

## ***Joint Oireachtas Committee – Referendum on Children***

### ***Submission by Youth Work Ireland***

At the outset while welcoming the opportunity to make this submission we must draw attention to the fact that broadly similar issues have been examined by a number of similar committees down the years. The recent Oireachtas sub-committee on child protection reported in 2006, the Constitutional Review Group reported in 1996 and a committee on the family and the Constitution in 2005. These are important matters and need attention; while legislation and constitutional change should not be rushed we do believe a certain amount of reflective urgency is needed to restore public confidence in this area of law and policy.

We also note the terms of reference for the committee and the wording of the previous bill differ in certain areas. For example in the terms of reference 1.b.vi no longer mentions the concept of endangerment which may be very relevant to child protection practices which did feature in the proposed article 42 a 5.1 Similarly 1.b.vii mentions sexual offences whereas the proposed 42 a 5.2 does not.

#### **Substantive Issue – Rights of the Child**

Youth Work Ireland supports the United Nations Convention on the Rights of the Child and its full implementation in Irish law. We see this as the best, most agreed and most effective way of dealing with the rights of children and young people. The incorporation of UN Convention into Irish law should be the aim of any children's rights referendum.

While the dualist nature of our constitution presents some difficulties in this regard in many instances these seem to be over played and the inordinate amount of time now since ratification has an impact on children and young people in this country. Indeed the U.N. Committee in its concluding observations following the states report in 2006 said.

“The Committee expresses regret that the Convention has not been incorporated into domestic law as recommended by the Committee in its previous concluding observations...The Committee encourages the State party to take further action to incorporate the Convention into domestic law.”

Article 41 of the Constitution is relevant to the debate on Children's Rights and the full implementation of the UNCRC. The report of the Constitutional Review Group as far back as 1996 pointed to the shortcomings of the Constitution's provisions on fundamental rights. Clearly the concept and definition of the family has changed radically since 1937. Approximately 1/3 of all children are born outside marriage today and while legislation may cover much of this area it does seem appropriate that our basic law should reflect these changes.

The courts have declared that the family in the Constitution is the one based on marriage. This has implications for children's rights. Thus a clear statement of children's rights should not be hampered by any other constitutional provisions. It may be debatable whether this involves changes to article 41 itself or whether changes in other areas will suffice however the intent to obtain the full implementation of the U.N. Convention should be clear.

Since the report of the Kilkenny Incest Investigation there has been a growing acceptance that the rights of the child need express recognition in the Constitution. There may be certain aspects of children's rights in the Constitution but often they are unenumerated and can end up being secondary considerations. The courts have often pointed to the rights of the family as a unit being a primary consideration. The Constitutional Review Group suggested amending Article 41 to at once cover both the rights of the child and those of parents. This remains an attractive proposition as in the vast bulk of relevant cases children and parents are actually on the one side trying to vindicate the rights of the child. The group felt express mention of the child in Article 41 would resolve any conflicts or confusion.

The issue we are confronted with is how to give proper effect to the UN Convention in Irish Law. The previously proposed amendment falls well short of this aim in our view. It would leave a lot up to judicial activism which we are not sure is as common as in the past. Therefore it seems we are looking for a simpler and more direct form of transposition. It may well be worth looking at other models of how this is done under our own legal system.

Since 1973 Ireland has ratified a number of E.U. treaties and they have direct effect. This is simply done by giving the state the power to ratify the treaty in a referendum thus removing the constitutional bar. The potential changing nature of the convention is also covered as recent EU treaties have provided for the state to take on certain types of flexibility for future changes in certain areas. Such a method provides for simplicity and understanding an important element in an area where we would wish there to be maximum public understanding.

Failing this the South African model would seem to be an attractive approach allowing for the incorporation directly of the specific rights set out in the U.N. Convention.

### **South African Constitution**

(1) Every child has the right to a name and a nationality from birth; to family care or parental care, or to appropriate alternative care when removed from the family environment; to basic nutrition, shelter, basic health care services and social services; to be protected from maltreatment, neglect, abuse or degradation; to be protected from exploitative labour practices; not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age; or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under [other] sections, the child may be detained only for the shortest appropriate period of time, and has the right to be kept separately from detained persons over the age of 18 years; and treated in a manner, and kept in conditions, that take account of the child's age; to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

This approach would substantially improve the previous wording.

