-enumerated rights guaranteed by Article 40, where such rights were socio-economic. He also accepted that the observations of Murphy J. about the existence or otherwise of the rights identified in *F.N. v. The Minister for Education* were weighty observations, but he declined to resolve those questions as he was of the view it was un-necessary to do so in the context of the *T.D. case*.

Whilst the Supreme Court in the *T.D. case* did not reverse the line of authority from *G. v. An Bord Uchtála*, there is now doubt about the nature and extent of children's rights in respect of the provision of special accommodation.

The *T.D. case* also established that it was not open to the Court to grant a mandatory injunction against the State requiring it to put in place particular accommodation for children requiring such accommodation. To do so, the Supreme Court held, involved the Court in determining social policy issues which were the sole preserve of the Executive and thus in breach of the doctrine of separation of powers.

6.6 Custody Disputes

Custody, Access and Guardianship are dealt with under the Guardianship of Infants Act 1964 as amended (primarily by the Status of Children Act 1987 and the Children Act 1997). Section 3 of the 1964 Act directs the Court in any proceedings for

“custody, guardianship or upbringing of a child....” to *“regard the welfare of the child as the first and paramount consideration”*. While section 3 does not specifically refer to access, it is well settled that the same rules apply in any access application.

Placing the welfare of the child as the “first and paramount consideration” puts it ahead of any other interests. In proceedings under the 1964 Act it is normal to have competing interests, for example between parents or between parents on the one hand and third parties on the other. Under the 1964 Act those interests must give way to the welfare of the child (subject, of course, to the presumption in favour of the child’s welfare being best served in the care of married parents (See *Re JH* [1985] IR 375 and [2006] 4 IR 375).

There are few reported cases under the Guardianship of Infants Act relating to disputes between parents and third parties. However, a relatively recent example is *F.N. and Others v. C.O. and Others* [2004] 4 IR 311. In that case Finlay Geoghegan J. had to resolve a dispute between the widowed father of two teenage children and their maternal family. The children had lived in Ireland with their maternal grandparents since their mother’s death, some 8 years earlier. The father came to Ireland to take the children back to live with him and his new wife. He did not succeed, and the maternal grandparents initiated proceedings under the 1964 Act seeking to be appointed guardians of the children and to have sole custody of them.

The Court obtained an expert report to assist in ascertaining the children’s wishes and their welfare. Under section 25 of the 1964 Act, as amended by the 1997 Act, the wishes of the child may be taken into account by the Court having regard to the age and understanding of the child. The Court held that while it was important to allow the children be heard that was not synonymous with making a relevant decision in conformity with the wishes of the children.

The father argued that having regard to his rights under Articles 41 and 42 of the Constitution as a married parent of the children, it was not permissible to appoint the grandparents as guardians. However, the Court rejected this argument saying that the appointment of the grandparents as guardians simply required the surviving parent to consult them in place of the dead spouse. She concluded on this point that the welfare of the children necessitated the maternal grandparents being appointed.

In relation to custody the father argued that having regard to *Re J.H.* there was an obligation to grant him custody notwithstanding evidence as to the probable detrimental impact on the welfare of the children of a return to his custody. In this case the court found that there were compelling reasons why reuniting the children with their father cannot be achieved as required by the test in *Re J.H.* In particular, the court found that the elder child had extremely strong objections to moving, and that forcing her to move against her wishes would probably cause significant damage to her education and social development. Therefore, notwithstanding the presumption that the children's welfare is best served within the family, the court found there were compelling reasons why they cannot be returned.

As already discussed there is some doubt as to whether this case was correctly decided in the light of the *Baby Anne* decision by the Supreme Court.

The rights of a non marital family were considered in *Eastern Health Board v. N.K.* [1999] 2 IR 99. In that case three children of non marital parents were the subject of wardship proceedings. The case involved argument about the admissibility of hearsay evidence concerning allegations of sexual abuse. The evidence was admitted and it led to the children being taken into wardship. In the course of his judgment, Barrington J. found that the parents did not enjoy rights under Article 42, but the mother did enjoy rights under Article 40.3. However, he expressed doubts as to whether there was any real difference as between the two provisions in the circumstances of that case, finding that the children enjoyed the same rights whether they were found under Article 40.3 or Article 42.5.

The rights of the child and the rights of natural fathers have been the subject of a number of cases. The Guardianship of Infants Act 1964 (as amended by the Status of Children Act 1987) provides for applications by un-married fathers to be appointed guardians of their children. The two leading cases concerning the rights of unmarried fathers are *K. v. W.* [1990] ILRM 79, and *O.R. v. EH* [1996] 2 IR 248. Both of these cases confirm that in deciding whether to appoint a father guardian of his child, the first and paramount consideration is the welfare of the child concerned. One of the factors that the Court also has to take into account is (as was the situation in both of these cases) that the appointment of the father as guardian would prohibit a future adoption of the children. In both cases, the Supreme Court reiterated that there was no constitutional presumption in favour of the father being appointed guardian. The blood link between the child and the father was only one factor to be taken into account when balancing considerations appropriate to the welfare of the child. Another important factor is whether the child is born of a stable, established relationship, in which case the father would have much more extensive rights than a father whose child was conceived as a result of a casual encounter.

On the 10 December 2009 the Supreme Court gave judgment in *McD v. L.* That case involved a sperm donor who had entered an agreement with the Respondents (the natural mother and her partner) to the effect that he would occupy an uncle role vis-à-vis the child. The Supreme Court held that the applicant was a natural father for the purpose of the Guardianship of Infants Act and, as such, was entitled to apply for guardianship and custody or access. Moreover, the Court held that the same principles of law were applicable to a sperm donor as apply to all natural fathers. Therefore, the Court held that the application must be determined in the best interests of the child. The agreement reached between the parties was not determinative and should only be enforced if and to the extent that it accorded with the best interests of the child. In that case the Supreme Court concluded that the child's interests dictated that he should have access to the applicant and referred the case back to the High Court to determine the access. In relation to guardianship, the Supreme Court concluded that it would not accord with the child's welfare but indicated that it might be open to the applicant to re-apply sometime in the future.

The 1998 Adoption Act (discussed earlier) was enacted in response to *Keegan v. Ireland* 18 EHRR 342 1994, which was decided in the European Court of Human Rights. The European Court of Human Rights found that Mr. Keegan enjoyed Article 8 rights under the Convention to “family life” with his child notwithstanding that he was not married to the mother. The European Court of Human Rights found that the evidence in the case established that the parents had resided together for a period of time after the birth of the child and that there was sufficient connection between the father and child to establish family life within the meaning of Article 8. The Court further found that legislation permitting adoption of a child without the knowledge or consent of the child’s father amounted to an interference with the father’s Article 8 rights.

In the case of *WS and Others v. NL and Others* [2009] IEHC 429, O’Neill J. considered the provisions of section 19A of the Adoption Act 1952, as inserted by section 6 of the Adoption Act 1998. The 1998 Act gives the natural father a right to be heard on an application for an adoption order and to be consulted. However, the Adoption Board has power to dispense with this request if it is satisfied that “having regard to the nature of the relationship between the father and the mother or the circumstances of conception of the child,” it would be inappropriate to consult with the father.

The case concerned an application by the natural father of the child to quash an Adoption Order in respect of the child S which was made in favour of the child’s mother and her husband. At the time of the adoption application, the mother informed the Board that her relationship with the father was fraught both before and after the birth of S. There was a history of violence resulting in the father undertaking to vacate the parties’ home, and refrain from violent behaviour. However, he remained in the property with the mother’s consent and there was a subsequent incident where he burned down the house. The mother and child were not living in the house at the time. The father was charged with arson and he spent one week in jail for breach of his bail conditions pending trial. In 2004, the father absconded to the U.K. and

remained there until 2006 when he returned to stand trial for the arson offence. He received a suspended sentence and continued to reside in Ireland.

The mother married in 2005 and she and her husband sought to adopt S. into their family. The mother informed the Board that she believed she, S and her extended family would be placed in great danger if the father were to be contacted in relation to the application to adopt S. The Adoption Board, exercising its discretion under section 19A, proceeded to grant the adoption order without any attempt to notify the father. He later asserted that the mother was aware before the adoption order was made that he had returned to Ireland and that they had met from time to time on the street as he lived in the vicinity of the mother's home.

In 2007 the father applied to the District Court to be appointed a guardian of child S. It was not until he made that application that he found out that S. had been adopted by the mother and her husband. He then brought judicial review proceedings to quash the Adoption Order. He asserted that his rights under Articles 6 and 8 of the European Convention on Human Rights were violated and his right to fair procedures and natural justice under the Constitution had also been breached.

O'Neill J. found that in this case there existed family ties between the father and child pursuant to Article 8. This is because the parties had been in a close relationship for three to four years prior to and after the birth of the child. He held that Convention cases show that once "family life" between the father and child exists for the purposes of Article 8 of the Convention, a very high threshold must be reached to demonstrate that those family ties are extinguished by subsequent events. Being deprived of participation in adoption proceedings may or may not breach Article 8. To determine whether it does the Court must examine whether the decision to exclude the father is in accordance with law, pursuant to a legitimate aim, or is necessary in a democratic society. The Court also pointed out that it was necessary to draw a distinction between the factors which the board must take into account in the decision to notify the father, and the factors that are relevant to the ultimate decision of whether to make

the adoption order. Insofar as the welfare of the child is concerned, relevant factors are confined to the effect on the child's welfare of consulting the father in the adoption application, and no more.

The Court held that the provisions of section 19A were convention compliant, provided that the application of the section was confined to extreme or exceptional cases. The Board's obligation under the section to have regard to "*the nature of the relationship between the father and the mother*" must be construed as including the relationship between the father and the child, for the section to be convention compliant.

Interpreting this section, O'Neill J. said that it was critically important to understand the duration of the relationship and the degree of engagement between the father and the child. The learned trial Judge also considered the section as it pertained to the relationship between the father and the mother. The Court stressed that where there had been a relationship of significant duration between the parents, the Board must not be drawn into a punishment of the father for what may have been ill treatment by him of the mother. Where there were allegations of violence or abuse, or fear of same, that these were matters for the Gardaí and not for the Board. The court said that the Adoption Board must take care to ensure that it is not impelled because of a threat or apprehension of violence to make a decision not to notify the father solely because of that concern.

The Court concluded that the adoption order should be set aside. There was no adverse risk to the child's welfare in permitting the father to be heard in the adoption application. Interestingly, the Court further held that neither S. nor her adoptive father could claim the protections afforded to the constitutional family under Articles 41 or 42 by virtue of the existence of the adoption order that was impugned in the proceedings. The Court held that there was in fact a risk that in refusing to consult the father, S's rights under Article 40.3 of the Constitution to have her welfare protected on the same basis as a marital child would be infringed. Unfortunately, the

learned Judge did not do any more than broadly state this proposition, and there is no explanation of the Court's thinking or approach in relation to the rights of marital and non marital children.

6.7 Care Proceedings

Applications for care orders in respect of any child are governed by the Child Care Act 1991 (as amended by the Children Act 2001).

Section 3 of the Act provides that, having regard to the rights and duties of parents whether under the Constitution or otherwise, in the performance of its function the HSE must "regard the welfare of the child as the first and paramount consideration". The HSE must also give due consideration to the wishes of the child having regard to the principle that it is generally in the best interests of the child to be brought up in his own family.

An application for a care order can be made where there is a risk of assault, ill treatment, neglect or sexual abuse, or where the child's health, development or welfare has been or is being avoidably impaired or neglected, or is likely to be avoidably impaired or neglected.

Applications for care orders are dealt with by the District Court under the 1991 Act. As a result, there are no reported cases showing how the Act is applied in practice by that Court. The only insight as to how the Act is being applied arises from Judicial Review applications brought against District Court Orders in Child Care cases.

An example of such a case is *M.F. v. The Superintendent of Ballymun Garda Station* [1991] 1 IR 1. In that case the Supreme Court considered the jurisdiction of the District Court under the predecessor of the 1991 Act, namely the Children's Act 1908, in an application for a place of safety order. The children concerned were taken into care for approximately seven weeks without any application by the Health Board to the District Court for an order permitting the children to be kept in care. On an

application by the mother under Article 40.4 of the Constitution (namely an enquiry as to the legality of the detention) the Supreme Court confirmed that the statutes relating to children must be interpreted having regard to the natural and imprescriptible rights of the child, guaranteed by the Constitution, and also having regard to the fact that in matters relating to custody, the paramount consideration is the welfare of the child. The difficulty that arose in this case was dealt with in the 1991 Act which has been amended by the 2001 Act and together those provisions ensure that a child is not detained in care for any longer than 3 days prior to the initial hearing, and 28 days on any interim care order (unless by consent).

In *North Western Health Board v. H.W.* [2001] 3 IR 623, the parents refused to consent to the test known as a *PKU Test*. The Supreme Court in that case approved a decision of the Circuit Court Judge who refused to make a care order to facilitate the test. Hardiman J. said that it was quite inappropriate to invoke the District Court procedure to enforce the *PKU Test* under an Act which was plainly envisaged for quite different circumstances.

It is not possible to examine the manner in which the District Court has interpreted and implemented the Child Care Act and to see how they decide when circumstances of a case warrant the removal of a child from his or her family. Furthermore it is not possible to examine in what circumstances a child will be returned to his or her family after a care order has been made. Once the failure of duty on the part of the parents has been rectified, the presumption that the child's best interests are served in his or her family would appear to apply. However, because there are no written Judgments of the District Court it cannot be ascertained how the constitutional rights of children and their families are interpreted in the child care legislation.

6.8 Education

Article 42.4 of the Constitution contains what has been described as the one and only explicit pledge by the State to underwrite socio-economic rights.

Article 42.4 provides as follows:

4. *The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.*

The case law relating to this provision deals exclusively with children with disabilities, or children who need special education in the context of being in the care of the HSE.

The constitutional provision is worded in such a way that the obligation on the State is to fund rather than provide education. This leaves parents free to choose the type of education they wish for their children, so long as it complies with the standard of a “certain minimum education” in accordance with Article 42.3.2°.

In *Director of Public Prosecutions v. Best* [2000] 2 IR 17, parents were prosecuted for breach of the School Attendance Act 1926. The Supreme Court held that so long as parents could establish they were providing “a certain minimum education”, they were constitutionally entitled to educate their children at home. The School Attendance Acts have now been repealed and replaced by the Education (Welfare) Act 2000 and the statutory definition is now the same as a constitutional one, thus requiring “a certain minimum education”.

The first case in which an action was taken on behalf of a child to enforce rights under Article 42.4 was *O’Donoghue v. Minister for Health* [1996] 2 IR 20. In that

case the child had developed severe intellectual and physical disabilities when he was a baby. When he reached school going age his mother applied to have him enrolled in the only available facility in her area. However, there was no place available for the child and he was placed on a waiting list. The mother commenced educating the child at her own expense, and brought proceedings for an order of mandamus compelling the Minister for Health and the Minister for Education to provide the child with primary education. The State contended that some children, such as the applicant, were ineducable. It was argued that such children received no real or lasting benefit from education, and that what was envisaged by Article 42.4 is confined to education in the purely scholastic sense. O'Hanlon J. concluded that the child in this case was not uneducable, in the broader sense of that word. In coming to the definition of education he quoted with approval on O'Dhalaigh CJ in *Ryan v. The Attorney General* [1965] IR 294, as follows:

Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential characteristics, physical, mental and moral.

O'Hanlon J. also drew on Ireland's obligations under the United Nations Convention on the Rights of the Child. Article 2 of the Convention prohibits discrimination on any basis including disability. Article 23 directs that children with any disability should "enjoy a full and decent life in conditions which ensure dignity, promote self reliance and facilitate the child's active participation in the community". It further directs that such children be provided with assistance, free of charge where possible, and education "in a manner conducive to the child achieving the fullest possible social integration and individual development". He concluded that integration of children with disabilities, even severe disabilities, into the school environment can be to the benefit of those children. In such circumstances, there is a constitutional obligation on the State to provide for free primary education in the same way as has been done for all other children.

On appeal to the Supreme Court the central issue was whether the courts were impermissibly trespassing on the function of the executive. However, by the time the appeal was listed, the State was providing the child with education appropriate to his needs. The parties agreed to a declaration that the child was entitled to a free primary education in accordance with Article 42.4 of the Constitution, and the State is under an obligation to provide for such education. Counsel for the State did, however, point out that the State was not to be taken as accepting the manner in which the trial Judge interpreted that obligation.

The question of the duration for which a child with special needs could claim the right to primary education was discussed in the Supreme Court case *Sinnott v. The Minister for Education* [2001] 2 IR 545. In that case the child was 23 years of age by the time the litigation came to Court. He had severe autism, with other profound intellectual disabilities. He had received two periods of special education in the United State of America while he was a young child. Apart from that, his education was patchy and in many instances inappropriate. The evidence was that the method of training given to him in America yielded significant benefits and improvement in his development. However, when that education ceased he deteriorated and eventually all of the improvements disappeared. Towards the end of his childhood he was given a place in a special school, which provided specialised training. In 1997, when he was approximately 20 years of age, the school indicated that it could no longer keep him and he was not offered alternative suitable educational facilities. He sought a declaration that he was entitled to primary education for so long as it was of benefit to him, and that the State had failed to comply with this obligation as contained in Article 42.4 of the Constitution.

