



**Report to the**

**Joint Committee on the Constitutional  
Amendment on Children**

An analysis by the  
**National Mens Council of Ireland**

**February 2008**

The State has failed to honour its existing guarantee and pledge in the Constitution to protect the Family and so is failing to protect the welfare of all the Nation's children.

#### **PREAMBLE**

There is a presumption in the Natural Law that Children's Rights are protected by their Natural Parents in a Married Family.

This is acknowledged in Bunreacht na hÉireann by Articles 41 and 42.

This presumption is known as the Subsidiarity Principle and was cogently expressed recently by Justice Hardiman in the Supreme Court in *N. & anor. -v- Health Service Executive & ors.* [2006] IESC 60, wherein he stated,

*"The effect of our constitutional dispensation is that, presumptively, the right to form a view of the child's welfare and to act on it belongs to the parents. The facts of this case make it unnecessary to consider the difficulties which arise where the parents themselves are in disagreement as to how the welfare of the child may best be secured. There are certain misapprehensions on which repeated and unchallenged public airings have conferred undeserved currency. One of these relates to the position of children in the Constitution.*

*It would be quite untrue to say that the Constitution puts the rights of parents first and those of children second. It fully acknowledges the "natural and imprescriptible rights" and the human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights. The Constitution does not prefer parents to children. The preference the Constitution gives is this: it prefers parents to third parties, official or private, priest or social worker, as the enablers and guardians of the child's rights. This preference has its limitations: parents cannot, for example, ignore the responsibility of educating their child. More fundamentally, the Constitution provides for the wholly exceptional situation where, for physical or moral reasons, parents fail in their duty towards their child. Then, indeed, the State must intervene and endeavour to supply the place of the parents, always with due regard to the rights of the child.*

*If the prerogatives of the parents in enabling and protecting the rights of the child were to be diluted, the question would immediately arise: to whom and on what conditions are the powers removed from the parents to be transferred? And why?*

*There is, of course, no doubt that the form and content of our constitutional dispensation in regard to the family and children was significantly influenced by Christian, and specifically Catholic, teaching on those subjects. But that is not to say that the preference for the natural parents as carers for a child is exclusively referable to those sources. In my judgment in North Western Health Board v. H.W. [2001] 3 IR 622 I expressed the view that this preference for the parents as the natural and primary guardians was equally consistent with quite different strands of thought, even a Benthamite one.*

*I reiterate that view here, without repeating what was said in the judgment referred to. A presumptive view that the children should be nurtured by their parents is, in my view, itself a child centred one and the alternative view, calling itself "child centred" because it is prepared more easily to dispense with the rights and duties of parents must guard against the possibility that in real individual cases it may become merely a proxy for the views of social workers or other third parties.*

*That is not for a moment to belittle the need for State intervention in the nurturing of children in appropriate cases, but to emphasise that the presumption mandated by our Constitution is a presumption that the welfare of the child is presumptively best secured in his or her natural family."*

The National Mens Council of Ireland and Family Rights Institute of Ireland are approached continuously by members of Families who are experiencing difficulties in carrying out the duties to their children that were outlined by Justice Hardiman.

More and more parents are beginning to realise that the difficulties they experience are not actually created by their spouse and themselves but are directly created by government policy and rules.

As stated the principle of Family subsidiarity governs how the law is applied. That principle simply states that no third party can act in any way that would affect the welfare of children within a Married Family unless they have in their possession an application for them to do so signed by BOTH parents/Guardians.

This also means that there has to be bilateral agreements regarding their child's health, their child's education and schooling, how they are to be provided for and maintained and of course, where they are to live.

These agreements can not be revoked unilaterally by either parent/Guardian.

It follows necessarily that a third party can not start acting in a manner that will affect the welfare of a child in a Married Family without the approval in writing of BOTH parents/Guardians and must immediately stop acting if required by EITHER parent/Guardian. A third party can NOT rely on the authority of only one of the child's parents/Guardians to support any action they are asked to undertake in relation to a child of a Married Family if they are aware that the other parent/Guardian does not approve.

This primacy of Married parents over any third party to the care, education and protection of their children is the founding principle of Articles 41 and 42 of Bunreacht na hÉireann.