### **Best Interest Principle**

Here again the U.N. Committee on the Rights of the Child said that Ireland had much to do in this area and this is related to the constitutional situation. They requested the state to “Ensure that the general principle of the best interests of the child is a primary consideration without any distinction and is fully integrated into all legislation relevant to children; and ensure that this principle is also applied in all political, judicial and administrative decisions, as well as projects, programmes and services that have an impact on children”. One of the basic necessities of constitutional law is that for balance, at the moment children do not feature adequately when such a balance is being struck.

As previously mentioned children’s right and parent’s rights often go together when it comes to ensuring proper respect from the state.

The 1996 Constitutional Review Group recommended expressly that the best interests of the child receive constitutional recognition as per the Convention. Indeed the phrase "paramount consideration" seems particularly apposite in the constitution. The group saw no conflict between this and the rights of parents.

This principle is crucial to many state services and processes that effect young people such as education, health, policing etc. The voice of the child as set out in the convention also needs strengthening in this country.

Such rights should extend to all children in the state regardless of their citizenship or country of origin.

### Adoption

We do not have any specific practice or insight into this area and would support the observations of the U.N. Committee on the Rights of the Child, the special Rapporteur on Child Protection, the Children's Rights Alliance and relevant NGOs in the area.

### Soft information

Those working with young people have long sought the highest standards in protection for this group. After many years campaigning Garda Vetting was introduced for a wide range of groups. This allows for information about criminal convictions to be supplied to potential employers where the employee has substantial and unsupervised access to children.

However it is widely recognised that many people who may be a risk to children may not have convictions but may have come to the attention of the authorities or previous employers. The provision of well founded information in this area has become known as "soft information. Of course such systems are no substitute for the highest standards of employer practice and child protection. Many other issues impact on these such as staff numbers, ratios and training.

Such a system of soft information sharing exists in Northern Ireland and the UK. Indeed the very term there "Pre Employment Consultancy Service" shows the nature of what is in question, effectively a well policed enhanced system of references. Currently employers seek references all the time and apart from little known data protection rules these could contain any sort of information often given verbally and off the record.

Naturally there may be some concern about such a system, for example that false allegations may be used against a person, or inaccurate information will be stored. It is vital then that proper safeguards be introduced as recommended by the Special Rapporteur Geoffrey Shannon. However we remain convinced that such a system is one valuable pillar in a comprehensive child protection regime.

Attention also needs to be paid the nature of the sex offenders register where registration is often seen as voluntary and may not be enforced as strictly as we would like.

This legislation should be published in advance of any referendum and the Constitution should be used to enable that legislation specifically.

### Strict Liability

The controversy in relation to strict liability and statutory rape was effectively imported into the concept of a children's rights referendum following a number of high profile cases in 2006 most notably the CC case where the Supreme Court ruled that the defence of mistake relating to age must be allowed and struck down the relevant sections of the 1935 Act.

In response the Oireachtas passed the 2006 Act and the Government proposed amending the constitution to once again allow strict liability in relation to sex with young people. However in so doing the Government and the Oireachtas also made a number of changes to the existing and proposed legal regime. The 2006 Act inserted a number of new acts into the definition of "defilement" it failed to make the offence gender neutral. The proposed constitutional amendment covered ages up to 18 and did not specify sexual offences.

Even before this discussion we must note that even the 2006 act was not necessarily a water tight response to the Supreme Court ruling. We share some of the special rapportuer's concern with the inclusion of new sexual acts in the legislation as certain forms of sexual experimentation should of course not attract high criminal sanction but other forms and acts may be much more serious, this is related to the presence of coercion, exploitation and force rather than the nature of the acts. Naturally questions of the maturity and understanding of a young person to sexual acts must to some degree also apply to acts other than actual sexual intercourse.

We have long argued as does Professor Mc Auley for the consolidation of legislation in the area of sexual offences, this featured in our submission to the previous sub-committee on child protection; the idea appears not to have advanced at all. Such a consolidation would aid the understanding and communication of the law in this area particularly to young people and those working with them.

Clearly one of the main concerns for organisations working with teenagers is the prospect of the "criminalisation" of peer relationships. This is an issue if there is a relatively high age of consent or age for strict liability. It is important then that the law recognises such a risk. However it is also important not to be over sensitive to such an issue and ensure that any protection for these situations are not exploited or do not become loopholes in the future.

The very concept of "criminalisation" needs analysis, we are all subject to the criminal law and a transgression of it brings consequences even if we are ignorant of it, any other situation would completely undermine any sense of enforceability. There are currently processes that guard against prosecutions in peer relationships, these include the discretion of the DPP, the concept of *de minimus* where if there is no real harm a prosecution will not be taken and the discretion in sentencing should there be a conviction.