The plaintiff was successful in the High Court, and prior to the appeal coming for hearing, the State conceded that the child had a constitutional right to a free primary education up to the age of 18 years. The State also accepted that the child's right in this case had been violated. The appeal was therefore confined to whether he was entitled to such education beyond the age of 18 so long as he was capable of

benefiting from it. While the State wished to provide for such people, and indeed had enacted the Education Act 1998 which obliges the Minister to provide such services, it argued that those rights should not be imposed on a constitutional basis. The majority of the Supreme Court accepted this argument and held that the obligation to provide for primary education referred to children, not adults. The Court therefore accepted that the obligation ceased once the child reached the age of 18 years.

In their Judgments the majority of the Supreme Court in *Sinnott* noted that the State had conceded the age of 18 as being the appropriate point at which primary education should cease. It appears that because of this concession the Supreme Court made the findings that it did. However, the individual Judges considered that in certain circumstances a lower age might be appropriate and this point has therefore not been definitively decided.

In *SOC v. Minister for Education and Science and others* [2007] IEHC 170, the child suffered with autism and he was offered primary education. However his parents, not being satisfied with the model provided, instituted proceedings seeking a declaration that the State had breached the child's constitutional and statutory rights to education and health care services. The parents further sought an injunction directing the State to implement the teaching programme they believed preferable.

The case revolved largely around whether the model of education provided by the Minister was sufficient to meet his obligations, or whether he was obliged to provide the optimal standard of education. The Court was satisfied that the Minister had not failed in his obligations under the Constitution and the legislation and that he was not obliged to provide the education sought by the plaintiff.

SOC has been followed in subsequent Judgments and it would appear therefore that the law in this area is relatively clear. The State has moved significantly from its position in 1993 in the *O'Donovan case* when virtually no education was provided to profoundly disabled children. The Education Act 1998, together with other statutes,

obliges the State to provide facilities, not only for children, but also for adults with special needs. These facilities must provide a standard of care and education which is adequate from an objective perspective. As the provisions are statutory obligations, they are subject to resource constraints and can be modified as necessary.

6.9 The Right of the Child of Un-Married Parents to Financial Provision

Family Law legislation confers on the court significant powers to make property and financial orders for the benefit of spouses and children where the marital relationship has broken down. The legislation enabling the court to make financial provision for the children of married parents is also extensive. However, to date, there is no power to make orders in favour of adults in non marital relationships. The power of the court to make financial provision for the child of unmarried parents is limited to periodic maintenance and lump sum payments. However the legislation permitting lump sum payments for such children is complex and more limited in scope than for the children of married parents. Further, there is no provision for the transfer of property for the benefit of dependent children whose parents are not married, and similarly there is no provision for a pension adjustment order or the transfer of a life policy for the benefit of a child of non marital parents, as there is for the children of married parents.

The question of the extent to which a court can provide for a non marital child arose in the recent case *McE. v. O'S.* [2009] IEHC 52, which was heard on appeal from the Circuit Court by Sheehan J. The Circuit Court Judge had directed the respondent father to provide the applicant mother the sum of €500,000 to facilitate the purchase of appropriate accommodation for her and the child. He was also directed to discharge periodic maintenance for the child's support. The lump sum order was made under section 11(1) of the Guardianship of Infants Act 1964 which permits the court to make directions with regard to "any question affecting the welfare of the child". Section 11(2)(a) empowers the court to make directions concerning custody and access; and section 11(2)(b) permits the making of periodic maintenance orders.

The father appealed on the basis that the Court was not empowered to direct that he provide a home for the mother and child by way of payment of the lump sum. Sheehan J. accepted the father's argument, and stated that the Circuit Court did not have jurisdiction under section 11 of the Guardianship of Infants Act 1964 to make the order directing the payment of the lump sum. In fact the Court noted that the portion of the Guardianship of Infants Act relating to the payment of maintenance was not amended to include non marital children, although the portion relating to custody/access had been so amended.

Sheehan J. distinguished the earlier case *M.Y. v. A.Y.* [un-reported HC 11 December 1995]. In that case Budd J. made an order under section 11 of the 1964 Act directing the husband to pay to the wife a lump sum sufficient to enable her purchase a home for herself and the child. Budd J. had found that section 11 was broad enough to permit the Court make such an order, and the applicant in *McE. v. O'S.* relied on the Judgment in support of her claim for a lump sum on the same basis. However, Sheehan J. pointed out that *MY. v. AY.* was distinguishable on the basis that the parties in that case were married and that therefore section 11(i)(b) was also applicable in that case, unlike here.

The applicant mother had also sought a lump sum under section 42 of the Family Law Act 1995 which expressly applies to children of both marital and non marital families. However, Sheehan J. refused to order the payment of the €500,000 to provide a home under this section, referring to the order being sought as a "Property Adjustment Order" not a Lump Sum Order. The Judge also determined that the monthly periodic maintenance payment of €1,200 rendered it inappropriate to make a Lump Sum Order to meet the expense of providing suitable accommodation for the child.

7. Consideration of the Text of the Proposed Amendment set out in the Twenty-eighth Amendment of the Constitution Bill 2007

Having considered the position regarding children's rights under the present legal and constitutional framework, the Committee proceeded to examine the wording of the amendment proposed in the Bill and its potential impact on those rights.

The legal advice received by the Committee was as follows:

- (i) Under the current constitutional provisions the inalienable and imprescriptible rights of the family give rise to a situation where, in particular, there can be a difference in treatment of children of married and unmarried parents;
- (ii) The threshold for State intervention in the family is interpreted in the case law in the light of the inalienable and imprescriptible rights of the family. There must be a failure of duty and an exceptional case before the State can supply the place of the parents;
- (iii) In the absence of a failure of duty and exceptional circumstances, the State can only intervene if it can be established that there is an extreme threat to the child, such as to the life or person of the child;
- (iv) In any proceedings between married parents and the State, the court is not entitled to consider the welfare of the child but must presume that the child's best interests are served within the family. The test to rebut that presumption is that there must be compelling reasons why the child cannot be with his or her family;
- (v) Children of both married and unmarried parents can be adopted under the provisions of the 1988 Adoption Act. In order to effect such adoption, the court must be satisfied that there is a total failure of duty on the part of the

parents which is likely to persist until the child attains the age of 18 years. In addition there must be found an abandonment of all parental rights in respect of the child concerned;

- (vi) Married parents cannot place their children for adoption under the present constitutional framework;
- (vii) Children have a right to free primary education under the Constitution. However, the right of children with special needs to education extends, at best, to the age of 18 years;
- (viii) Parents cannot insist on their children with special needs getting a particular type of primary education, provided those children are receiving an appropriate level of primary education;
- (ix) The courts have found children to possess a variety of personal rights under the Constitution. However, there is some doubt as to the nature and extent of such rights if they are un-enumerated socio-economic rights. Moreover, in the context of the marital family, the rights of children are secondary to parental rights;
- (x) Children born to a marital family have been held to have superior rights to proper financial provision and support than children born to parents not married to each other;
- (xi) It is an impermissible breach of the doctrine of separation of powers for the courts to make orders directing the State to implement particular policies which go beyond the particular needs of an individual child, as this involves the court in determining policy issues concerning particular social problems.

The Committee welcomes this opportunity to consider the rights of children and sees the proposed amendment set out in the Twenty-eighth Amendment of the Constitution Bill as an opportunity to advance the cause of children's rights and enshrine those rights in the Constitution. The proposals in relation to adoption are welcomed by the Committee, and are seen as advancing the rights of children in this area. The Committee considered how the other provisions of the amendment will

improve the position of children. The Committee believes that the proposed wording did not go far enough to achieve the aim of enhancing children's rights. There was concern that the proposed amendment will not bring about equality for all children, irrespective of the marital status of their parents. There was also concern that the rights of children will remain subservient to family autonomy, which may undermine the goal of strengthening children's rights. Finally, there was concern that the threshold for State intervention in the family will remain too high notwithstanding the amendment proposed by the Bill and that as a consequence the State will be unduly constrained to intervene in an appropriate and proportionate manner where there are reasonable grounds for concern that a child is at risk.

The Committee recognises and endorses the view that the family is best placed to bring up a child, and that in the vast majority of cases parents know best how to promote their children's best interests. However, the Committee noted that there are cases where this is not so, and it is in those cases that the law must be sufficiently robust to enable the State to protect children. The Committee was concerned that in those cases, the provisions of the proposed amendment would not make it any easier for the State to intervene as appropriate to vindicate the welfare of the child.

8. Analysis of the Wording of the Proposed Amendment set out in the Twenty-eighth Amendment of the Constitution Bill 2007

In this section of the report the Committee examines the wording of each section of the proposed amendment under consideration in this report. The submissions received by the Committee are also summarised, while because of the volume and detail, it is not possible to refer to every point or proposal. What is sought to be achieved is a flavour of the thinking of the individuals and groups who made submissions and an overall view of the main areas of support for and criticism of the proposed amendment.

The proposed amendment set out in the Twenty-eighth Amendment of the Constitution Bill is titled “Children”. This indicates an intention that the amendment is to bring about a situation where the rights of all children are to be found under one constitutional provision. It appears that it is intended to bring to an end any confusion as to where the rights of children are to be found in the Constitution, particularly in relation to children of unmarried parents whose rights are sometimes found under Article 42.5 or Article 40.3 of the Constitution.

8.1 Children’s Rights: Article 42(A).1

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

The word “affirms” means to “declare to be true, to uphold, confirm or ratify, to make firm”. However, absent from the text is any explicit obligation to guarantee the protection of those rights.

Use of “Natural and Imprescriptible”

There was some discussion in the submissions to the Committee about the use of the words “natural and imprescriptible rights” in the proposed amendment. The amendment acknowledges the “natural and imprescriptible” rights of children. However, those rights are not specified or enumerated in the text. Ultimately, therefore it will be a matter for the judiciary to identify and delineate the nature of the natural and imprescriptible rights acknowledged and affirmed by the State.

The courts have considered the question of “natural” rights on previous occasions. In *McGee v. The Attorney General* [1974] IR 284, Walsh J. refers to Articles 41 to 43 and says that these Articles “...acknowledge that natural rights or human rights are not created by law but that the Constitution confirms their existence and gives them protection.”

The word “imprescriptible” has also been defined by the courts. In *Ryan v. The Attorney General* [1965] IR 294, “imprescriptible” was defined as meaning that the rights concerned “cannot be lost by the passage of time or abandoned by non exercise”.

A number of submissions referred to a possible difficulty in interpretation brought about by the use of what the contributors felt were ambiguous “natural law” terms. The Children’s Rights Alliance suggested that the language of any amendment should be unambiguous. The Alliance, in its written submission in January 2008, considered the term “natural and imprescriptible rights” as currently applied. Having reviewed the leading case *G. v. An Bord Uchtála* [1980] IR 32, the authors concluded:

It is evident, therefore, that even within the same judgment; different judges give different interpretations of this constitutional provision. Moreover, despite numerous opportunities for the courts to further specify and expand on the meaning of “natural and imprescriptible rights” very few judgments have done so. The report of the Constitution Review Group has stated that no clear

meaning of these terms has emerged from the judicial consideration of them and recommended that the terms “natural and imprescriptible” should be removed from the Constitution.

Other submissions, such as those from the CARI Foundation, the Irish Council for Civil Liberties and Amnesty International also considered that the natural law terms were ambiguous and should be avoided.

Need to Strengthen Wording

The Committee agreed with many contributors that the provisions of the proposed Article 42(A).1 needed to be strengthened in order to bring about what it felt would be real change and explicit recognition of the rights of children under our Constitution. In addition to a specific obligation to vindicate children’s rights, the Committee suggests that the wording be amended to include an acknowledgement of particular rights. Moreover, the Committee proposes that the amendment includes a guarantee to protect children and promote their welfare, and to ensure they have a right to be heard in accordance with their capacity in cases involving their care. The Committee also proposes an additional provision explicitly acknowledging the commitment of the State to treat all children equally.

Obligation to Vindicate

Some contributors regretted the fact that there was no obligation in the proposed wording set out in the Bill to vindicate the rights of children. The Children’s Rights Alliance suggested that an explicit vindication of children’s rights should be added to the proposed wording. Dr. Geoffrey Shannon noted that the State guarantees to defend and vindicate personal rights in Article 40.3, but in the case of children it delegates this responsibility to a third party, namely parents. He further noted that parents in a married family are immune from scrutiny relating to their vindication of their children’s rights, save in exceptional circumstances.

A number of contributors felt that a mere acknowledgement of children's rights would not significantly affect the current situation concerning these rights. The Committee agreed that the State must be under a duty to vindicate the rights of children.

Dr. Ursula Kilkelly, Dr. Conor O'Mahony and Dr. Catherine O'Sullivan of the Centre for Criminal Justice and Human Rights, Faculty of Law, UCC, provided a joint written submission to the Committee. They suggested that the acknowledgement of children's imprescriptible rights be moved from the proposed Article 42(A) to Article 40 of the Constitution. They suggested this so that the rights would not be limited to family law issues but could include a wide range of issues with which children's rights are concerned. They further suggested that the wording of Article 40.3 be replaced to ensure that children's rights are specifically vindicated, which is not currently the case. They felt that the wording as it stands is weak by comparison to the rights of the citizen as set out in Article 40.3. Dr. Geoffrey Shannon in his submission agrees that the acknowledgement of children's rights should move to Article 40 on the basis that to locate them elsewhere would be to suggest that their rights are "of a different order to those of other individuals".

The joint submission made by Barnardos, Cari, Dublin Rape Crisis Centre, ISPCC, One in Four and the Rape Crisis Network of Ireland also supported the amendment of Article 40 to make specific provision for children's rights and their proposed wording is set out later in this report (see pp 74/75).

However, quite a large number of contributors felt that the proposed amendment was not necessary and that children's rights were adequately protected in Article 40 of the Constitution. (See for example submissions from the Pro Human Life Movement, European Life Network, Parents for Children, Mothers at Home and Ms. Kathy Sinnott). Parents for Children and European Life Network expressed concern that the proposed acknowledgement of children's rights separates the child from the family. They also pointed out that under the amendment contained in the Bill, parents

are not named as the primary vindicators of the child's rights and that this creates a presumption that parents are not acting in the interests of the child.

There was also concern that the addition of the acknowledgement of rights in favour of a child would remove the children's right to parental protection and advocacy (see for example submission from the Christian Solidarity Party).

Additionally, because the rights are not defined in the proposed wording set out in the Bill, there was concern that the State could define them in legislation, potentially to the detriment of parents. (For example Parents for Children were concerned that parental rights could be undermined by legislation establishing specific rights for children).

Specific Rights

Many of the submissions favoured including specific rights for children in the Constitution. As can be seen from the wording proposed by the Committee, it carefully considered and agreed with this suggestion, and its proposed wording contains specific rights. The Committee also considered submissions suggesting that the United Nations Convention on the Rights of the Child (hereinafter referred to as "UNCRC" or "the Convention") be incorporated into the Constitution in its entirety, or that the Convention be taken as a template for children's rights, or that parts of it be amended or modified for inclusion in the Irish Constitution. Such suggestions were supported by the Equality Authority, Focus Ireland, Youth Work Ireland, Irish Human Rights Commission, Dr. Ursula Kilkelly and her colleagues and the Children's Rights Alliance. Aligned to this suggestion was a proposal that the rights of children should be enumerated within the constitutional amendment. (For example the ISPC, National Youth Council of Ireland, Children's Rights Alliance, the Ombudsman for Children and the Women's Health Council). Dr Aoife Nolan, Assistance Director, Human Rights Centre, Queens University, went so far as to say "indeed, it seems bizarre that a 'child's rights' constitutional amendment should not expressly enumerate any children's rights". She also suggested that the (then)

Taoiseach's concerns (in his speech on the publication of the Bill) that a list of rights might have the effect of excluding those not listed could be obviated by an indication that the list was not exhaustive.

Some of the enumerated rights suggested included non-discrimination, the best interests of the child being paramount, and the right to life, survival and development (see for example submission of the Irish Council for Civil Liberties). The Irish Human Rights Commission suggested the inclusion of the following rights:

- the right to be registered immediately after birth;
- the right of the child to know his or her parents;
- the right to be subject to regulation by law in the interests of the child;
- the right to be reared by his or her parents as far as practicable; and
- the right to be reared with due regard to his or her welfare.

The Children's Rights Alliance suggested, as an alternative to the current wording, that either specific rights "to include socio-economic rights" be included in the Constitution or that the UNCRC be incorporated into the Constitution.

A number of submissions advocated including a right of a child to be heard in all matters concerning his or her welfare, having regard to the child's age and degree of maturity. Many of the contributors pointed out that the UNCRC specified this right, and, in the case of Barnardos, the suggestion was made that the child should in each case be entitled to independent representation.

In their oral submissions to the Committee, the Children's Rights Alliance discussed their core submission that it was imperative that the provisions of the UNCRC were incorporated into the Irish Constitution, specifying that "we must also give children a voice and ensure that they have a respected position in society". They also continued as follows relating to how the Convention could be incorporated into Irish Law:

We believe that there are two options available to the Committee. The first is to directly incorporate the Convention into the Constitution, thereby binding the State to its principles and provisions. This would be similar to the constitutional amendments used for the Good Friday Agreement and the Maastricht Treaty. Such an amendment would need to incorporate the Convention as of a particular date, as it is a living document which can be amended by ratifying States. The second option is to incorporate key principles from the Convention into the Constitution as express rights. In our eyes, the amendment should encapsulate the principles of the best interests of the child and non-discrimination and, in addition, the principles of the right of the child to be heard, the right to identity and certain socio-economic rights.