The State must honour its guarantees and pledges made in Article 41 where it states:

*41.1.2° 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.*

*41. 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.*

As the person in government who is responsible for the implementation of the law, the Minister for Justice must ensure that every other Minister and every worker in every Department of government is aware of the Subsidiarity Principle and that every Rule, Policy and Guideline issued by government upholds the Subsidiarity Principle.

We are finding however that in almost every aspect of government policy this Subsidiarity Principle is being violated.

We can provide copious examples with certain evidence of this occurring and we would like to have the opportunity to present such evidence to the Committee.

We believe that any consideration of Children's Rights and Children's Protection must have at its core an investigation of the operation of the Subsidiarity Principle by the government and State bodies.

We assert that where the Subsidiarity Principle is violated Children's Rights are necessarily violated and certain harm will come to them.

We assert that the best guarantee for a Child's Protection is for the State to honour its pledge to guard with special care the institution of Marriage and protect it from attack.

We assert that all government primary legislation, and subsidiary legislation in the form of policies, regulations and guidelines must be in conformity with the Subsidiarity Principle and support Marriage as the optimum institution for the procreation and upbringing of Children.

We assert that, as has been done in the name of Equality, by the imposition of "Gender mainstreaming" throughout government there must be "Marriage mainstreaming and respect for the Subsidiarity Principle" throughout government if we genuinely wish to protect Children and their Rights.

### **OUR RESPONSE TO THE 28TH. AMENDMENT OF THE CONSTITUTION BILL**

Our response that follows is directly relevant to the Orders of Reference of the Joint Committee on the Constitutional Amendment for Children asked to examine the 28th. Amendment of the Constitution Bill at (a) and to make suggestions at (c). We find that the Orders of Reference at b) are inappropriate as the phrases provided in (i) to (vii) are so markedly different from the actual text of the Bill that any consideration of them would be diversionary and would unavoidably lead to unnecessary confusion over what is already a highly complex issue.

Our initial thoughts are that the basic concept which places the fundamental rights of children in a new section, titled, "Children" is flawed as, by so doing, it isolates children from the section dealing with the Family and the section which deals with parental rights and duties regarding the children's Education and upbringing.

In examining the actual text the first observation one must make is that there is an unhelpful conflation of the two circumstances that children might find themselves in. It would appear that, without making this explicit, we are supposed to accept that the two forms of marital status that children are brought up in are equal and can be treated as a single homogeneous circumstance. This 'fudge' of the 'status' issue renders most of the proposed amendments to be either unhelpful to protect children or downright guaranteed to provide them with less protection.

We analyse how the amendments might affect the welfare and safety of children by examining the proposals section by section.

## **1. THE STATE ACKNOWLEDGES AND AFFIRMS THE NATURAL AND IMPRESCRIPTIBLE RIGHTS OF ALL CHILDREN.**

The Bill at section 1 says nothing as to what the natural and imprescriptible rights of all children are. We can only assume that the intention here is to rely on the established case law handed down by the Superior Courts. In that respect clause 1 achieves nothing. To date the case law, in conformity with the existing provisions of the Constitution, necessarily draws a sharp distinction between the rights of children born within & without wedlock. As already stated, it appears to be the intention of the amending Bill to create an equality of rights amongst all children regardless of their social status or background but fails entirely to show how this can be achieved.

It is opportune to note, as this appears to have escaped those with Marxist/socialist tendencies, that discrimination on the grounds of inequality is, in itself, not unlawful and is necessarily permitted under Article 40.1 under Personal Rights where it states, "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

This means that it is legitimate and often of benefit to the Common Good for discrimination on the grounds of capacity, physical and moral, and of social function. The difference that exists between parents who have submitted themselves to the rigours of regulation and self-restraint required by the making of a covenant of Marriage with God and those who have opted to shun the customs of the people and act selfishly without regard to the Common Good requires the state to discriminate between them. Sadly having made such choices, those who spurn what is best for their children will inevitably create a circumstance for their children which is inferior in potential to children born within a Married Family.

Given this reality of life that all children are not born in equal situations, and that some children are born outside of marriage and are perceived as being at a disadvantage, this provision could entitle a socialist-leaning State, with Equality their banner rather than the Common Good, to take affirmative action to offer disproportionate assistance in favour of the unmarried 'family' on a child's rights basis, massively increasing the already existing incentives to mothers and fathers not to get married and to have children outside of the accepted civilized rules for procreation and the stable institution of the Married Family that is the foundation of our society. Prima Facie this is in conflict with the existing

provisions and inevitably must throw the Constitution into turmoil. Anything that would act in this manner would reduce the effectiveness of the Constitution in its function of protecting the people from the possibilities of unfettered state power and increase the risk of harm to children.