However it is clear that additional protection should be in place. Broadly speaking the concept that a differential rule should apply to those in positions of authority or where the age differential is greater than two years merits examination however it must be done with caution. In such a debate we are often presented with the example of a 15 year old and 17 year old in a relationship to demonstrate the dilemma. Of course reports of the major cases in this area often featured younger people. A minimum

threshold is needed to reassure people. Just because we recognise there is sexual activity at a young age does not mean we must immediately change our laws. Indeed all public health advice is that we should discourage such sexual activity as it is inherently risky

What if the young people are 14 and 16 or 13 and 15? Such relativism leads us somewhere that policy makers simply cannot go. Thus any recognition of peer relationships must be cautious and involve adequate safeguards such as a minimum age and perhaps some role for mediation and alternative dispute resolution (i.e. where parents become aware). This is not to say the law must be involved in a forceful way outside of these circumstances through prosecutions and court cases. Juvenile justice can make use of other methods should it be deemed necessary. The Children's Act and other forms of alternative dispute resolution may be appropriate depending on the situation.

The debate on the age of consent is not necessarily the same as that on the Constitution as the provision inserted is seen as enabling legislation to deal with the general area. However the proposed wording was at it's broadest to ensure any legislative solution will be protected. This may not be the best way of going about this as it can create uncertainty and leaves the way open to future change which was not envisaged in a referendum. We detected no political consensus on a wholesale change to the age of consent at the time of the previous Oireachtas committee either on the part of the young people consulted, the members of the committee, the political parties or NGOs. Indeed the previous Joint Committee stated that the majority of submissions opposed any change.

There has been no real progress since then. It would seem the least the Government should do is publish any such legislation in advance of a referendum and use the referendum to constitutionally protect the named legislation and thus create an informed debate.

It is also notable from public debate that a lot of emphasis is put on age and a differential made between peer relationships and other more "predatory" behaviour. Once more this is understandable but we seem to avoid a broader discussion about the nature of consent and the ability of young people to make such decisions. Consent to the very concept of sexual relations seems to be the real issue. How is consent different amongst teenagers, and between teenagers and much older people where there is no overt force or exploitation? Perhaps by intuition we know or feel it is but can this be clear in the law?

There may be some benefit to examining the U.K. situation where the notion of the young persons mental abilities has been current for some time since the Gillick case (in relation to contraception). This has developed the "Gillick/Fraser Competencies" widely used in medical ethics and law in relation to consent for young people (although somewhat diluted with respect to children's rights viz a viz their parents), such a framework has been absent in similar debates in Ireland. The test is whether the child had sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It should also be noted that Gillick has been retreated from somewhat but the concept that maturity and understanding be reckoned

with is valuable however society at large no doubt desires a minimum age for sexual activity for obvious reasons.

The 2006 Act provides for no lower age limit for such a defence to be introduced and while a court may balk at such a defence with an extremely young victim it would seem essential to specify such an age in statute.

There is also a suggestion that the distinction between absolute and strict liability is useful here. This would entail the highest level of protection for younger people and the potential for a rebuttable presumption in relation to consent for an older person, for example 15 and 17 as exists in the 2006 Act.

If a defence of mistake due to age is present it should be based on an objective and not subjective basis. Legislation on statutory rape should be gender neutral.

It does seem that strict liability and the offence of statutory rape may have grown more common due to its "ease of use" and the desirability that young people should not have to appear in court, this is understandable but it would seem more appropriate that the courts system changes to accommodate young people and their needs for example in giving evidence etc, rather than the entire legislative framework be abandoned.

Generally speaking we endorse the findings of the special rapporteur that strict liability needs to be re-introduced and given constitutional protection. However while agreeing with the need to protect peer relationships we would urge caution here. Some safeguards exist and need to be built on but new loopholes should not be created and protection needs to be highest on the agenda. Legislation should be published in advance and specifically enabled by referendum.

### **Recommendations**

- The U.N. Convention on the Rights of the Child is speedily transposed into Irish Law
- A system of "soft information" is introduced modelled on the U.K. with proper protection for all and such legislation alone is enabled by constitutional amendment. This legislation to be published in advance of any referendum
- An offence of strict liability is re-introduced to protect young people consistent with the report of the special rapporteur in this area. Attention be given to "peer relationships" in this and the concept of a two year age gap along with a position of authority provision. There may be a general assumption that sexual activity between peers of similar age (15 and over) is not an offence where there is no coercion or intimidation involved. The latter safeguards should be clear and concise and should not provide any loopholes.
- Consolidation of Sexual Offences legislation be progressed speedily

## Sources

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