In her submission to the Committee in February 2008, the Ombudsman for Children, Ms. Emily Logan, noted that the proposed referendum presented a rare opportunity to enhance the protection of children's rights in Ireland. She suggested that certain amendments should be made to the proposed draft so as to include an express statement of specific rights for children. She proposed that those rights should include the right of a child to participate in matters affecting the child, giving due weight to the child's view in accordance with his or her age and maturity as provided in Article 12 of UNCRC; the right to freedom from discrimination as provided in Article 2 of the Convention; the right to family or appropriate care as defined in Article 5 of the Convention. On this point the Ombudsman noted that parents and families are often the principal advocates of rights of children, and rarely do they come in conflict. She also noted 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. However, the Ombudsman expressed doubt as to how the current wording set out in Article 42(A).2.1^o could achieve the effect of removing discrimination given Article 41 will remain unchanged.

In their submission to the Committee, on the 9 September 2008, the National Youth Council of Ireland also suggested as follows:

To ensure that children's rights are given paramount importance in Irish law, they must be clearly and comprehensively defined in the Constitution. Looking at best practice internationally, section 28 of the South African constitution provides one of the best examples of how this can be done. By neglecting to provide a detailed framework of rights, the State is providing a vague and ambiguous statement on children's rights which will add little value in terms of the desired outcome of enhancing the rights of children.

In response to questions from the Committee, Miss Mary Cunningham, Director of the National Youth Council of Ireland, confirmed that “there is no point in having a long list of rights enumerated which do not have any currency in influencing legislation or policy making”. She did suggest, however, that in the area of giving the child a voice, young people should be given the opportunity to have a say with regard to medical treatment, schooling and other such things.

Dr. Geoffrey Shannon disagreed with the proposal that the South African Constitution provides a suitable template for any proposed amendment to the Irish Constitution. Article 28 of the South African Constitution provides that the “child's best interests are of paramount importance in every matter concerning the child”. This formula has been found to be problematic as it results in “inconsistency and unpredictability” according to Dr. Shannon. He also suggests that such a test might, given the strong presumption in favour of the family, be interpreted as meaning that the child's welfare is best served in the family. Additionally, he says that the South African formula, and the case law under it, demonstrates that “it is difficult, and arguably unwise, to attempt to prescribe a fixed scale of Constitutional Rights”. He also said that because so many areas of law potentially impact on the rights of children, it is imprudent to always regard the children's interests as paramount. Such a hierarchy of rights in favour of children would create tensions between, for example, children's rights and those of society.

The Committee has suggested many changes to the proposed wording in the 2007 Bill, in line with those suggested by people and groups who support the proposed amendment. While the Committee's proposed wording retains natural law concepts, which concerned some contributors, the Committee is satisfied that they should be retained in keeping with many other provisions relating to the rights of the citizen in the 1937 Constitution. However, the Committee has also proposed the addition of concrete provisions that are designed to make a tangible difference to children's rights. The Committee also considered the proposal by a number of contributors to move children's rights to Article 40, but felt that it was more appropriate to create a new Article 42, which contains a wide range of rights designed specifically to protect children.

The Committee does not accept that children's rights are currently adequately protected, as suggested by some, or that acknowledging children's rights specifically will adversely affect the position of their families. The Committee acknowledges the concerns of some contributors opposed to this amendment that parents are not named as the primary vindicators of their children's rights. This concern is addressed in the Committee's proposed Article 42.3, which specifically acknowledges parents as the primary and natural carers, educators and protectors of the welfare of the child.

8.2 United Nations Convention on the Rights of the Child

As many of the submissions received by the Committee suggested incorporation of the UNCRC into the Irish Constitution in one form or another, the Committee spent some time considering the provisions of the Convention and the feasibility of incorporating it into the Irish Constitution, directly, indirectly or otherwise. In particular, Barnardos, CARI, Dublin Rape Crisis Centre, ISPCC, One in Four and Rape Crisis Network of Ireland, made a joint submission to the Committee. They said in respect of the current constitutional provisions:

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.

They went on to say:

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).*

The joint submission set out the views of the organisations concerned as to what the objectives of the constitutional amendment should be, as follows:

- *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.

The submission suggested a new Article 40.7 to be inserted as part of the constitutional guarantees of personal rights. The text 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 Children's Rights Alliance in its submission to the Committee, urged the adoption of certain provisions of the UNCRC, and in particular suggested that the core rights of the UNCRC should be directly incorporated into the Constitution. Specially, they urged that Articles 2, 7, 8, 12 and 19 of the UNCRC be incorporated into the Irish Constitution. They went on to say that:

The incorporation of such rights must not limit the constitutional protection of other unenumerated rights of the child.

The Committee carefully considered the proposals that all, or some, of the provisions of the UNCRC should be incorporated into the Irish Constitution. However, it immediately became apparent that some of the provisions of the document, if incorporated into the Irish Constitution, may conflict with the provisions of Article 41 in relation to the inalienable and imprescriptible rights of the family.

The Committee acknowledges that the rights enumerated in the Convention are extensive. They encompass civil and political rights, as well as economic, social and cultural rights together with humanitarian provisions. The Convention also deals with issues such as schooling, family life, health and material welfare, the rights of vulnerable children, as well as children with disabilities, the rights of children who have been subjected to abuse and exploitation, the rights of refugee children and children in conflict with the law, are covered by the Convention.

The Committee on the Rights of the Child identify four general principles arising under the Convention as follows:

- Article 2, which provides for the right of every child to enjoy his or her convention rights without discrimination of any kind;
- Article 3, which requires that the best interests of the child are the primary consideration in all actions taken concerning children;

- Article 6 which recognises the right of the child to life, survival and development and;
- Article 12 which provides that the State shall assure to every child capable of forming a view the right to express that view freely in all matters concerning him or her and to have it given due weight in accordance with the child's age and maturity.

The Committee acknowledges that many of the rights provided for in the Convention inhere in children under the provisions of Article 40 of the Irish Constitution. However, the Committee noted that the current constitutional position is that the family based on marriage possesses inalienable and imprescriptible rights. If the UNCRC were incorporated into the Irish Constitution, certain of its provisions have the potential to conflict with the State's duty to "guard with special care" the institution of marriage, and the "inalienable and imprescriptible" rights of the family under Article 41 and the existing Article 42.

Further, the constitutional presumption that the welfare of a child is best served within the child's constitutional family could give rise to further conflict between the provisions of the Convention and existing constitutional norms.

The Committee took the view that particular rights enshrined in the Convention, such as a child's right to be heard in any proceedings affecting him or her and equality or non discrimination in respect of children, should be reflected as specific rights in the Constitution. However, the Committee was of the view that the direct adoption of all of the provisions of the UNCRC into the Irish Constitution, by whatever method, gave rise to complex and difficult issues.

The Committee also considered the wording submitted by Barnardos and associates in their joint submission as quoted above. The Committee welcomed the submission from the six organisations. However, the Committee, having considered the analysis by its legal advisers of the wording proposed by the six organisations was of the view

that it simply underlines the difficulty of achieving a re-calibration of rights as between children and their parents without creating internal contradictions in the Constitution. In its proposed wording (discussed later) the Committee recommends the inclusion of some of the central guarantees of the UNCRC namely the rights to equality, the right to be heard in appropriate circumstances and the obligation to treat the child's welfare as the first and paramount consideration in applications concerning his or her care. The Committee also recommends that any of the UNCRC principles not adopted into the Constitution should be incorporated into Irish Law by appropriate means.

Ms. Mary Flaherty, Chief Executive Officer of *CARI* speaking on the joint submission of Barnardos et al said at a meeting of the Committee on the 25 September 2009 in relation to the wording of the proposed constitutional amendment:

I have come to accept that in fact it could actually worsen the situation unless there are some amendments to the other areas such as the areas of the family...if we just have a statement and the articles relating to the family remain over-arching, it could make for a worse and certainly not improved situation in all critical issues. If the family is still over-arching it could still be interpreted in that way.

Ms. Fiona Neary of Rape Crisis Network Ireland speaking on the joint submission of Bardardos et al said at the said meeting:

We also came up against some of the difficulties the Committee has in that if we leave the over-arching principle in there we run the possibility of ending back almost at square one because there will be an ongoing contradiction.

8.3 State Intervention: 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.

This proposed provision determines the threshold for State intervention in the family. There was much discussion in the Committee, and in the submissions made to the Committee, about the meaning and effect of this provision.

The proposal contained in the Twenty-eighth Amendment of the Constitution Bill includes moving the existing Article 42.5 from the “Education” Article of the Constitution, and placing it under the new heading of “Children”. This provision is almost identical to the existing Article 42.5. The wording has been changed to insert the words “any child” and substitutes “such child” for “their children”, in order to clarify that the provision refers to all children and not just the children of marital families.

Threshold for State Intervention

The Committee expressed concern that the threshold for State intervention, in the case of marital children in particular, was too high. The Committee was concerned because where an exceptional case and a failure of duty could not be made out, there was no power to examine the circumstances of the case or decide it on the basis of the child’s welfare.

Contributors in favour of the amendment also felt that the threshold for State intervention remained too high in the case of children of married parents. This was mainly because of the tension between the proposed amendment and the existing Articles 41 and 42 of the Constitution. (See for example submissions from Dr. Ursula Kilkelly and colleagues and Dr. Geoffrey Shannon). Additionally, some submissions suggested that in relation to State intervention the word, “exceptional” is open to judicial interpretation. They suggested that any such intervention should be guided by “the best interests” principle (see for example submission from ISPCC).

The Committee and some of the parties from whom submissions were received, pointed to the difficulty that these Articles brought to an amendment providing for children's rights. It was submitted that the current wording of the amendment would bring little change to the position of children under our Constitution in those circumstances. The Committee believes that its proposed wording will address to some extent the concerns raised, while recognising that change cannot be absolute in light of the continued existence of Article 41.

In their joint submission, Barnardos and associates stated that there must be a rebalancing of rights as between the rights of children and of the family. They said:

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 now know 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.

They go on to say:

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.

They continue:

But because of the way that 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 the 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 child involved as well as governed by constitutional guarantees of fair procedures;

Whether to Amend Existing Articles 41 and 42?

The Committee gave careful consideration to whether Article 41 or 42 should be significantly amended so as to remove the “inalienable and imprescriptible” rights provisions from those Articles. This issue was also canvassed in many of the submissions to the Committee. As can be seen from the recommendations and wording proposed by the Committee it is suggested that Article 42 is amended quite significantly.

As stated above, a number of submissions referred to the conflict between children's rights in the proposed Article 42(A).1, and the rights of the family as defined in Articles 41 and 42. Suggestions were made that Article 41 of the Constitution ought to be amended to reduce the conflict between the autonomy of the family and the right of the State to protect children, in order that the threshold for intervention could be lowered in the case of children of the married family (see for example Dr. Geoffrey Shannon). The ISPCC felt that there was the possibility of a conflict with Article 41 that might provoke a hierarchy of rights in favour of the family. The Ombudsman for Children also suggested that any potential conflict with Articles 41 and 42 should be addressed. She suggested that this could be done by the inclusion of an express prohibition on discrimination of children based on the marital status of their parents.

Two submissions proposed quite significant changes to the draft amendment. Those submissions were made by Dr. Geoffrey Shannon and the coalition of six children's rights groups, namely Barnardos, CARI, the Dublin Rape Crisis Centre, ISPCC, One in Four, and the Rape Crisis Network of Ireland. Dr. Shannon's proposed amendment was to delete the existing Article 42.5 and to insert a new Article 41.4 as follows:

Nothing in this Article shall be understood to reduce, weaken or otherwise undermine the primary responsibility of parents and, where necessary, of the State to protect a child from physical, mental or emotional harm as far as is practicable.

The coalition of children's rights groups suggested a similar, although expanded, new Article 41.4, as follows:

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 parents, it will act proportionality and always with due regard to the rights and welfare of the child.

The rationale of the coalition is that as things currently stand the State cannot intervene effectively in the family, particularly a family based on marriage, because it must be proved that parents have failed completely in their duty towards the child. This threshold is too high and the aim of the proposed Article 41.4 is to enable intervention at an earlier stage. It also aims to enable such intervention to be appropriate and proportionate, limited to what is required to protect the rights of children, rather than undermining families.

Dr. Shannon suggests his amendment in Article 41, as opposed to Article 42, as it “should transform the relationship between parent and child from one of parental rights to one of parental responsibilities”. The language embraces the notion of parental responsibility and the notion that parental rights are connected to the protection of the child, rather than being “conceived as a rival value”. He also suggests that in his proposed amendment the role of the State is to supplement the responsibility of the parents, in whom “primary responsibility” is initially invested. His proposed amendment is intended to lower the threshold for intervention, and that the State would be obliged to intervene in many more sub exceptional cases. He acknowledges that the requirement of “necessity” in his proposed amendment is relatively imprecise, and would entrust the courts with a considerable discretion.

The Children’s Rights Alliance also had concerns about the conflict between children’s rights and those of the family under Articles 41 and 42, and stated as follows in their oral submissions:

Under the current constitutional provisions of Articles 41 and 42, there is an automatic presumption that the best interests of the child lies within the marital family. Although we have provided for the best interests principle in both our private and public child care law, the Constitution takes precedence

in judicial decisions concerning children of marital families and, therefore, blocks the application of the principle. Basically, we have a situation where children are not equal before the law; they are treated differently depending on the marital status of their parents;

A change in mindsets should not be feared. Children's rights are not about driving a wedge between parents and their children. Parents and children are inextricably linked; one cannot be a parent without having a child. We forget too often that it is the parent who champions his or her child's rights. Inevitably, when children's rights are not acknowledged it places parents, particularly those who have a child with special needs or those who are struggling in their parenting role, under enormous pressure and stress.

Proportionate Intervention

A number of other submissions suggested that the test for intervention should be proportionate. It was suggested that the word “proportionate” be included in the draft after the word “appropriate” in Article 42(A).2.1° by Focus Ireland in their submission. Dr. Ursula Kilkelly and her colleagues also suggested a proportionality test, as did Amnesty International and the Ombudsman for Children. On this point, the Children's Rights Alliance suggested that there be a preference for supporting vulnerable families to avoid care proceedings and that “proportionate” response would involve intervention only as a last resort.

The Ombudsman for Children in her submission to the Committee specifically recommended that Article 42(A).2.1° be reformulated to include a duty on the State to support families and to act in a proportionate manner. She also suggested that the reference in the current draft to “parental failure” be removed. She pointed out that the then Minister for Children proposed the inclusion of the concept of proportionality in his first briefing document on the proposed constitutional amendment and she strongly recommended a return to this position. It was her view that 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.

In response to questions from the Committee, Ms. Jillian Van Turnhout, Chief Executive of the Children's Rights Alliance, stated as follows:

With regard to the State and the family, the Alliance believes it is important that we move from a model where we wait for failure in a system towards one where we could bring the pendulum back a little and allow the State to make a proportionate and appropriate response. Rather than waiting for families to fail, which leads families to believe that the big hand of the State is coming in to intervene in family life, we should compel the State to support families at a much earlier stage in order that they can succeed. We should provide resources at community level and work with families. For me, this is a child welfare approach versus a child protection approach.

The National Parents Council (Primary) and the Ombudsman for Children both pointed out that proportionality would involve support for vulnerable parents without them being in fear of having their children removed.

Mr. Fergus Finlay, in his oral submissions to the Committee on behalf of Barnardos, also suggested proportionality in relation to intervention and stated as follows:

In the Constitution the bar is set too high to enable effective intervention in time. However, we would never wish circumstances to arise in which the Constitution was used to ride roughshod over families. Hence, Barnardos supports the principle of proportionality. However, the protection afforded to children and the need to put the best interests of children first must be strengthened.

The Committee also had concerns about the need for proportionate intervention to support and protect families. For this reason the Committee recommends a proposed wording that permits proportionate intervention not only to supplant the place of parents if necessary, but to supplement them where appropriate.

Some contributors were concerned about any alteration in the current status relating to State intervention. The Iona Institute cautioned against State intervention save in the most exceptional cases, and stated that parents should be given a wide “margin of appreciation” in deciding what is best for their children. On this point, the Iona Institute said:

Of course, fierce arguments can be fought over when an intervention is necessary and when it is un-necessary. However, the presumption has always been that the State should only be allowed to intervene in family life in “exceptional” circumstances, and this is the word used by our Constitution. We should be very slow to extend the power of the State beyond this;

Quite apart from the fact that it is a general principle of liberal societies that the State should only be given powers of intervention in the lives of its citizens when absolutely necessary, the State can be a blunt instrument for so delicate a task as child rearing and is liable to make mistakes.

Constitutional Presumption Applicable to Non Marital Children

One of the concerns raised by the Committee, as well as in the submissions, was that the new provision, explicitly including all children, may mean that the constitutional presumption that a child’s interests are best served within his or her family will now apply to both marital and non marital children. It was the view of the Committee, and this was reflected in some of the submissions, that such an outcome would not be to the advantage of children of non-marital families. However, the Committee is also aware of the argument that the provisions of Article 42(A).2 in their application to “all children” may have little effect in practice. This is because under the

Constitution, the parents of marital children retain their inalienable and imprescriptible rights, while the position of the non-marital family remains the same. Thus, while the provision applies to all children, the rights of the parents of the children will be different based on whether they are married or not. However the Committee was mindful that the interpretation of Article 42(A).2.1° will ultimately be a matter for the Supreme Court in an appropriate case.