Additionally it can be argued and therefore presumably will be argued that an amendment, especially one specifically for children should outweigh the cherished family rights so dear to the hearts of the people as so clearly demonstrated in the Reports to the All-Party Oireachtas Committee on the Constitution 2006, when despite an enormous campaign to persuade them otherwise, the people successfully defended their rights against this attack.

It is difficult to see this as anything other than a stealth attack on those rights in the face of that defeat. It certainly does not follow the recommendations of the All-Party Oireachtas Committee on the Constitution which advocated a simple amendment affirming "equality before the law for 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.**

2.1 is a new paraphrasing of Article 42.5 by the addition of the words "of any child" and "such child" in place of the words "their children" bringing about, in this way a forced disconnection between the previous close association of the child and their parents as established in the existing family provisions. Additionally, this provision retains the concept of "moral failure" which was formally derived from Article 41.1.1.

Inevitably, if this is to be done for ALL children, it must involve the examination of the behaviour of people who have, in many cases, chosen to procreate outside of the moral institution of marriage. It is difficult to see on this basis how moral failure is to be judged. If one were to take for example the case of a mother who has six children - all by different fathers - and who cannot recall who those fathers might be., what further moral failure, in terms of her feelings of responsibility to these children, could she be deemed to fall into? By this standard, if such a mother is allowed to act so obviously without concern for the wellbeing of her children and escape official condemnation, surely no person who had subjected themselves to the regulations and self-control of

their behaviour imposed by marriage and yet who's efforts were not sufficient, could ever be accused of moral failure.

Where the text, as in this case refers to moral failure by "parents" in the plural it is likely that a case will be made that moral failure is not a test where, as in this case, the mother has opted to be a "parent" singular!

It has to be said of course that the potential for failure in the married parent is far greater than that of the unmarried parent Or one could say, in the alternative. that by lumping together the married and unmarried groupings in one clause it is an attempt to do away with the unique moral institution of the married family by attributing "moral" status to every grouping of children living with any combination of adults, heterosexual, bisexual or homosexual.

The established case law (see in particular G v an Bórd Uachtála) on the duties of parents clearly distinguishes that unmarried parents can and do, partly or wholly, alienate their limited responsibilities toward their children, whereas Married parents cannot and are morally bound to look to their children's every need for their entire childhood. It is not possible within the same provision to join together such widely differing degrees of duty. Nothing in the new provision changes these facts so it is very difficult to see by the addition of the words "any child" how children will be afforded any extra protection. Rather there exists the potential for the Married Family to fail in their far greater duties to their children relative to those who choose to shun marriage, thus leading to the conclusion that disproportionately more children from Married Families will be taken away by the state under this new provision.

**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.**

2.2 There have been lately so many incidences of state failure acknowledged in the Courts in high profile cases that any confidence in the competence of state bodies such as the HSE to properly protect children's rights or comprehend the law in relation to care and adoption proceedings is now at an all time low. For example, the failure of the HSE in the Baby Anne case; the failure of the HSE in the recent judgement in the High Court by Justice Henry Abbott, the well documented failure by the HSE where they wrongfully took autistic children into care; the failure in the

O'Dolan case where the children were taken into care by the HSE because the mother had a stroke but without the consent of the husband and without any court order to do so; the shameful protection by the Eastern Health Board of Dr. Moira Woods whom the Medical Council eventually found the Health Board had supported her, without applying any proper procedures, to blight the lives and compromise the welfare of children in over a thousand families and the finding of the 'Jimmy Jones' internal report which exposed the HSE's failure to train social workers into any competent understanding of the applicable law in Ireland to the extent that there was a widespread and institutional belief amongst HSE workers that they did not have to have regard for the primacy of parents as required by the principle of family subsidiarity. (Further details on all of these cases can be supplied on request.)

In the face of these findings it is entirely inappropriate to expect the public to extend the powers of, for example the HSE, to hold on to children, operating under advice of private solicitors, in lower courts of summary justice, with a view to placing those children for adoption.