The Committee acknowledges and appreciates the concerns of contributors who support an amendment to the Constitution that the continued existence of Article 41 in its current form may conflict with or undermine any proposed amendment to Article 42. However, having considered the proposals of various contributors, the Committee felt that it was not feasible to alter or remove the existing Article 41 of the Constitution. The Committee believes that its proposal to create a revised Article 42, with significantly enhanced rights for children, will address many of the concerns of those who suggested alterations to Article 41.

8.4 Adoption - Parental Failure: 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.

This is the provision that facilitates the adoption of children where parents have failed in their duty towards them. The words: “Provision may be made by law” mean that until a law is enacted the status quo will remain, and adoptions will not be affected by the constitutional amendment until a new statute is passed.

The proposed amendment will permit adoption without the necessity of proving that the failure amounts to total abandonment of rights. Moreover, there is no reference in the wording to a requirement for the failure to continue into the future. It appears, therefore, that even where parents are in a position to resume care of their children

(unlike the current situation, where it is necessary to show that the failure of duty is likely to continue until the child attains the age of 18 years and there has been complete abandonment of parental rights) an adoption order can still be made against the wishes of the parents.

The current situation under the 1988 Adoption Act is that the failure of duty must have persisted for 12 months before an adoption order can be made. Under this new provision the Oireachtas will be entitled to set a different or specific period for the test of failure of duty because the Oireachtas will be able to provide for “such period of time as may be prescribed by law.”

The additional requirement of the amendment that adoptions be granted “where the best interest of the child so requires” restates the existing statutory requirement under the 1988 Act, the difference being that under the proposed new amendment “best interest” has a constitutional status. Unlike the 1988 Act, there is no reference in the proposed amendment when considering the best interests of the child to have regard to “the constitutional rights of all parties, including the natural and imprescriptible rights of the child”.

It is quite clear that the proposed amendment is intended to liberalise the law in respect of involuntary adoptions. It appears that such a development could not be achieved in the absence of a constitutional amendment.

A number of those in favour of lowering the threshold for making adoption orders in the case of parental failure were concerned about certain aspects of the wording of the proposed amendment. As an example, the Children’s Rights Alliance and the ISPCC suggest that the amendment should include the imperative “shall” rather than the permissive “may”. This suggestion is also repeated in relation to the draft Article 42(A).3 and 42(A).4. The Teen Parents Support Programme suggested that the wording be expanded to read “physical, moral, emotional or psychological reasons”, noting that this is in line with Article 19 of the UNCRC.

In her oral submission to the Committee, Ms. Jillian Van Turnhout, Chief Executive of the Children's Rights Alliance, spoke about the need to reform this area of adoption on the following terms:

In the area of adoption, for example, children are treated differently depending on the marital status of their parents in two specific instances: first, it is virtually impossible for a child of a marital family to be adopted in circumstances where the child has been abandoned by his or her birth parents; and second, children of marital parents cannot voluntarily be placed for adoption;

The Children's Rights Alliance believes that these children, approximately some 500 to 700, should be afforded the opportunity of a second chance to grow up as part of a family, where normal family events such as a holiday abroad will no longer require a social worker's sign off and where the child's future and his or her succession rights are clear.

The Children's Rights Alliance believes the current formulation "is not robust enough in its instructions to the legislature". The Alliance proposes strengthening and clarifying the situation by including the phrases "of any child" and "regardless of the marital status of the child's parents". They also suggested that parental duty is made more concrete by inclusion of the words, "their duty to vindicate the rights of the child". They submit that while this phrase is more concrete, it leaves open to the judiciary room to manoeuvre and develop a practical and helpful doctrine of "children's rights".

Of those who provided submissions a number of contributors expressed concern about the negative effect of the proposed amendment on the position of parents. Parents for Children considered that the lack of definition in the meaning of the term "failure of duty" increases State power. Also, because no time period was expressed in the draft amendment, a temporary failure could suffice to trigger State intervention. This concern was also expressed by the Iona Institute, and that organisation also

stated that the failure could be for a short period of time. During oral submissions on behalf of Barnardos, Ms. Norah Gibbons sounded a note of caution as follows:

As regards 42(A), as proposed — the adoption of any child where parents have failed for a particular period of time — we believe that should be prescribed in law before it is voted on. For example, there was some public concern when this was discussed before that if somebody placed a child in voluntary care — a good thing for parents to do if they cannot cope for a period — he or she might find the child being placed for adoption in six months' time. International research over many years has shown that the longer a child is away from its family, the lower the chance that it will be rehabilitated. Where children are living away from their families, the first duty accepted by our 1991 Act is for the HSE to work actively to put things right and support the family so that the child goes home. If the child does not go home to its immediate family, then it should at least go home to a member of its family.

However, if a period of time has passed — we suggest around five years — where there has been continuous good efforts made at rehabilitation, we feel it should be prescribed in law that adoption should be considered where a child is settled with a family and it is the wish of the child to remain with the family. This is particularly the case for children in long-term foster care. It is so important for the development of children that they are happy and secure where they are. Changes in law and a change in social workers should not mean a change in a child's family. The child should not be buffeted by the changes that happen.

Parents for Children point out that parental failure in this section does not require parents to have failed for physical or moral reasons. They need simply to have “failed”.

A number of contributors suggested that some mechanism be put in place to enable children to have continuing knowledge of their parents following adoption. The Iona Institute pointed out that under Article 7 of the UNCRC, children had the right to know their parents, and that this should be included in any proposed amendment of the Constitution.

The Committee does not believe that the wording of the proposed Article 42(A).2.2° amendment needs to be altered as suggested by the Children's Rights Alliance and the ISPCC. Existing constitutional provisions are enabling, in that they do not impose an imperative on the Oireachtas to enact legislation. The Committee believes that the proposed amendment in the 2007 Bill is in keeping with such existing constitutional provisions. The Committee is satisfied that the wording in the Bill needs no further alteration, particularly having regard to the robust wording included by the Committee and other parts of its proposed amendment. The Committee is also of the view that the arguments raised by those against the amendment do not give rise to any substantive concern. Moreover, the Committee does not agree that it is necessary to include any further additions to the wording, as recommended by the Iona Institute.

The Committee shared general support for this proposed amendment which is designed to ease the requirements for permitting the adoption of children where the parents have failed in their duty. The Committee is concerned to ensure that adoptions pursuant to this provision only occur where adoption is truly appropriate in the best interests of the child. The amendment will interact with application of the new proposed Article 42.4 which requires proportionate intervention by the State where the parents of any child fail in their responsibility towards such child. As a consequence of this provision, it will not be possible for a child to be placed for adoption where an alternative course of action is consistent with the best interests of the child.

In its suggested wording the Committee proposes the use of the word “responsibility” in substitution for the word “duty”, which appears in the Bill. The Committee

considers this to be a more appropriate term to reflect modern society. The Committee further recommends that any proposed legislation is published with the draft constitutional amendment, to enable the electorate make an informed decision on the proposal.

8.5 Placement for Adoption: Article 42(A).3

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

This proposed amendment will permit the voluntary adoption of all children including those of married parents, which is not currently permissible. This amendment again uses the formulation “Provision may be made by law”. As with the previous provision, the situation will not alter unless and until legislation is passed by the Oireachtas.

The words “voluntary placement for adoption” and “adoption” appears to reflect the fact that adoption is a phased process. As stated previously, the process is currently commenced by the child being placed for adoption, and then the final consent is given after which an adoption order is made. It would appear that this proposed amendment anticipates that there will continue to be at least a two stage process in any future legislation relating to adoption.

The use of the words “of any child” in the text brings about the most significant change as it permits legislation to be passed for the valid placement for adoption of children of married parents.

As married parents are automatically guardians of their children, any such legislation would have to require that both parents consent to any placement of their child for adoption. Presumably, any such legislation would have to provide a mechanism to dispense with the consent of married parents to the making of a final adoption order in the event that the couple, or either of them, changed their minds or otherwise fail,

refuse or neglect to consent to the adoption order, after validly placing their child. Thus, in the case of married parents, the father of the child will have to give his express consent to the adoption, as well as the mother.

The case law relating to voluntary adoptions demonstrates that the test for dispensing with the consent of the mother where she has validly placed the child for adoption, but subsequently changes her mind or failed to give her final consent, evolved over time. It moved from a presumption in favour of the child being returned to the mother (in *G. v. An Bord Uchtála*) to a balancing analysis of what is in the best interests of the child.

The material provisions of Articles 41 and 42 of the Constitution will remain unchanged by the Twenty-eighth Amendment to the Constitution Bill and thus the presumption in favour of the constitutional family will remain. It is possible that married parents may continue to have the benefit of the presumption if they, having validly placed their child for adoption, change their minds, or fail to give their final consent to adoption. The rights of married parents are currently described as both inalienable and imprescriptible. Those rights can only be lost by the failure of duty of parents towards their children as specified in Article 42.5 of the Constitution. The Supreme Court in the *Baby Ann* case made it clear that placing a child for adoption does not constitute a failure of duty.

This aspect of the proposed amendment in the Bill arguably permits legislation allowing married parents alienate their rights. The provisions of any legislation on foot of this aspect of the amendment in the Bill will also be relevant. It can be asserted that this provision means that parental rights are no longer inalienable for the purposes of adoption. A future court will have to decide how the provisions of Article 41 and the Bill can be harmoniously interpreted.

The submissions received by the Committee contained significantly less comment on this proposed amendment than the other ones. By and large there was support for the

proposed amendment although a number of contributors expressed reservations. As an example, Dr. Ursula Kilkelly and her colleagues considered that the impact of the amendment is likely to be minimal, and suggested that it be moved to Article 41 with a redefinition of the words “family” and “marriage”, “so as to reflect the diversity of family units now prevalent in Irish society”.

It was generally acknowledged that the purpose of the proposed amendment was to permit legislation for the voluntary adoption of children of married parents. It was also generally accepted that there was currently a constitutional ban on such adoptions. However, Dr. Brian Foley B.L. on behalf of the Bar Council questioned whether such a constitutional ban was clear-cut. The question was also raised concerning whether or not, despite the intention of the proposed amendment, legislation providing for the adoption of marital children might fall foul of other provisions in the Constitution. Dr. Foley raised this question but suggested that the courts would be inclined to defend any legislation designed to facilitate the objectives of this proposed amendment. However, he concluded:

It is also appreciated, however, that in an area such as this, concrete certainty is required and, indeed deserved by those who may be affected by adoption law.

TREOIR (The National Federation of Services for Un-married Parents and their Children) expressed similar concerns, as follows:

While the proposed amendment is welcome, we question its impact if Article 41 which recognises the family as “the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law” is not amended. It is not clear if Article 41 of the Constitution would be superior to legislation which might be enacted to facilitate parents to place their children for adoption. Clarification is needed on this.

The Bar Council makes two short observations on Article 42(A).3. First it seems clear that nothing in Article 42(A).3 will immunise such law from constitutional challenge. Second, unlike Article 42(A).2.2°, there is no constitutional requirement that voluntary adoption be in “best interests” of the child although, per Article 42(A).4 it will be open to the legislature to include such a requirement in future legislation.

Both the ISPCC and the Children’s Rights Alliance suggested that the wording be amended to replace the permissive “may” with the mandatory “shall”. As with adoptions for failure of duty, these bodies felt that the Oireachtas ought to be obliged to enact the anticipated legislation. It was also noted that this proposed section did not contain any reference to the best interests of the child, and it was considered that this omission was a failure.

The Iona Institute suggested that parents should not be entitled to give up their children for adoption without good reason to believe that the parents would not fulfil their duty towards the child. A number of contributors were concerned that it should only be allowed in circumstances where both the mother and the “un-married father” consented.

Some contributors were concerned about the effect of the amendment on the inalienable rights of the family in Article 41.

The European Life Network questioned the use of the word “any” child and suggested that this was too broad and should be limited. It also suggested that parents should have a say in the household to which their child is adopted.

Some contributors disagreed with the amendment on the basis that one parent might be entitled to place a child for adoption without the consent of the other.

The Committee considered the suggestion by some contributors that this provision should be moved to Article 41. However as with the other proposed amendments, the

Committee decided that it is best placed in the revised Article 42, along with all other provisions specifically dealing with children. The Committee does not share the pessimism of some contributors in regard to the impact of this proposed provision. In fact, taken in tandem with the Committee's other proposals, particularly relating to State intervention and equality, the Committee believes that the aim of the proposed Article 42(A).3 will be achieved. In sections 10.8 and 10.9 of this report, the Committee sets out its analysis of how it envisages the protection of children's welfare will be enhanced in adoption applications based on parental failure.

The Committee does not believe it necessary or advisable to substitute the word "shall" for the current permissive "may" in the draft. As stated previously, the Committee believes that the current word is in keeping with the general tenor of the Constitution and it is best to continue with this phraseology. Also, if the Committee's suggestion regarding legislation being published with the draft constitutional amendment is accepted, much of the concern on this point will be moot.

The Committee does not agree with the suggestion of some contributors that voluntary adoption should not be permissible without a finding of failure against married parents. In fact, it is, in the Committee's view, imperative that parents be facilitated in placing their children for adoption without the necessity of such a finding. Married parents should be free to make a decision of this nature if they think that this is best for the child and for the family. Moreover, contrary to the views of some contributors, the Committee believes that the aim of this proposed amendment must be to permit married parents alienate their constitutional rights.

The Committee does not agree with the proposal of some contributors that the amendment should permit the original family have an input into the choice of adoptive family.

Further, the Committee does not believe that the amendment as framed will permit one married parent place a child for adoption without the consent of the other. The Committee believes that concerns expressed to this effect are unfounded.

The Committee is in favour of a constitutional amendment to permit the voluntary adoption of children of married parents. However, it is recommended that the current proposal be amended to include the words “and any such law shall respect the child’s right to continuity in its care and upbringing”. The Committee recommends this addition to ensure that in any dispute between prospective adopters and natural parents, one of the central factors to be considered is the bond that may have built up between the child and prospective adopters, and the consequences for the child of the breaking of the bond. The Committee recommends that any proposed legislation be published with the draft amendment for the reasons set out in the previous section.

8.6 The Best Interests of the Child: 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.

This proposed amendment incorporates, for the first time, the principle of the child’s interests into the Constitution. As a result it will arguably elevate to constitutional level the obligation to safeguard children’s interests, although this is qualified by the fact that the provision is enabling only. However, as will be seen hereunder, the amendment is not universally supported. Advocates of an inclusion of children’s welfare in the Constitution believe the proposed amendment does not go far enough and that the wording is too weak. Furthermore, some people believe the proposed amendment will be undermined by the existing Articles 41 and 42. Those who oppose the amendment consider it unwieldy and believe that it does not deal with who should decide what is in the child’s best interests in any given case.

As with other provisions of the amendment, the formula “Provision may be made by law” is used. Again, this means that the proposed amendment will permit the Oireachtas to pass legislation.

The text provides “that in proceedings before any court concerning the adoption, guardianship or custody of, or access to, any child...”. Current legislation relating to children directs courts, in the case of guardianship proceedings and care proceedings, to regard the welfare of the child as the first and paramount consideration, and in the case of adoption proceedings to act in the best interests of the child. In any adoption procedure, other than an application to the High Court, it would appear that the adoption board must regard the welfare of the child as the first and paramount consideration.

The phrase “endeavour to secure” is somewhat different from the test in the current legislation. Endeavouring to secure does not imply the same imperative as appears to be contained in the current statutory provisions.

The fact that a welfare test may be given a constitutional footing could possibly alter the constitutional presumption in favour of the married family. Much will depend upon how the totality of the amendments contained in Article 42(A) might be interpreted when read together. The fact that it could be possible to alienate parental rights (by virtue of voluntary adoption) coupled with the effort to equalise children’s constitutional rights and the establishment of a constitutional obligation to secure the best interests of the child might, when taken together, enable the courts to look again at the constitutional presumption in favour of the family. However, any such changes may be confined to the area of adoption.

The majority of submissions indicated support for this proposal, although many criticised it for not going far enough as will be seen hereunder. The CARI Foundation strongly supported the amendment with the following words:

Along with section 1 it will help reduce the number of children who are returned by the courts to unsafe custody situations. It should reduce if not eliminate the numbers of parents who contact us distraught at having to return their child to situations where the child is unwilling to go and is at risk. Parents are aware that they run the risk of being in contempt of court if they do not comply. Consequent on this there is a need to resource a supervised access service throughout the country such as is available in the U.K. and in Canada and which is non-existent in Ireland. This would allow access in safe and appropriately supervised settings where it is deemed appropriate.

Some of those in favour of this amendment welcomed the concept of “best interests” because it is in keeping with the requirements of the UNCRC (see for example National Parents Council (Primary) and Children’s Rights Alliance) The Children’s Rights Alliance also said that this principle is “more far reaching and in keeping with the requirements of the Convention than the more narrow and limited concept of the child’s welfare”. Virtually all of those in support of the amendment confirmed their belief that in most cases the best interests of the child are best served with the parents, but when the interests of the child and those of the parent conflict, that the child’s interest should take precedence.

A number of those in favour of the amendment were concerned that its wording was not sufficiently strong, and did not go far enough. As an example, Focus Ireland and the Ombudsman for Children suggested that the wording should be strengthened to state that the best interests of the child must be of paramount consideration in any proceedings or decision. Both the Irish Human Rights Commission and the Children’s Rights Alliance felt the proposal was too restrictive and that it should apply to all matters concerning children, rather than just proceedings. Concern was also expressed to the fact that the provision was enabling only, and that it would therefore be subject to the provisions of Articles 41 and 42 of the Constitution.

The National Parents Council (Primary) also supported the amendment, but suggested that it be amended as follows:

The best interests of the child should be the paramount consideration in all actions concerning children, whether by legislative, judicial, or administrative authorities.

A number of other suggestions were made to strengthen the wording of the provision. As an example, it was felt that the word “endeavour” was weak and it imposed no positive duty such as is contained in the UNCRC. Also, the wording should be amended to include “upbringing” (see submission of Dr. Ursula Kilkelly and colleagues). The ISPCC suggested that the word “shall” be substituted for the existing “may”. That contributor also felt that the best interests of children are normally served within the family, but that this should apply no matter what the marital status of the family.

An individual contributor, Mr. Peter O’Hara, said as follows:

The suggested Article 42(A).4 reads very sensibly, but it is more general and not about a specific matter as adoption in Articles 42(A).2.2° and 42(A).3. I think it would be open to litigants to submit that Article 41 still gives rights to a family which must be balanced against the legal consequences of the suggested Article 42(A).4. I think there will be several court cases on this subject and the eventual interpretation by the Supreme Court may well not be as fully with the imprescriptible rights of the child as the electorate desires. Accordingly, I submit that the provision of rights for children cannot be achieved as well as the electorate wants until Article 41 giving rights to a family is modified...I think having taken in submissions both from within the branches of government service and from the general public the Oireachtas should inform the electorate that there is a genuine and real need to consider major changes.

The Children's Rights Alliance in its written submission agreed, stating that consideration needs to be given to the issue of whether the existing Article 41 would continue to present an obstacle to ensuring that the courts can give paramount consideration to the best interests of the child, including those for marital families. The Children's Rights Alliance also urged that the best interests principle must be inserted as a direct constitutional provision, rather than enabling the Oireachtas to insert it in legislation. That, coupled with a non-discrimination guarantee, would assist courts in balancing competing rights in conflict between interests of the family or the State, and interests of the child. If these provisions are included as direct constitutional amendments with the same status as other provisions they will be stronger than if they were merely enacted in legislation.

Mr. Mark Coen, Trinity College Dublin, identified what he perceived to be a potential conflict between Article 42(A).4 and Article 42(A).2.1°. On this point he said:

The bill proposes to insert, in Art 42(A).4, a "best interests of the child" test. However this is completely undermined by the proposed Art 42(A).2.1°, which replicates the current Art 42.5, the "exceptional circumstances" test. These two proposed sections can thus be said to be in conflict with each other. A literal reconciliation of these proposed sections is that the best interests of the child is the paramount consideration, but that only in exceptional circumstances will a child be removed from the care and custody of his/her parents. It is difficult to avoid the conclusion that this represents a dilution of the test currently pertaining to the intervention of the State in the case of non-marital children, which is not constrained by an "exceptional circumstances" requirement. The fact that these provisions include the terminology of the current tests – which are perceived as having completely different emphases – is apt to cause confusion in the amendment's purpose and interpretation. As Eoin Carolan has pointed out, its effect could be to disimprove the protection of the non-marital child, rather than improve the position of the marital child.

The Iona Institute suggested an amendment to the effect that it would include a rebuttable presumption that the children's best interests would be served by the family. This group was also concerned that the concept of "best interests" could be stretched unless proper safeguards were put in place. Therefore, it suggested that, in accordance with Article 7 of the UNCRC, and for the purpose of clarification, a qualifier be inserted to confirm that "parents" mean biological parents. The Pro Life Campaign in its submission suggested that the definition of a child be extended to include "any relevant affected un-born from conception to 18."

A number of contributors were against the proposed amendment, primarily because of concerns about who would determine the best interests of children. Mothers at Home felt that third parties should not be in a position to dictate what is in the best interests of children. The European Life Network expressed concerns about over involvement by social workers, who, it was felt, had abused their position.

Dr. Gerard Hogan in his written submission addressed the difficulties surrounding State intervention, but he considered this difficulty by reference to the proposed Article 42.4 namely the principle of the best interests of the child. He disagrees with a number of supporters of the amendment, who advocate a direct inclusion of the "best interests" principle into the Constitution. He says that:

...Those who support this sort of constitutional change perhaps do not appear to have sufficiently reflected on the implications were such a principle to be incorporated into the Constitution or if the courts were called upon to apply such a principle in everyday litigation or if they were called upon to test the validity of legislation by reference to this principle.

Having considered the Supreme Court case *North Western Health Board v. H.W.* [2001] 3 IR622 (otherwise known as *the PKU case*), he continued as follows:

The HW case sums up the dilemma at the heart of this issue. It is all very well to say that children's best interests must be safeguarded. But who is to decide this and what does it mean? Save in stark cases - such as B v. National Maternity Hospital where the child's life was at risk - the State can intervene only with caution. Otherwise, there would be a real risk - as Murray J. pointed out - that parents with singular and unorthodox views would find themselves overridden by official intervention. Should, for example, the State (through the courts) administer the MMR vaccine to all children, irrespective of the views of those parents who conscientiously object to its administration, where medical advisers concluded that the parents' objections were not well founded?

If, for example, there is a custody dispute along the lines of the Baby Ann case [N v Health Service Executive [2006] 4 IR 322] between the natural parents and prospective adoptive parents in respect of a very young child, does it mean that the State should be neutral - all other things being equal - as between the natural parents and the adoptive parents? If that is so, then the affluent and educated adoptive parents, living in comfortable circumstances will win out at the expense of natural parents with no such advantages. And if we say that child's interests should be separately represented in such cases, who exactly is going to give instructions to such a legal team and which choice of prospective custodians will they decide to opt for and why?

...If one proceeds to apply the "best interests" test - such as along the lines envisaged by the proposed Article 42A.4 - then one would have to accept that cases such as these might well be decided differently, with the potential for hugely difficult and sensitive decisions concerning the family being taken by representatives of the State such as courts, social workers and officialdom. Of course, the line is not easy to draw, because failure to act may well expose vulnerable children to harm. In my view, experience has shown that Article 42.5 as it stands is sufficiently flexible and has weathered the test of time as

well as any formula is likely to do. One could not, therefore, lightly recommend change on this point.

Parents for Children also opposed this amendment, stating:

This is a very dangerous change to the Constitution. Regardless of what any other Article in the Constitution might say, this provision in one fell swoop dispenses with all parental rights at the whim of a judge (depending on legislation) and allows the court at all times to decide what is in the best interests of a child;

It will be argued that other Articles in the Constitution uphold children's rights to parental protection and advocacy; however these Articles will not protect families against the power of this provision. Take, for example, the right of parents to make decisions in regard to their children's education. Article 42 which protects the right to home-school and make other educational decisions, is not altered by this proposal, but since the State may decide that the rights of the child include a right to a State education it is certainly affected. Under this section a court may decide that it is in the best interest of the child to attend a state-approved school or be subject to certain school programmes. This article empowers a judge to remove children from their parents and place them in care so that they can be assured of receiving court or state approved-education.

The Committee accepts and agrees with many of the concerns of contributors to the effect that the proposed amendment, as worded, will not sufficiently enhance the position of children. The Committee has therefore proposed an alternative wording, which it believes, is more likely to protect Children's Rights. Firstly, the Committee recommends the inclusion of an acknowledgement of the child's natural and imprescriptible right to have his or her welfare regarded as a primary consideration, which acknowledgement is a general principle. Secondly, the Committee

recommends that in specific cases concerning children there be an obligation to treat their welfare and best interests as the first and paramount consideration. The Committee believes that its proposed wording addresses to a significant extent the concerns and criticisms of those parties and groups who felt that the wording in the 2007 Bill was not sufficiently strong.

The Committee does not accept that an amendment designed to enhance children's rights will dispense with parental rights, as suggested by some of those against the proposed amendment. Furthermore, the proposed amendment is not intended to undermine parental rights in relation to the education of children, nor does the Committee believe that the wording proposed will have this unintended effect.

9. Do We Need a Constitutional Amendment Relating to Children?

As with its First and Second Interim Reports, the Committee considered whether it was possible or desirable to incorporate any or all of the proposed amendment provisions in the 2007 Bill into Irish Law by way of ordinary legislation. The Committee also considered whether the proposed amendments were necessary or would have any effect on the existing law.

9.1 Article 42(A).1: Acknowledgement and Affirmation of the Natural and Imprescriptible Rights of All Children

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

It is arguable that this provision in its current form is not necessary because under the existing constitutional framework children are acknowledged to have certain constitutional rights. Sometimes these rights depend on whether the child concerned belongs to a non-marital family. However, it may have the potential in the future, when read in combination with any legislation passed under the enabling provisions of the other proposed amendments, to give rise to new rights for children.

It is not possible by legislation to achieve the intent of the proposed amendment. It is of course, possible to legislate to provide for particular rights for children. For example, the Oireachtas has already enacted legislation for provision of education for children who are suffering from various disabilities, following the decision of the Supreme Court in the *Sinnott* case.

9.2 Article 42(A).2.1º: The Right of the State to Intervene in the Family

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.

The position would remain relatively unchanged by deletion of the proposed amendment, save that the amendment refers to all children. It gives rise to the question as to whether the constitutional presumption as discussed in this report will apply to non-marital as well as marital children.

It is not possible by the simple enactment of legislation to recalibrate the constitutional test for State intervention. It is however possible to enact legislation allowing the State to intervene in certain family circumstances where the public good dictates that this should be so. An example of such intervention in the past is the fluoridation of the water supply. Presumably legislation providing for, say, a national vaccination campaign against debilitating diseases in the public interest may also fall under that category. However, much would depend on the particular circumstances, and the specific provisions of such legislation.

9.3 Article 42(A).2.2º: Involuntary Adoption

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.

If the provision allowing the Oireachtas to legislate for the period of failure of duty were deleted, then the current situation would continue, and the 1988 Act would represent the law as far as involuntary adoptions were concerned.

The 1988 Act was the subject of an Article 26 reference to the Supreme Court and was confirmed to be in conformity with the provisions of the Constitution. Absent a constitutional amendment, any new legislation providing for a lesser period of failure of duty to allow for the adoption of children against the wishes of their parents, particularly married parents, is unlikely to be upheld.

9.4 Article 42(A).3: Voluntary Adoption

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

If this provision were deleted from the proposed amendment, then the law remains unchanged and married parents cannot place their children for adoption. This will not change circumstances currently in operation where married parents fail in their duty towards the child for the purposes of a 1988 Act Adoption application. However it would prevent married parents voluntarily placing their child for adoption.

It is not possible to provide for this by legislation, given the current constitutional norms.

9.5 Article 42(A).4: Best Interests of the Child

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.

Current legislation provides that in custody cases the interests of the child are the “first and paramount” consideration. The proposed amendment places on a constitutional level the duty of the court to use its best endeavours to “secure the best interests of children” in certain types of cases. Concerns have been expressed that because the wording does not go as far as the current Guardianship of Infants Act 1964, the proposed amendment may dilute the “first and paramount” test set out in that Act.

The Act of 1964 must be interpreted in the light of the constitutional rights of the family and the presumption that the welfare of the child is best served within his or her constitutional family. In custody disputes between married parents and third parties, the Supreme Court has held that courts cannot apply solely a child welfare test because of the presumption in favour of the family. This position is unlikely to change under the proposal as set out in the Twenty-eighth Amendment of the Constitution Bill.

10. Conclusions of the Committee

The Committee considered carefully the views expressed to it both orally and in writing from the many interested parties who made submissions on the nature and effect of the proposed amendment under the Twenty-eighth Amendment to the Constitution Bill. It also considered the legal advice received in respect of the current position vis-à-vis children's rights under Irish law. The Committee also deliberated on the likely impact of the proposed amendment contained in the Bill and whether it would work as intended. From those deliberations there emerged a number of concerns about the current legal position in relation to children's rights, as well as a desire to strengthen the rights of children.

The Committee is concerned that the present constitutional framework in certain cases creates a difference in treatment between children of marital and non-marital families. This inequality arises particularly when a court is called upon to resolve an issue pertaining to the guardianship, custody or day-to-day care of a marital child in a dispute between parents and third parties. The Committee is of the view that children of marital parents are less protected from harm within the family than children of non-marital parents.

In a recent High Court decision the Committee also notes that the Court held that children of non-marital families have lesser rights to proper provision and accommodation than children born to a marital family. This case demonstrates that there are still some differences in the treatment of children based on their parent's marital status. Aside from the above case of course, an un-married mother cannot seek maintenance for her personal support and therefore is less likely to be in a position to choose to remain at home with the child on a full time basis. The Civil Partnership Bill 2009 currently before the Houses of the Oireachtas envisages the making of periodical payment and Lump Sum Orders in favour of cohabitees in specified circumstances. However, the Bill as published contains no provisions to

extend to non-marital children of cohabitants the same entitlement to financial provision as applies to children of marital parents and is entirely silent on the entitlements of such children.

The Committee does not believe that the amendment as set out in the Twenty-eighth Amendment of the Constitution Bill will ensure equality of treatment in court proceedings as between children of marital and non-marital families. The Committee is of the view that the wording of the proposed Article 42(A).2.1° of the Bill simply replicates the existing provisions of the Constitution and does not address, therefore, the problems identified by the Committee.

The Committee was also concerned that where a family was found to be experiencing difficulties in relation to the care and upbringing of their children, that there should be proportionate intervention by way of assistance and support to that family. The Committee wishes to emphasise that in the vast majority of cases, parents are best placed to protect and provide for children, and it is only in those cases where there is a genuine threat to a child's safety or welfare that the courts or the State should be entitled to intervene, and that that intervention must be proportionate.

The Committee proposes a wording that will permit the State to take steps that are proportionate to the child's need to have his or her welfare and safety protected. In other words, it may not be necessary to remove the child from a family, and it may be sufficient to provide some sort of supervision and/or support for the family which will be sufficient to safeguard the child. The Committee's wording therefore, mandating proportionate intervention in the family, affords additional protection to parents and families. The Committee believes that its proposed wording is sufficiently flexible to allow such a response. The current constitutional framework does not have any provision for proportionate intervention in the family and indeed, in the case of the marital family, intervention can only take place in extreme situations. Furthermore, the Committee believes that the wording of the Twenty-eighth Amendment of the Constitution Bill does not address this shortcoming.

The Constitution as it currently stands makes no specific reference to the rights of children. The Twenty-eighth Amendment of the Constitution Bill addresses this by providing for children's rights at Article 42(A).1. However, the Committee believes that this provision is unsatisfactory in that while Article 42(A).1 of the Bill recognises that children have natural and imprescriptible rights, there is no explicit guarantee to protect and vindicate those rights.

Further, the Committee is of the view that there should be specific rights attributed to children and that those specific rights should be enumerated in the Constitution. In this regard the Committee considered favourably the core provisions of the UNCRC as setting out the basic rights which should be acknowledged as inhering to all children.

The Twenty-eighth Amendment of the Constitution Bill attempts to ensure equality between children by referring in Article 42(A).1 to "all children". The Committee is fully supportive of any amendment that ensures all children are treated equally, regardless of the marital status of their parents. However, the Committee was of the view that the amendments proposed in the Bill did not sufficiently address the issue of equality for all children which it felt should be an express provision of the Constitution.

The Committee was concerned that children who are in long term foster care may be precluded from adoption by their foster family, where it would be in the best interests of the child to be adopted. The Committee was concerned that the current constitutional provisions militate against such adoptions. To that extent, the Committee was of the view that the present proposals of the Bill in relation to adoption were helpful and was satisfied to support them, subject to some amendment.

In the light of the above concerns, the Committee discussed possible amendments and alternative wording to that proposed in the Bill to meet its concerns.

10.1 The Committee's Proposed Wording for a Constitutional Amendment to Enshrine and Enhance the Protection of the Rights of Children

After much deliberation and debate, the Committee agreed a proposed wording for the amendment which it recommends to Government. The Committee therefore propose that the following revised Article be inserted into the Constitution, to replace the current Article 42 thereof.

Children

Article 42

1. 1° The State shall cherish all the children of the State equally.
 - 2° The State recognises and acknowledges the natural and imprescriptible rights of all children including their right to have their welfare regarded as a primary consideration and shall, as far as practicable, protect and vindicate those rights.
 - 3° In the resolution of all disputes concerning the guardianship, adoption, custody, care or upbringing of a child, the welfare and best interests of the child shall be the first and paramount consideration.
2. The State guarantees in its laws to recognise and vindicate the rights of all children as individuals including:
 - i the right of the child to such protection and care as is necessary for his or her safety and welfare;
 - ii the right of the child to an education;

- iii the right of the child's voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child's age and maturity.
- 3. The State acknowledges that the primary and natural carers, educators and protectors of the welfare of a child are the child's parents and guarantees to respect the right and responsibility of parents to provide according to their means for the physical, emotional, intellectual, religious, moral and social education and welfare of their children.
- 4. Where the parents of any child fail in their responsibility towards such child, the State as guardian of the common good shall, by proportionate means, as shall be regulated by law, endeavour to supply or supplement the place of the parents, regardless of their marital status.
- 5. Provision may be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their responsibility towards the child and where the best interests of the child so require.
- 6. Provision may be made by law for the voluntary placement for adoption and the adoption of any child and any such law shall respect the child's right to continuity in its care and upbringing.
- 7. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

- 2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.
- 3° Parents shall be free to provide education in their homes or in private schools or in schools recognised or established by the State.
- 8. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

What is proposed by the Committee is that the current Article 42 be deleted from the Constitution, save for sections 2 - 4 thereof which are to be re-enacted in sections 7 - 8 of the proposed new Article 42. The deletion of the existing Article 42.1 and Article 42.5 from the Constitution allows for a rebalancing of rights so that there can be greater focus on the welfare of the child than can be achieved under the present provisions or under the amendment proposed in the Bill.