### **3. PROVISION MAY BE MADE BY LAW FOR THE VOLUNTARY PLACEMENT FOR ADOPTION AND THE ADOPTION OF ANY CHILD.**

3 Is in direct conflict with the parental duty within a family which is inalienable and imprescriptible. This provision inevitably attacks these rights within the family with the obvious outcome of weakening the family's position and giving more power to that of the state in society.

This is a well documented "pet cause" of Geoffrey Shannon who, in recent years, has been outspoken in his dislike of the strength of the Married Family in Irish law. His claim that the benefit of adoption to a small number of children in care (under what may well be questionable court orders) far outweighs the protection provided to all Married Families and society as a whole, is plainly unfounded. Bad cases always make bad law. As a claimed expert he should know that.

**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.**

4 When it was previously proposed by the All-Party Oireachtas Committee on the Constitution to insert the word and concept of "Custody" in to the Constitution the National Mens Council of Ireland asked the Minister of Justice to explain its meaning and usage. Sadly he declined to respond to our request for clarification and therefore the meaning of this word remains a mystery for ordinary people. As no one in the country is in a position to make an informed decision as to whether this provision containing the undefined concept of custody would be of benefit to children any approval of this amendment would fail as it would not be considered "informed" consent. (Copy of letter to Minister available on request).

Proceedings before a court regarding adoption, guardianship, custody or access may be in the form of private family law or public family law. Where the proceedings are of a private family law nature there is a presumption that the applicant and respondent are acting in their capacity as fit parents/Guardians and that they are simply looking for directions from the court by way of arbitration between their two viewpoints.

However this new provision will allow the court to completely disturb the settled principle of Family Subsidiarity, ie that the children's best interest and welfare is the concern of the parents/Guardians exclusively. This new provision would interfere with the private law nature of such applications and in effect render them a public law hearing with the court now acting as a super-parent entitled to make decisions over and above the wishes of the parents in what it believes - not the parents - to be in the child's best interest. That is plainly in conflict with the concept that the state cannot step in except when there is a finding of parental failure (as at 2.1 in these proposed amendments!) as this provision will allow the state to do so where the parents are acting entirely responsibly as parents/Guardians of the child's best interests. Wherever the state has in the past acted as a parent to children - ie where they are in care - the outcomes for those children has been appalling. 60%+ of inmates of our prison and reformatories are the products of such State 'care'.

**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.**

5.1. The first comment that must be made is that this clause specifically refers to information relating to "children, or other persons of such a class or classes as may be prescribed by law". Clearly by deduction "other persons" means non children so this provision cannot be in a section about children.

Our research shows the information they refer to is already collected by the HSE under existing statutory law. This new provision therefore is completely unnecessary except if this is to allow the HSE to collect and exchange information outside of what is allowed by the law and one must question if we are being asked to authorize such activities now as to authorise their illegality heretofore.

The Constitution allows the state to collect information about criminals. They want to now collect a whole new section of information on risk that is indefinable and un-monitorable. One has to ask why these particular abuses of children have been selected for the collection and exchange of information rather than the more prevalent situation where there is evidence a child has been physically mistreated or neglected or emotionally abused or exploited for financial gain.

The idea of risk, which is necessarily a subjective decision, offends the very basis of constitutional rights to one's good name and the presumption of one's innocence unless proven otherwise. There appears to be no good reason to create risk assessment when we have the benefit already of certain evidence in the form of criminal records. The only additional benefit that the framers of this amendment are seeking is that a risk assessment might be made and circulated among certain organizations over which the public have no say. This then questions who is going to decide on which organizations or bodies are to be involved in the collection and exchange of such information and how that information might be used against a person who is a deemed "risk". Such an exercise of unregulated risk assessment and unregulated collection and exchange of that risk assessment very clearly offends the very principles of natural justice in that a person will never be given an opportunity to have their side heard.

**5.2 NO PROVISION IN THIS CONSTITUTION INVALIDATES ANY LAW PROVIDING FOR OFFENCES OF ABSOLUTE OR STRICT LIABILITY COMMITTED AGAINST OR IN CONNECTION WITH A CHILD UNDER 18 YEARS OF AGE.**

5.2 This is obviously a knee jerk reaction to the Supreme Court striking down the law on statutory rape as being unconstitutional as it denied the accused an opportunity to present a defence. Within the wording there is no useful qualification or definition of the term "offences" which might be committed "against or in connection with a child under 18 years of age". This renders the provision too open to loose interpretation to be acceptable.