10.2 Replacing Article 41 of the Constitution?

The Committee considered whether or not to propose that Article 41 of the Constitution should also be amended or deleted. That Article recognises the family as the fundamental unit group in society, possessing inalienable and imprescriptible rights. The Committee considered legal advice to the effect that the existence of Article 41 may impinge on the interpretation of the provisions of its proposed wording. Depending on how its proposed wording is interpreted in any future case Article 41 may modify, or even negate, the effect of the proposed wording in certain circumstances. The Committee is of the view that many people regard Article 41 as central to the rights of the family under the Constitution and as generally reflecting

the social and cultural view of the importance of the family. The Committee in its deliberations was concerned that parents in particular would be assured that their rightful authority and pivotal role in relation to their children would not be in any way undermined by any proposed amendment. The Committee felt that the continued existence of Article 41 provided that assurance to parents.

On balance therefore, the Committee favours retaining Article 41. The Committee acknowledge that the continued existence of Article 41 poses the problem of potentially diluting the efficacy of their proposed wording in certain circumstances. Nonetheless, the Committee felt that the combination of its proposed wording and Article 41 provided a better balance of rights as between the State, the family and children, than that proposed by the Twenty-eighth Amendment to the Constitution Bill.

10.3 New Article 42 of the Constitution

The proposed amendment set out in the Bill uses the heading “Children”. The Committee also proposes that the new Article 42 would be under the heading “Children” rather than “Education” as is currently in the Constitution. This proposed amendment is set out in a number of sections. Article 42.1 concerns the recognition of equality between all children, the recognition of children’s natural and imprescriptible rights, and their right to have their welfare regarded as either a primary or a paramount consideration, depending on the circumstances.

Article 42.2 concerns the rights of children as individuals, including the right to such protection and care as is necessary for the welfare of the individual child, and the right of the child’s voice to be heard in any judicial and administrative proceedings affecting the child having regard to their age and maturity.

Articles 42.3 and 42.4 are concerned with the acknowledgement of parents as the primary and natural carers, educators and protectors of the welfare of their children, and includes a guarantee to respect those rights and responsibilities. Article 42.4

allows the State, where parents fail in their responsibilities, to either supply to supplement the place of the parents in a manner that is proportionate.

Article 42.5 and Article 42.6 are concerned with Adoption.

Articles 42.7 and 42.8 re-enact some of the existing provisions of Article 42. These deal with the rights of parents to provide education for their children in their homes or in private schools established or recognised by the State. They also provide that parents cannot be obliged against their conscience to send their children to State school or schools designated by the State. They also provide that children must receive a certain minimum education and obliges the State to provide free primary education.

10.4 Equality

The Committee is anxious to ensure that there is a specific acknowledgement in the Constitution that all children are entitled to be treated equally, and that this provision is given a prominent position in the proposed amendment. In particular the Committee believes that there should be no discrimination between children, based on the marital status of their parents or otherwise. Article 40 of the Constitution already provides that citizens are equal before the law. However, the Committee is of the view that an explicit statement of equality between all children is required in the Constitution. The Twenty-eighth Amendment of the Constitution Bill did not contain such an explicit recognition.

10.5 The Rights of Children

The Committee's proposed Article 42.1.2° goes further than the text in the Bill. It not only sets out that the State recognises and acknowledges the natural and imprescriptible rights of all children, but explicitly confirms that those rights include a right to have their welfare regarded as a primary consideration. The Committee was concerned that the format set out in the Bill may mean that a child's natural and imprescriptible rights consist only of the right to belong to its marital family. The

wording proposed by the Committee makes it clear that natural and imprescriptible rights are not so confined.

10.6 Welfare and Best Interests of the Child

Article 42.1.3° gives constitutional recognition to provisions that are currently in statutory form, namely the guarantee that in all disputes concerning guardianship, adoption, custody, care or upbringing of a child, the welfare and best interests of the child shall be the first and paramount consideration. The Committee considered that this wording is more satisfactory than the wording in the Bill which is to the effect that a Court should “endeavour to secure the best interests of the child”. It was felt by the Committee that such a wording may operate in fact to undermine the statutory provisions currently in existence, and will not sufficiently protect the welfare interests of children.

The Committee is of the view that a child’s welfare should be paramount in all matters concerning custody, adoption, care or upbringing of a child. In all other matters engaging children’s rights, their welfare is to be regarded as a primary consideration, but not the paramount consideration. Thus, for example in considering legislation that has an impact on a child’s welfare the court can view the child’s right to have his or her welfare regarded as a primary consideration, but not necessarily ousting other considerations.

10.7 Children as Individual Rights-Holders within Families

Article 42.2 of the Committee’s proposed wording enjoins the State to guarantee in its laws to recognise the rights of all children as individuals. The Committee is concerned that the rights of children are often considered primarily in the context of their membership of a family. The Committee is anxious that children have rights as individual stakeholders, and that the Constitution specifically recognises their rights as individuals. The Committee considers that the proposed wording set out in the Twenty-eighth Amendment of the Constitution Bill failed to give sufficient recognition to children as having rights as individual stakeholders. Further, by the

use of the word “including” in that provision, it is clear that the rights of children as individuals are not limited to the enumerated rights set out but merely include those rights. Thus it is open to a Court in the future to specify further unremunerated rights.

The Committee considered that the Constitution should set out specific rights for children, and to this end, this provision gives each child a right to such protection and care as is necessary for his or her safety and welfare and recognises the child’s right to an education. The provision also gives constitutional weight to the right of the child’s voice to be heard, in any judicial and administrative proceedings affecting the child having regard to his or her age and maturity. These rights are rights enshrined in the provisions of the UNCRC and in the EU Charter of Fundamental Rights and Freedoms, and the Committee is of the view that they should be specifically reflected in the Irish Constitution. The Committee views the right of the child to be heard as an important and valuable right which will benefit children. The right to such “protection and care” as is necessary for the child will put beyond doubt concerns, for example, as to the entitlement of children with very special needs to special accommodation. The provision will also protect children whose safety or welfare is under threat in a variety of other circumstances. The Committee views these rights as important guarantees for children, having the capacity to deliver real change for the benefit of all children. No such rights were proposed to be specifically enshrined under the wording in the Twenty-eighth Amendment to the Constitution Bill. The Committee considers this a deficiency in the Bill.

10.8 State Intervention in the Family

Article 42.3 of the Committee’s proposal provides that parents are the primary and natural carers, educators and protectors of the welfare of a child. The State then guarantees to respect the right and responsibility of parents to provide according to their means for physical, emotional, intellectual, religious, moral and social education and welfare of their children. The Committee felt that use of words such as “failure of duty” did not reflect modern society and that it is more appropriate that parents are described in the Constitution as having responsibilities, rather than duties, towards

their children. The Committee seeks to achieve a balance in the Constitution which clearly and unambiguously recognises the primary and fundamental role of parents in the upbringing of their children while at the same time also recognising that children have certain rights, as enumerated in the Committee's proposed wording.

Article 42.4 of the Committee's proposals provides that where a parent fails in his or her responsibility towards a child the State shall by proportionate means, as shall be regulated by law, endeavour to supply or to supplement the place of the parents, regardless of their marital status. In proposing this amendment the Committee sought to introduce a degree of flexibility in relation to intervention by the State in a family. The provision applies equally to married and unmarried families. It is intended that this provision will allow the State make an early intervention to support the family to be the primary and natural carers, educators and protectors of their children, while at the same time being able to protect the welfare of any child whose welfare may be under threat. The provision also has the effect of protecting the rights of families because it ensures that any intervention must be proportionate.

The Committee considers this to be a more desirable approach by the State in the interests of the common good. The aim should at all times be to keep the family together and enable it to function, without sacrificing the welfare of any child. Therefore the State's intervention in the family must be proportionate and regulated by law. Where however the welfare of a child cannot be protected by the child's continued residence with his or her parents, the provision clearly permits appropriate State intervention and the taking of a child into care. The provisions of this amendment allow a more flexible approach than the provisions of the proposed amendment set out in the Bill.

10.9 Adoption

Article 42.5 of the Committee's proposal is virtually identical in its terms to Article 42(A).2.2° proposed by the Twenty-eighth Amendment of the Constitution Bill save that the latter uses the term "duty" and the Committee's proposal uses the term

“responsibility”. It enables provision to be made by law for the adoption of any child, from a marital or non-marital family, where the parents of that child have failed in their responsibility to that child for such a period of time as may be prescribed by law and where the best interests of the child require that such an order be made. The provision makes clear that the Oireachtas can enact legislation to prescribe a period of time for which failure of parental responsibility has occurred. The current constitutional provisions mean that it is necessary to show that the failure will persist until the child reaches the age of 18 years. This amendment must also be read in conjunction with the proposed Article 42.4 which will permit State intervention in cases of parental failure. The Committee has recommended that the appropriate legislation be drafted for consideration by the people together with the proposed constitutional amendment.

Article 42.6 of the Committee’s proposal allows provision to be made by law for the voluntary placement for adoption and the adoption of any child. This provision is similar to the provisions set out in the Twenty-eighth Amendment to the Constitution Bill, save that it refers to necessity for any such law to respect the child’s right to continuity in its care and upbringing. The Committee was concerned that under the current constitutional regime, it is not possible for married parents to agree to the placement of their child for adoption. This provision now enables the Oireachtas to enact legislation providing for this.

There was also a concern in the Committee that, when considering the welfare of a child in the context of adoption, the court shall consider as a separate element of the child’s welfare the issue of continuity in its care and upbringing. The Committee regards this as a matter of reasonable common sense and practicality and wishes to have this principle reflected in the legislation enacted under this provision. Again, the Committee recommends that the appropriate legislation be drafted for consideration by the people together with the proposed constitutional amendment.

The Committee's concerns as set out above arise largely from the Supreme Court decision of *N v. HSE (Baby Ann Case)* [2006] 4 I.R. 375. In that case the Supreme Court overturned the High Court decision that the removal of the child from the care of the prospective adopters would be damaging to her welfare. The trial Judge had laid significant emphasis on the psychiatric evidence to the effect that the child had developed a strong bond with the prospective adopters and to end that bond would be traumatic and damaging to the child. A number of the Supreme Court judgments attached far greater importance to the biological link between the child and natural parents than to the child's attachment to her prospective adoptive parents and the benefits to her of continuity of care. The Court also applied the constitutional presumption that the child's interests were best served within her marital family, notwithstanding the psychological evidence that to return her to her natural parents was likely to damage her welfare. The Committee believes that the addition in the proposed amendment of the words "*...and any such law shall respect the child's right to continuity in its care and upbringing*" will enhance the prospects of decisions being based more readily on what is best for the child and have regard for the importance of the continuity of care with the prospective adopters.

Article 42.7 to 42.8 inclusive, re-enact Articles 42.2 – 42.4 of the existing Article 42 of the Constitution. These Articles recognise, inter alia, the rights of parents to send their children to schools other than those established by the State, while ensuring that children receive a certain minimum standard of education, and the right to free primary education. The Committee was of the view that these existing constitutional provisions are of considerable legal, social and cultural value, and should be re-enacted in the proposed new Article 42.

The Committee therefore recommends to the Government the adoption of its proposed wording for a new Article 42 in the terms set out in this report and for the reasons stated.

APPENDIX A

ORDERS OF REFERENCE

Dáil Éireann on 22 November 2007 ordered:

“(1) That a Select Committee consisting of thirteen members of Dail Éireann be joined with a Select Committee to be appointed by Seanad Éireann to form the Joint Committee on the Constitutional Amendment on Children to:

(a) examine the Twenty-Eighth Amendment of the Constitution Bill 2007; and

(b) consider the text set out in the Schedule to that Bill with regard to the following:–

- (i) the acknowledgement and affirmation of the natural and imprescriptible rights of all children;
- (ii) the restatement and extension of the existing provision in relation to children and parents contained in Article 42.5 of the Constitution to include all children;
- (iii) the provision of legal authority for the adoption of children who have been in care for a substantial period of time if it is in the best interests of those children;
- (iv) the provision of legal authority so that all children may be eligible for voluntary adoption;
- (v) the provision of legal authority so that the courts shall be enabled to secure the best interests of a child in any court proceedings relating to adoption, guardianship, custody or access of that child and to ensure that such interests are taken into account in all other court proceedings in relation to that child;
- (vi) the provision of legal authority for the collection and exchange of information relating to the risk or actual occurrence of child sexual abuse;
- (vii) that no provision in the Constitution should invalidate any law providing for absolute or strict liability in respect of sexual offences against or in connection with children;

(c) make such recommendations, including recommendations in relation to amendments to the text in Schedule 1 of the Bill, as shall to the Committee seem appropriate.

- (2) The Committee shall report back to each House with recommendations in a final report four months from the date of establishment.¹
- (3) The Minister for Justice, Equality and Law Reform and the Minister of State at the Departments of Health and Children, Education and Science and Justice, Equality and Law Reform, with special responsibility for Children, shall be *ex officio* members of the Committee and shall be entitled to vote.
- (4) The quorum of the Joint Committee shall be four, of whom at least one shall be a Member of Dáil Éireann and one a Member of Seanad Éireann.
- (5) The Joint Committee shall have the powers defined in Standing Orders 83(1) to (8) inclusive and 93(2).
- (6) The Chairperson of the Joint Committee shall be a Member of Dáil Éireann.”

Seanad Éireann on 22 November 2007 ordered:

- “(1) That a Select Committee consisting of four members of Seanad Éireann be joined with a Select Committee to be appointed by Dáil Éireann to form the Joint Committee on the Constitutional Amendment on Children to:
- (a) examine the Twenty-Eighth Amendment of the Constitution Bill 2007; and
 - (b) consider the text set out in the Schedule to that Bill with regard to the following:—
 - (i) the acknowledgement and affirmation of the natural and imprescriptible rights of all children;
 - (ii) the restatement and extension of the existing provision in relation to children and parents contained in Article 42.5 of the Constitution to include all children;
 - (iii) the provision of legal authority for the adoption of children who have been in care for a substantial period of time if it is in the best interests of those children;
 - (iv) the provision of legal authority so that all children may be eligible for voluntary adoption;
 - (v) the provision of legal authority so that the courts shall be enabled to secure the best interests of a child in any court proceedings relating to adoption, guardianship, custody or access of that child and to ensure that such interests are taken into account in all other court proceedings in relation to that child;

¹ This reporting deadline was extended to 30 November 2008 by order of Dáil Éireann on 13 March 2008.

- (vi) the provision of legal authority for the collection and exchange of information relating to the risk or actual occurrence of child sexual abuse;
 - (vii) that no provision in the Constitution should invalidate any law providing for absolute or strict liability in respect of sexual offences against or in connection with children;
- (c) make such recommendations, including recommendations in relation to amendments to the text in Schedule 1 of the Bill, as shall to the Committee seem appropriate.
- (2) The Committee shall report back to each House with recommendations in a final report four months from the date of establishment.²
 - (3) The Minister for Justice, Equality and Law Reform and the Minister of State at the Departments of Health and Children, Education and Science and Justice, Equality and Law Reform, with special responsibility for Children, shall be *ex officio* members of the Committee and shall be entitled to vote.
 - (4) The quorum of the Joint Committee shall be four, of whom at least one shall be a Member of Dáil Éireann and one a Member of Seanad Éireann.
 - (5) The Joint Committee shall have the powers defined in Standing Orders 70(1) to (8) inclusive and 86(2).
 - (6) The Chairperson of the Joint Committee shall be a Member of Dáil Éireann.”

² This reporting deadline was extended to 30 November 2008 by order of Seanad Éireann on 13 March 2008.

APPENDIX B

POLICY IMPERATIVES OF THE TWENTY EIGHT AMENDMENT OF THE CONSTITUTION BILL 2007 MINISTER FOR CHILDREN AND YOUTH AFFAIRS

Background to the Preparation of the 28th Amendment of the Constitution Bill 2007

The Government's policy intent in pursuing an amendment to the Constitution was three-fold i.e. to provide:

- A clearer and more direct acknowledgement of the rights of children within a constitutional presumption that the best interests of the children are served within the family
- A restatement of Article 42.5 which would, *inter alia*, extend the provision to all children;
- A statement which would permit the adoption of marital children and children in care.

It is important to emphasise that consideration was also given to broader interpretations of the rights of children based on the wide consultation process undertaken by the then Minister with Dáil parties, NGOs and faith-based groups. The Bill, as drafted, is an accurate and exact representation of the change desired by Government at the time.

Therefore, it is worth stating that it was not the intent of the Bill to provide a broad based inclusion of children's rights beyond what currently exists in Article 42 of the Constitution. There was no intention or desire to provide for a rights based interpretation of the State's responsibilities towards the provision of services for children – beyond that which currently exists. While it was the clear intention that the "best interests" be given greater scope, this was to be confined to cases of proven family failure or where the parents have consented to the care or adoption of their children. It was clearly expressed at the time that the definition of the family was to remain unaltered and the overall presumption that the best interests of the children are served within the family was to remain unaltered.

Children's rights are already expressed in the context of Article 40.3 as human beings and as citizens. The view is that these rights are, in the main, asserted by parents on behalf of their children. However, at times, these rights need to be asserted by a third party when they conflict with the individual interests of parents themselves. Contrary to some views heard by the Committee and the Committee's urging of the Minister for Children and Youth Affairs to reformulate some of the provisions, the Government's view is that the Bill, as drafted, has the potential to achieve the policy imperatives intended at the time.

Article 42(A).1

The State recognises and affirms the natural and imprescriptible rights of all children

The policy desire is to give expression to the special position of children based on the personal and natural rights that a child has along with every citizen under Article 40

of the Constitution. This article, for the first time, singles out children as a discrete group possessing rights. There has been much debate in the Committee on the extent of the effect of this statement.

The Government does not accept that this provision is devoid of effect. If the People in a referendum take the step of inserting this language into the Constitution, under normal canons of constitutional interpretation, this language must be held to have legal effect as the People cannot be held to have acted in vain. It is argued that the Courts would give it due weight and consider it in the balancing of rights.

The Bill also uses the language “all” children in this Article. This is the first time that the Constitution gives recognition to children coming from family structures - other than those based on marriage - providing that there can be no distinction made between marital and non-marital children.

This Article also provides an overarching element to it, in that it has a compounding effect when considered with the other sub-articles of the proposed Article 42(A). The fresh expression given, for example to the best interests of children in adoption, guardianship, custody and access in Article 42(A).5 will have to be analysed in the Courts having regard to Article 42(A) as well as other Articles of the Constitution.

Article 42(A).2

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.”

The restatement of Article 42.5 in Article 42(A).2.1 is intended to reflect the commonly held view that there is a balance to be struck between the responsibilities of parents and State intervention to protect children. It was not the intention of the Government to alter the primary responsibility of parents to keep their children safe. Unfettered interference by the State is not considered desirable by any party.

The Government gave detailed consideration to the test of parental failure in their duty towards the child to capture some degree of proportionality. However, it was strongly viewed that to attempt to “diminish” or lower the test of family failure could have unintended consequences and, in fact, could make the referendum unpalatable to the majority of the people.

It is worth considering the proposed Article 42(A).4 next – where the Government’s intent was to give greater scope to the best interests principle.

Article 42(A).4

Provide by law that in proceedings concerning adoption, guardianship, custody or access, the Court shall endeavour to secure the best interests of the child.

This provision incorporates a new concept into the Constitution. It will require legislation to have full effect and it was envisaged by the Government that substantial amendments would be made to the Guardianship of Infants Act, 1964. It has been argued to this Committee that since the rights of the constitutional family remain unaltered and since any new right of the child must be weighed in the balance against those rights, the provision will have no effect.

It is certainly true that the constitutional presumption remains that the children's best interests are served within the family. This was the policy judgement made by Government at the time the Bill under consideration was published. However, this provision constitutes an unambiguous statement at the level of the Constitution, that the duty to promote children's best interests is recognised. In that respect, it is not accepted that the provision will have no effect.

As referred to above, it is a normal rule of statutory interpretation that the Oireachtas does not speak in vain. It follows, as noted above, that as a matter of constitutional law the People do not act in vain. Judges will be required to have regard to the provision and to give it due weight. The fact that children's rights will have been given fresh expression in the new Article 42(A) and that Article 42(A).2 is reiterated only in that context will also have to form part of that analysis.

Article 42(A).3 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”.

Article 42(A).4 Provision may be made by law for the voluntary placement for adoption and the adoption of any child.

There is no specific constitutional provision for the adoption of any child. Adoption is solely dealt with on a legislative basis. The Adoption Act 1988, which was referred to the Supreme Court by the President under Article 26 of the Constitution, provided for the involuntary adoption of children including children of marriage. The legislation which was referred by the President to the Supreme Court to test its constitutionality relies, in its construction, on the provisions of Article 42.5 of the Constitution : “ In exceptional cases, where the parents for physical and moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of parents, but always with due regard for the natural and imprescriptible rights of the child.”

The Supreme Court held that the Adoption (No. 2) Bill, 1987 was constitutional. However, the circumstances under which a child could be placed for adoption (under what became the Adoption Act, 1998), against the wishes of the parents, are extremely limited. The Supreme Court said that in addition to proving that the failure of duty was to extend until the child reached 18 years, it would also be necessary to show that failure of duty amounted to a total abandonment. In order to take proceedings, the child must be in the care of the proposed adopters for a minimum period of 12 months before the foster parents lodge proceedings in respect of the adoption.

The provision itself primarily focuses on children placed in long term foster care. However, the test set affects a number of categories of children for whom adoption may be in their best interests:

- A child placed for adoption but subsequently legitimated by the marriage of their natural parents and reclaimed by them.
- A child placed in foster care, who has limited or negligible contact from the natural parents but “sufficient” contact to guard against a claim of abandonment of parental rights and duties.

- A child one of whose natural parents has died and the other wishes to adopt the child jointly with a new spouse.
- A child in circumstances where a parent may be struck down by a long-term illness or a disability (clearly rendering the parent incapable of caring for the child) and the parent desires that the child be placed for adoption.

The most recent case which dealt with the first of these matters was the Baby Ann case. The circumstances were specific and the issue of whether the “right” decision was made remains a matter of opinion. However, the most significant aspect of the judgement was the view expressed by the Supreme Court in describing the impact of the marriage of the parents of “Ann” “....The central issue to be considered by the Court underwent a metamorphosis; it was no longer the best interests of the child but the lawfulness or otherwise of the Doyles’ custody of her. When deciding whether the Doyles’ custody of Ann is in accordance with law it is no longer possible for the Court to follow the original approach of Lynch J. in *Re J.H.* – “to look at it through the eyes, or from the point of view of the child”. It is clear that the Court is bound by the decision in *Re J.H.*; the full rigour of the test established in that case must be applied. In that case the test set by Finlay C.J. in his judgment was as described by Justice McGuinness as follows “compelling reasons why the child’s welfare could not be achieved within the natural family – is so exacting that it would be difficult to see it being met other than in the most extreme circumstances. This is particularly so when the test is given the added weight of being set in the context of the constitutional declaration of the rights of the family and of parents, and the related constitutional presumption that the welfare of the child is to be found within the family. These constitutional rights and presumptions apply, of course, to the legally married family alone.”

It is further interesting to note that in the Baby Ann case, Justice McGuinness commented that while “their marriage reflected their commitment to each other and their determination to recover the custody of their child; it admittedly also reflected their legal advice”.

Similar judgements have been given in respect of children in long-term foster care. In those cases, even minimal parental contact or interest weighed heavily against the adoption order being made in cases where the natural parents have been party to proceedings. In *Western Health Board v An Bord Uchtala* the Court refused to make an order in respect of a child of married parents. While meeting many of the tests required under the Adoption Act, 1998, the Court held that it was “not satisfied that the evidence was such as to prove abandonment of parental rights on the father’s part”. The Supreme Court agreed noting that the failures “did not automatically amount to an abandonment of all parental rights” [Shannon:2005:310].

The policy imperative is to ensure that the best interests test, allowing a child of marriage to be adopted, be suitably weighted so that the Court can consider these interests as the paramount consideration notwithstanding the valid rights of parents under the Constitution and the special protection afforded the family. Rather than the requirement for a full rehearing of the original case of neglect or abuse in relation to children of long-term foster care, such children’s cases could be advanced on a “best interests” basis after a defined period.

The provision also allows the voluntary relinquishment of children for adoption because parents are unable or unwilling to care for them.

The two provisions, therefore, address an important child welfare issue and allow children of a marriage, whose parents cannot care for them, the same opportunity of a stable and secure family life, which is currently available to non-marital children.

Conclusion on Impact of Existing Proposed Provisions

The impact of the changes proposed cannot be precisely gauged. All parties agreed that ultimately, the full effect of the changes will depend on the provisions of implementing legislation and how the constitutional provisions and the legislation are interpreted by the Courts over time. In order to move beyond the provisions proposed and proffer new wordings, the Committee must first set out in the clearest possible terms the degree of “shift” it is seeking.

Rather than arguing in general terms that the proposed provisions do not go far enough, the Committee may wish to consider:

- What are the Committee’s policy imperatives to be achieved through a referendum on children’s rights?
- Which policy objectives are not met by the provisions already drafted?
- Is an incremental approach, which has the greatest chance of success, a more appropriate strategy, rather than a significant shift away from the constitutional principle that the rights of children are best secured through the medium of the family, except when that family has failed in its duty?

Moving beyond the current provisions – other policy imperatives

It is worth considering the types of situations in which it is intended that the proposed new provisions would allow more flexibility for the Court in finding the right balance in respect of an individual child, without imposing State intervention unless absolutely necessary.

Ms. Justice Catherine McGuinness in her Report on the Kilkenny Incest Investigation (1993) found that “*the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving higher value to the rights of parents rather than to the rights of children*”..... and recommended that the Constitution should include “*a specific and overt declaration of the rights of born children.*”

Since this case, a number of other reports or court cases involving individual children and their families have continued to raise the question of the apparent conflict between the best interests of children and the rights and duties of married parents. Cases in respect of child welfare and protection under the Child Care Act, 1991 are held in camera. As a result, there is limited jurisprudence in the public domain. Therefore, it is difficult to assess how prevalent or influential the approach referred to by Justice McGuinness is in practice. However, despite the passage of time, there is a perception that it is a factor in both the actions of authorities in assessing the likely success of care proceedings and the actions of courts in acceding to requests for care orders. Whether this perception is valid, or not, is difficult to prove.

The implication of the McGuinness comment was that the failure of the State to intervene rested, in part, on the special consideration given to the fact that the

children in this case were part of a marital family. It further suggests that professionals or courts involved in decisions relating to these children gave a consideration to the inalienable and imprescriptible rights of the parents [Article 41.1.1] and the special protection of the family under the constitution in [Article 41.3]. In doing so, they acted, or failed to act, in the interests of the children. They did so despite the provisions of Article 42.5 [where parents for physical or moral reasons fail in their duty towards their children..... with due regard for the natural and imprescriptible rights of the child] which suggest that the test to be met was considered to be too high, and yet, children met with harm because of this approach. That test was most clearly enunciated in the consideration of the Adoption (No.2) Bill 1987 under Article 26 of the Constitution:-

In the matter of Article 26 of the Constitution and in the matter of the Adoption (No. 2) Bill 1987 [1989] I.R. 656 Finlay C.J., *“The first essential here provided is that for not less than twelve months the sole parent or each of the parents for physical or moral reasons have failed in their duty towards the child. The most important element in this provision is the concept of failure which must be construed as being total in character. No mere inadequacy of standard in the discharge of the parental duty would, in the opinion of the Court, suffice to establish this proof. Furthermore, the failure must arise for physical or moral reasons. This does not mean that the failure must necessarily in every case be blameworthy, but it does mean that a failure due to externally originating circumstances such as poverty would not constitute a failure within the meaning of the sub-clause.”*

Another significant judgement in the context of care proceedings is the Supreme Court judgement in North Western Health Board v H.W. and C.W. which emphasises that parents should be afforded every opportunity to demonstrate their intention and ability to provide a safe and secure environment for their child. In that case McCracken J. held that the Constitution places the married family in a “*very special position*””*also provides that the family possesses rights which are antecedent and superior to all positive law*”.

In this context the failure of duty must be complete, final and without any indication of a resumption. The policy imperative is to find the right balance in this “test”, which not only allows the presumption in favour of the married family to be challenged but equally allows the issue of the best interests to be weighed against it. Therefore, for example, in extreme welfare cases, while cumulatively the impact on the child is enormous, the individual incidents do not carry sufficient weight to be considered a complete and ongoing failure of duty. This may give rise to situations where children may suffer neglect during a period when evidence is being gathered to make a case for care proceedings.

There seems to be a need to ensure that there is no impediment, perceived or otherwise, in assessing the best interests of a child and providing alternative care if the safety, protection or welfare of that child is in question.

In summary, the analysis suggests that while the child has rights that are to be protected by the State, these rights are, for the most part, considered to be vindicated on behalf of children by their parents. Essentially, Article 41 “regulates” how the State might defend or vindicate these rights by referring first to rights and responsibilities of the family. The individual rights of the child are to some degree viewed through the lens of the “family” for children whose parents are married.

Simply put, is there a point of failure (intensity, duration, impact) at which best interests might be considered before total failure is achieved (with the resultant, perhaps catastrophic impact)?

In summary, what I have set out in this position paper represents the Government's policy intent at the time of the publication of the Twenty-eight Amendment to the Constitution Bill (2007). In the event that the Committee considers that the Bill does not achieve the Committee's policy goals, I would ask the Committee to consider setting out its views as it has already done in respect of its First Interim Report (soft information) and Second Interim Report (absolute and strict liability). In this way, the Government will have the opportunity to consider the policy contained in the current Bill in light of the Committee's recommendations.

APPENDIX C

WRITTEN SUBMISSIONS

Acknowledgement

The Committee wishes to acknowledge the valuable contribution of individuals and organisations who made submissions to the Committee.

ORGANISATIONS

1. AMEN (Men's Support Group)
2. Amnesty International (Irish Section)
3. Association of Secondary Teachers Ireland (ASTI)
4. Barnardos
5. Children in Hospital Ireland
6. Children's Rights Alliance
7. Church of Ireland General Synod
8. Comhar Chríostaí (Cathal Loftus, Chairman)
9. Comhar Chríostaí (Michael Maguire, Vice-Chairman)
10. Concerned Citizens (Ranelagh, Dublin 6)
11. Crisis Pregnancy Agency
12. Council for the Status of the Family
13. Dublin Rape Crisis Centre
14. Ombudsman for Children
15. Equality Authority
16. European Life Network
17. Family Lawyers Association
18. Family Support Agency
19. Focus Ireland
20. Home Education Network
21. Immigration Control Platform
22. International Adoption Association
23. Irish Preschool Play Association (IPPA), the Early Childhood Organisation
24. Irish Association of Social Workers
25. Irish Catholic Bishops' Conference
26. Irish Congress of Trade Unions
27. Irish Council for Civil Liberties

28. Irish Family Planning Association
29. Irish Human Rights Commission
30. Irish Society for the Prevention of Cruelty to Children (ISPCC)
31. Mothers at Home
32. National Federation of Voluntary Bodies
33. National Parents Council (Primary)
34. National Youth Council of Ireland
35. National Men's Council of Ireland
36. One Family (Support organisation for one-parent families)
37. One in Four
38. Our Lady's Children's Hospital, Crumlin
39. Parental Equality
40. Parents for Children
41. Pro Life Campaign
42. Rape Crisis Network Ireland
43. Teachers' Union of Ireland (TUI)
44. Teen Parents Support Programme
45. The Bar Council
46. The CARI Foundation (Children At Risk In Ireland)
47. The Iona Institute
48. The Women's Health Council
49. Treoir (National Federation of Services for Unmarried Parents and their Children)
50. Women for the Third Millennium
51. Youth Work Ireland

INDIVIDUALS

52. A.M. Foley and B. Bonar
53. Anne Brennan
54. Anne Gorman
55. Antoinette Loughnane
56. Bríd Gemayel and Family
57. Caroline Comiskey
58. Ciara Lynam

59. Daniel Harrington
60. David and Vivienne Kavanagh
61. David Nolan
62. Dermot Layden
63. Dervila Healy
64. Donal O'Driscoll
65. Dr. Aoife Nolan, Assistant Director, Human Rights Centre, Queens University
Belfast
66. Dr. A. and Mrs F. Loxley
67. Dr. Geoffrey Shannon
68. Dr. Gerard Hogan S.C. Law School, Trinity College, Dublin
69. Dr. Ursula Kilkelly, Faculty of Law, University College Cork
70. E. Danaher
71. Eileen Glynn
72. Eleanor McFadden
73. Elizabeth Aherne
74. Ethna Cotter
75. Eunan McDonnell
76. F.M. Gaffney
77. Frank Murphy
78. Fr. Owen Wynne SCJ
79. Gerard Hanratty
80. Harry and Maria Buckley
81. Hubert and Joan Durkan
82. James McCoffrey
83. Jason FitzHarris
84. Joan Mc Mahon (Pro Human Life Movement Member)
85. Karl Mercer
86. Kathleen Lounin
87. Kathy Sinnott, MEP
88. Liam MacMeanmain
89. Liz Whyte
90. Louise Hanrahan
91. Lynda Finneran

92. M.T. Leonard
93. Margaret and Patrick Furlong
94. Manus McDaid
95. Mark Coen
96. Mary Doherty (Christian Solidarity Party Member)
97. Mary Stewart
98. Maura Eithne MacCormack
99. Maurice Fitzgerald
100. May Boland
101. Michael and Mary Fitzgibbon
102. Michael O'Brien
103. Mícheál Ó Béarra
104. Noel Gorman
105. Noel Mulqueen
106. Nora Burke, M.A.
107. Olive O'Brien
108. Oliver Broderick
109. P.J. Neavyn
110. Pat and Kathleen Cummins
111. Patricia Murray
112. Patrick O'Neill
113. Paul MacDonald
114. Peter O'Hara
115. Pierce MacLochlinn
116. Rena Haverty
117. Rita O'Driscoll
118. Sinead Ní Caluiste
119. Siobhan Casey
120. Terence Walsh
121. Teresa Mann
122. Teresa O'Neill
123. Thomas C McDermott
124. Veronica Ryan