The reference to a child under 18 years of age flows from the reality that a person must be Married to lawfully have sex and one is prohibited from marrying without a court order under 18 years of age. Therefore the drafters of this provision were forced, at last, to acknowledge the moral institution of Marriage. Notwithstanding this it is not possible for a provision in the constitution to indemnify a law from being unconstitutional. The constitution provides a framework for all legislation. There cannot exist a provision in a Constitution that allows law to override the authority of the Constitution.

**5.3 THE PROVISIONS OF THIS SECTION OF THIS ARTICLE DO NOT, IN ANY WAY, LIMIT THE POWERS OF THE OIREACHTAS TO PROVIDE BY LAW FOR OTHER OFFENCES OF ABSOLUTE OR STRICT LIABILITY.**

5.3 On its face this provision does not refer to children and is unacceptable on the basis that it gives a free hand to the Oireachtas - or to the EU - to legislate in a way that would disturb the framework that exists in the Constitution to protect the people from the unfettered power of the state or the EU. The Oireachtas operates under the structure created by the Constitution. It cannot operate outside of this structure. It is so obvious that this is being put in here for ulterior motives that it is not even listed for discussion at section (b) of the terms of reference of the committee.

## **CONCLUSIONS**

There is copious evidence to show that in seeking our authorisation of these new provisions, which appear to entitle them to interfere with the Married Family rather than to protect children, the state are merely asking us now to legitimise, retrospectively, what they have been wrongfully doing for a long number of years.

Our recommendation in the light of our analysis would be to dispense with the existing text in its entirety to be replaced by a new article which will actually protect the rights of children by strengthening and assisting, in a practical way, parents to perform their duties in conformity with the Family Subsidiarity Principle.

The evidence unearthed by the National Men's Council and supported by other groups, many of whom made submissions to the All-Party Oireachtas Committee on the Constitution, clearly demonstrates that the State has failed to provide for children born outside the Married Family. In the allocation of responsibility for children's protection it is established that within the Married Family the parents hold that duty exclusively whereas for children born outside of the family the protection of children is a duty shared in partnership between the parent(s) and the state.

It is vitally important therefore that every citizen is aware of their parental rights in each circumstance in relation to the State.

In the Married Family it is clearly detrimental to the children's welfare if there is a failure by the state to facilitate the vindication of the rights of the Family under Public Law.

There is a need therefore for a provision in the Constitution to facilitate a parent/Guardian to make a finding in a Public Law court that a person or body, not being a guardian jointly with them, has violated the proper exercise of their authority.

Such a public remedy is essential to entitle a parent/Guardian in a Married Family to restore their full custodial rights against any person or third party who refuses to acknowledge the applicable law.

It is the experience of many parents that when they are dealing with schools, with Gardaí, with doctors, social workers and civil servants that their authority over their children is being compromised on the basis of legal advice given to the third party.

Whereas this legal advice is more often incorrect, ordinary parents find themselves, due to their lack of resources, unable to challenge this position. What they need is a simple clear statement in the Constitution which spells out for all to see that anybody

who interferes with their authority and the subsidiarity principle will be punished under public law.

Ordinary parents cannot be expected to have the resources to go to the High Court for a writ of Habeas Corpus every time that a third party acts in contempt of their authority especially where that third party has at its disposal the resources of the state.

The Constitution exists to protect the fundamental liberties of the people and to act as a shield against the awesome power of the state precisely because the state has a natural impulse to think that it knows best and to therefore interfere with and override the decisions of parents.

In the current "Nanny State" climate emboldened by the EU superstate ideal, the state, on a daily basis, is seeking to invade the privacy of the Married Family, privacy that is a prerequisite for a society to be considered free and civilized.

A simple provision in the Constitution such as we describe, could provide a way of rebalancing that dynamic which is threatening to overpower the Married Family and put the Nation's children at risk.

God bless,  
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*Holy Father, You call us to share the power and promises of  
Your Son, Jesus Christ.*

*We pray that we may become a holy Family, so alive in His  
Spirit of loving kindness and justice, that we each become the  
Apostle You call us to be, with the wisdom and courage to  
change the world according to Your will and purpose.*

*Amen*