THIRD-LEVEL EDUCATIONAL INSTITUTIONS

Institute of Technology, Tralee

3rd Year Students, Applied Social Care (Legal Studies Module)

125. Aine O'Connor
126. Aishling Cremin
127. Audree Poff
128. Bernadette Murphy
129. Breda Cronin
130. Casey McMahon
131. Catherine Foley
132. Catherine Josey
133. Catherine O'Donoghue
134. Cecilia Tako
135. Ciara O'Sullivan 1
136. Ciara O'Sullivan 4
137. Deirdre C O'Halloran
138. Deirdre Curran
139. Delia A Ward
140. Eavan O'Connor
141. Edel Lawlor
142. Edel Vesey
143. Eibhlin Flynn
144. Eleanor K Coffey
145. Emer Sweeney
146. Emma O'Donnell
147. Francesca Dowling
148. Harriet Browne
149. Jacqueline Halpin
150. Jonathan L Gaffey
151. Julie Brosnan
152. Laura A Spillane
153. Laura O'Carroll
154. Lauren O'Connor

155. Marguerite Crowley
156. Mary O'Donnell
157. Michelle N Collins
158. Michelle Walsh
159. Michelle Moore
160. Niamh Lawlor
161. Noelle Browne
162. Paula P O'Regan
163. Rachel Collins
164. Rosalind Fitzgerald
165. Sarah O'Connell
166. Sheila Morrissey
167. Siobhán McMahon
168. Siobhán O'Donnell
169. Stephanie C KeaneStack
170. Stephanie Cremin
171. Tracy F Moore
172. Tracy Lynch

University College Dublin

MSc - Graduate Diploma in Equality Studies

173. - Joanne O'Grady
 - Laura Shehan
 - Hannah Creedon
 - Maria Shanahan

PRO-FORMA SUBMISSIONS

174. 366 Pro-Forma submissions received

LETTERS TO THE COMMITTEE

175. 15 Letters received from members of the Public

ORAL SUBMISSIONS

1. Dr. Patrick Walsh, Director of Psychological Services, St John of God Services
2. Crisis Pregnancy Agency
3. Rape Crisis Network Ireland
4. Children's Rights Alliance
5. Mr. James Hamilton, Director of Public Prosecutions
6. Mr. Tom O'Malley B.L., Senior Lecturer in Law, NUI Galway

APPENDIX D

COMMITTEE'S HEARINGS AND BRIEFINGS

Thursday, 6 December 2007 (Private Session)

Wednesday, 12 December 2007 (Private Session)

Wednesday, 19 December 2007 (Private Session)

Wednesday, 23 January 2008

Government Rapporteurs on Child Protection:

Professor Finbarr McAuley

Dr. Geoffrey Shannon

Wednesday, 30 January 2008 (Private Session)

Wednesday, 6 February 2008

Children's Rights Alliance

Jillian van Turnhout, Chief Executive

Maria Corbett, Policy Director

Roisin Webb, Legal Policy Officer

Wednesday, 13 February 2008

Ombudsman for Children's Office

Ms. Emily Logan, Ombudsman for Children

Ms. Sophie Magennis, Head of Policy and Research

Mr. Bernard McDonald, Assistant Ombudsman for Children

Wednesday, 20 February 2008

Garda Central Vetting Unit

Assistant Commissioner Michael McCarthy

Detective Chief Superintendent Noel White

Inspector Pat Burke

Wednesday, 27 February 2008 (Private Session)

Wednesday, 5 March 2008

Barnardos

Fergus Finlay, Chief Executive

Norah Gibbons, Director of Advocacy and Central Services

Wednesday, 12 March 2008 (Private Session)

Wednesday, 9 April 2008 (Private Session)

Wednesday, 23 April 2008

Northern Ireland Vetting Authorities

Tom Clarke, General Manager, Access Northern Ireland

Detective Superintendent Dr. Andrew Bailey, Head of Branch for Criminal

Justice in the Police Service of Northern Ireland

Inspector Brian Downey, Criminal Records Office, Police Service of Northern Ireland

Wednesday, 30 April 2008 (Private Session)

Dr. Gerard Hogan S.C., Law School, Trinity College, Dublin

Wednesday, 14 May 2008 (Private Session)

Wednesday, 21 May 2008 (Private Session)

Wednesday, 28 May 2008 (Private Session)

Wednesday, 4 June 2008 (Public Session)

Wednesday, 18 June 2008 (Private Session)

Wednesday, 25 June 2008 (Private Session)

Social Work Staff from the Child Protection and Welfare Services of the Health Service Executive

Ms. Margaret Mitchell and Mr. Derek Hanley

Wednesday, 2 July 2008 (Private Session)

Dr. Patrick Walsh, Director of Psychological Services with the St John of God Mental Health Services

Wednesday, 9 July 2008 (Private Session)

Wednesday, 16 July 2008 (Private Session)

Wednesday, 23 July 2008

Crisis Pregnancy Agency

Katharine Bulbulia, Chairperson

Caroline Spillane, Director

Maeve O'Brien, Policy Officer

Orla McGowan, Education and Information Officer

Tuesday, 9 September 2008

National Youth Council of Ireland

Mary Cunningham, Director

James Doorley, Assistant Director

Gearóid O Maoilmhichil, National Coordinator of Child Protection.

Wednesday, 24 September 2008 (Private Session)

Wednesday, 1 October 2008

Rape Crisis Network Ireland

Fiona Neary, Executive Director

Clíona Saidléar, PhD, Policy and Communications Director

Caroline Counihan, Legal Director

Wednesday, 8 October 2008

Children's Rights Alliance

Jillian van Turnhout, Chief Executive

Maria Corbett, Policy Director

Wednesday, 15 October 2008 (Private Session)

Wednesday, 22 October 2008 (Private Session)

Wednesday, 29 October 2008 (Private Session)

Mr. James Hamilton, Director of Public Prosecutions

Wednesday, 5 November 2008

Mr. Tom O'Malley B.L., Senior Lecturer in Law, NUI Galway

Wednesday, 26 November 2008 (Private Session)

Wednesday, 28 January 2009 (Public Session)

Wednesday, 4 February 2009 (Private Session)

Wednesday, 11 February 2009 (Private Session)

Wednesday, 25 February 2009 (Private Session)

Wednesday, 11 March 2009 (Private Session)

Wednesday, 25 March 2009 (Private Session)
Wednesday, 1 April 2009 (Private Session)
Wednesday, 8 April 2009 (Private Session)
Wednesday, 29 April 2009 (Private Session)
Wednesday, 13 May 2009 (Meeting adjourned due to lack of quorum)
Wednesday, 20 May 2009 (Private Session)
Wednesday, 29 April 2009 (Meeting Cancelled)
Wednesday, 17 June 2009 (Private Session)
Wednesday, 24 June 2009 (Private Session)
Wednesday, 1 July 2009 (Private Session)
Wednesday, 8 July 2009 (Private Session)
Wednesday, 15 July 2009 (Private Session)
Wednesday, 2 September 2009 (Private Session)
Wednesday, 23 September 2009
Presentation from 6 Children's Groups;
Barnardos
 Mr. Fergus Finlay
CARI
 Ms. Mary Flaherty
Dublin Rape Crisis Centre
 Ms. Ellen O'Malley-Dunlop
ISPCC
 Mr. Ashley Balbirnie
One in Four
 Ms. Maeve Lewis
Rape Crisis Network of Ireland
 Ms. Fiona Neary
Wednesday, 7 October 2009 (Private Session)
Wednesday, 14 October 2009 (Private Session)
Wednesday, 21 October 2009 (Private Session)
Wednesday, 4 November 2009 (Private Session)
Wednesday, 18 November 2009 (Private Session)
Wednesday, 25 November 2009 (Private Session)
Wednesday, 2 December 2009 (Private Session)
Wednesday, 9 December 2009 (Private Session)
Wednesday, 13 January 2010 (Private Session)
Wednesday, 20 January 2010 (Private Session)
Wednesday, 3 February 2010 (Private Session)
Wednesday, 10 February 2010 (Private Session)

APPENDIX E

UN CONVENTION ON THE RIGHTS OF THE CHILD

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

Entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

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,

Recognizing 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,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and

recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

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.

Article 3

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.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

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.

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States 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.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility

for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required,

the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) 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.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the

present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention.1/ The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

APPENDIX F

ARTICLE 24 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

ARTICLE 24

THE RIGHTS OF THE CHILD

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

APPENDIX G

TWENTY-EIGHT AMENDMENT OF THE CONSTITUTION BILL 2007



**TWENTY-EIGHTH AMENDMENT OF THE CONSTITUTION
BILL 2007**

As initiated

ARRANGEMENT OF SECTIONS

Section

1. Amendment of the Constitution.
2. Citation.

SCHEDULE

PART 1

PART 2

[No. 14 of 2007]



**AN BILLE UM AN OCHTÚ LEASÚ IS FICHE AR AN
mBUNREACTH 2007**

Mar a tionscnaíodh

RIAR NA _NALT

Alt

1. An Bunreacht a leasú.
2. Lua.

AN SCEIDEAL

CUID 1

CUID 2

[Uimh. 14 de 2007]



**TWENTY-EIGHTH AMENDMENT OF THE CONSTITUTION
BILL 2007**

BILL

entitled

AN ACT TO AMEND THE CONSTITUTION. 5

WHEREAS by virtue of Article 46 of the Constitution, any provision of the Constitution may be amended in the manner provided by that Article:

AND WHEREAS it is proposed to amend the Constitution:

BE IT THEREFORE ENACTED BY THE OIREACHTAS AS 10
FOLLOWS:

Amendment of the
Constitution.

1.—The Constitution is hereby amended as follows:

- (a) section 5 of the Irish text of Article 42 shall be repealed,
- (b) section 5 of the English text of Article 42 shall be repealed,
- (c) the Article the text of which is set out in *Part 1* of the 15
Schedule shall be inserted after Article 42 of the Irish
text,
- (d) the Article the text of which is set out in *Part 2* of the
Schedule shall be inserted after Article 42 of the English 20
text.

Citation.

2.—The amendment of the Constitution effected by this Act shall be called the Twenty-eighth Amendment of the Constitution.

This Act may be cited as the Twenty-eighth Amendment of the Constitution Act 2007.



AN BILLE UM AN OCHTÚ LEASÚ IS FICHE AR AN
mBUNREACTH 2007

BILLE

dá ngairtear

5 ACHT CHUN AN BUNREACTH A LEASÚ.

DE BHRÍ gur cead, de bhua Airteagal 46 den Bhunreacht, foráil ar bith den Bhunreacht a leasú ar an modh a shocraítear leis an Airteagal sin:

AGUS DE BHRÍ go bhfuil beartaithe an Bunreacht a leasú:

10 ACHTAÍTEAR AG AN OIREACHTAS AR AN ÁBHAR SIN
MAR A LEANAS:

1.—Leasaítear an Bunreacht leis seo mar a leanas:

An Bunreacht a
leasú.

- (a) aisghairfear alt 5 den téacs Gaeilge d’Airteagal 42,
- (b) aisghairfear alt 5 den téacs Sacs-Bhéarla d’Airteagal 42,
- 15 (c) cuirfear an tAirteagal a bhfuil an téacs de leagtha amach i
gCuid 1 den *Sceideal* isteach i ndiaidh Airteagal 42 den
téacs Gaeilge,
- (d) cuirfear an tAirteagal a bhfuil an téacs de leagtha amach i
gCuid 2 den *Sceideal* isteach i ndiaidh Airteagal 42 den
20 téacs Sacs-Bhéarla.

2.—(1) An tOchtú Leasú is Fiche ar an mBunreacht a thabharfar Lua.
ar an leasú a dhéantar ar an mBunreacht leis an Acht seo.

(2) Féadfar an tAcht um an Ochtú Leasú is Fiche ar an
mBunreacht 2007 a ghairm den Acht seo.

SCHEDULE

PART 1

LEANAÍ

Airteagal 42(A)

1. Admhaíonn agus deimhníonn an Stát cearta nádúrtha dochloíte gach linbh. 5
2. 1° I gcásanna neamhchoiteanna nuair a tharlaíonn, ar chúiseanna corpartha nó ar chúiseanna morálta, nach ndéanann tuistí aon linbh a ndualgas don leanbh sin, ní foláir don Stát, ós é an Stát caomhnóir leas an phobail, iarracht a dhéanamh le beart oiriúnach chun ionad na dtuistí a ghlacadh, ag féachaint go cuí i gcónaí, áfach, do chearta nádúrtha dochloíte an linbh. 10
- 2° Féadfar socrú a dhéanamh le dlí maidir le leanbh a uchtáil nuair nach bhfuil a ndualgas déanta, ar feadh cibé tréimhse a fhorordófar le dlí, ag na tuistí don leanbh agus nuair is riachtanas chun leasa an linbh é. 15
3. Féadfar socrú a dhéanamh le dlí maidir le haon leanbh a shuíomh go saorálach lena uchtáil agus maidir le huchtáil aon linbh.
4. Féadfar socrú a dhéanamh le dlí, in imeachtaí os comhair aon chúirte i ndáil le huchtáil, caomhnóireacht nó coimeád aon linbh, nó i ndáil le rochtain ar aon leanbh, go ndéanfaidh an chúirt iarracht chun leas an linbh sin a áirithiú. 20
5. 1° Féadfar socrú a dhéanamh le dlí maidir le faisnéis a bhailiú agus a mhalartú ar faisnéis í a bhaineann le leanaí, nó daoine eile de cibé aicme nó aicmí a fhorordófar le dlí, a chur i mbaol nó i ndáil le dúshaothrú gnéasach nó mí-úsáid ghnéasach a dhéanamh orthu nó i ndáil leis an bpriacal go dtarlóidh na nithe sin. 25
- 2° Ní dhéanann aon fhoráil atá sa Bhunreacht seo aon dlí lena ndéantar socrú maidir le cionta dliteanais iomláin nó dliteanais dhocht a dhéantar in aghaidh linbh faoi bhun 18 mbliana d'aois, nó i dtaca le leanbh den sórt sin, a chur ó bhail dlí. 30
- 3° Ní dhéanann forálacha an ailt seo den Airteagal seo teorainn a chur, in aon slí, le cumhachtaí an Oireachtais chun socrú a dhéanamh le dlí maidir le cionta eile dliteanais iomláin nó dliteanais dhocht. 35

PART 2

CHILDREN

Article 42(A)

1. The State acknowledges and affirms the natural and imprescriptible rights of all children. 40

AN SCEIDEAL

CUID 1

LEANAÍ

Airteagal 42(A).

- 5 1. Admhaíonn agus deimhníonn an Stát cearta nádúrtha dochloíte gach linbh.
2. 1° I gcásanna neamhchoiteanna nuair a tharlaíonn, ar chúiseanna corpartha nó ar chúiseanna morálta, nach ndéanann tuistí aon linbh a ndualgas don leanbh sin, ní foláir don Stát, ós é an Stát
10 caomhnóir leas an phobail, iarracht a dhéanamh le beart oiriúnach chun ionad na dtuistí a ghlacadh, ag féachaint go cuí i gcónaí, áfach, do chearta nádúrtha dochloíte an linbh.
- 2° Féadfar socrú a dhéanamh le dlí maidir le leanbh a uchtáil nuair nach bhfuil a ndualgas déanta, ar feadh cibé tréimhse a
15 fhorordófar le dlí, ag na tuistí don leanbh agus nuair is riachtanas chun leasa an linbh é.
3. Féadfar socrú a dhéanamh le dlí maidir le haon leanbh a shuíomh go saorálach lena uchtáil agus maidir le huchtáil aon linbh.
4. Féadfar socrú a dhéanamh le dlí, in imeachtaí os comhair aon chúirte i ndáil le huchtáil, caomhnóireacht nó coimeád aon
20 linbh, nó i ndáil le rochtain ar aon leanbh, go ndéanfaidh an chúirt iarracht chun leas an linbh sin a áirithiú.
5. 1° Féadfar socrú a dhéanamh le dlí maidir le faisnéis a bhailiú agus a mhalartú ar faisnéis í a bhaineann le leanaí, nó daoine eile de cibé aicme nó aicmí a fhorordófar le dlí, a chur i mbaoil nó i
25 ndáil le dúshaothrú gnéasach nó mí-úsáid ghnéasach a dhéanamh orthu nó i ndáil leis an bpriacal go dtarlóidh na nithe sin.
- 2° Ní dhéanann aon fhoráil atá sa Bhunreacht seo aon dlí lena ndéantar socrú maidir le cionta dliteanais iomláin nó dliteanais dhocht a dhéantar in aghaidh linbh faoi bhun 18 mbliana d'aois, nó i dtaca le leanbh den sórt sin, a chur ó bhail dlí.
- 3° Ní dhéanann forálacha an ailt seo den Airteagal seo teorainn a chur, in aon slí, le cumhachtaí an Oireachtais chun socrú a
35 dhéanamh le dlí maidir le cionta eile dliteanais iomláin nó dliteanais dhocht.

CUID 2

CHILDREN

Article 42(A).

- 40 1. The State acknowledges and affirms the natural and imprescriptible rights of all children.

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. 5
- 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.
3. Provision may be made by law for the voluntary placement for adoption and the adoption of any child. 10
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. 15
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.
- 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. 20
- 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. 25

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