

## Briefing Note on the Children's Referendum

October 2012

### Who we are?

The Children's Rights Alliance was established in 1995 and is a coalition of over 100 organisations working to secure the rights of children in Ireland, by campaigning for the full implementation of the UN Convention on the Rights of the Child (UNCRC). The Alliance has advocated for constitutional change for children since its foundation. The Alliance engages in a range of activities including publication of an annual *Report Card* which tracks Government progress on its stated commitments to children.

### Children's Referendum

On 19 September 2012, the Government published the Thirty-first Amendment to the Constitution (Children) Bill 2012, which contains the text of a proposed constitutional amendment to strengthen children's rights. The amendment, if passed, will repeal (delete) the existing Article 42.5 and introduce a new Article into the Constitution. The new Article, Article 42A, entitled 'Children' will be a stand-alone article, and will sit between Articles 42 and 43.

The Alliance warmly welcomes the amendment wording and is calling for YES vote on referendum polling day, Saturday 10 November. The Alliance is joining Barnardos, ISPC and Campaign for Children to work as Yes for Children, a national campaign for a YES vote. We believe this referendum is an historic opportunity for the People of Ireland to ensure that this generation of children, and future generations, are better protected, respected and heard.

### 5 Key Reasons to Support the Children's Referendum

1. For the first time, the Constitution will take a child-centred approach to the protection of all children and will allow for the State to better support families who are struggling, rather than wait for a situation to reach crisis point.
2. Allow up to 2,000 children, currently in long-term State care, the opportunity to be adopted and given a second chance at a loving, stable and permanent family.
3. Base child care, adoption, guardianship, custody and access decisions on what is in the best interests of the child.
4. Ensure that judges listen to the views of children when making decisions in child care, adoption, guardianship, custody and access cases
5. Set out how we, as a country, now view and value children and move beyond the damning history of child abuse in Ireland.

## Summary of Amendment Wording

**Article 42A.1** recognises that all children have rights and pledges to protect those rights by law. It allows the courts to identify rights for children on a case-by-case basis. It is the first time that the rights of all children – those from married and from unmarried families – are brought together in the same place within the Constitution. This provision will enable the courts to develop new thinking in relation to children’s rights and to break with past decisions, some of which have resulted in bad outcomes for children.

**Article 42A.2** contains two parts. The first part sets out how and when the State can intervene in family life to protect a child. The second part reforms our adoption laws to allow ‘abandoned’ children to be adopted in certain circumstances.

*Article 42A.2.1* clarifies how and when the State can step in to protect children. It is an amended version of an existing Article in the Constitution (Article 42.5), which it will replace. It shifts the trigger of intervention from focusing solely on the parents’ failures to the impact of that failure on the children. It provides a strong constitutional foundation for our child protection system, by providing the State with power to act when the “safety or welfare” of a child “is likely to be prejudicially affected”. This new wording should encourage the State to intervene earlier in families that are struggling to offer them support and better protect the child. Importantly, it also contains safeguards to protect against over-intervention by the State, by including the phrases ‘exceptional cases’ and ‘proportionate’. It provides, for the first time, the same threshold of protection to children, regardless of whether their parents are married or unmarried.

Under the Constitution at present, the best interests of children from married parents are presumed to be found within the child’s family. This new wording could be used to challenge this presumption in cases where the child’s “safety or welfare” is at risk.

*Article 42A.2.2* commits the Oireachtas to bring in a law to allow a child to be given the opportunity of being adopted, where their parents have met a high threshold of failure towards their child. This law must also set out the length of time that parents have failed in order for the child to be eligible for adoption. Critically, such adoptions can only take place where it is in the best interests of the child and where all other options have been explored and failed.

The Government has published draft legislation [<http://www.oireachtas.ie/documents/bills28/bills/2012/7812/b7812d.pdf>] to show what will change in the area of adoption, if the referendum is passed. Under the legislation, there must have been a continuous failure on the part of the parents towards the child for a period of 36 months (three years). There must also be no reasonable prospect of the parents resuming care of the child, and the child must have been living in the home of their prospective adoptive parents for a minimum continuous period of 18 months.

**Article 42A.3** commits the Oireachtas to bring in a law that allows parents, either married or unmarried, to voluntarily place their child for adoption. At present, it is not legally possible for married parents to place their child for adoption, or consent to the adoption of their child.

**Article 42A.4** contains two parts. The first part commits the Oireachtas to bring in a law in relation to the best interests of the child. The second part commits the Oireachtas to bring in a law to provide for the courts to listen to the views of the child. This Article is unique to the Constitution in that it legally obliges the Oireachtas to define these rights and to make sure that relevant legislation is in place.

*Article 42A.4.1* commits the Oireachtas to bring in a law that ensures the best interests of the child will be “the paramount consideration”, in certain areas of decision making affecting a child. This means those decisions will be determined based on what is best for the child in question. It applies only to proceedings:

- brought by the State involving children in the care system; and
- concerning the adoption, guardianship or custody of, or access to, any child.

*Article 42A.4.2* commits the Oireachtas to bring in a law to ensure the views of the child are taken into account in the proceedings listed in 4.1 (children in care, adoption, guardianship, custody and access cases). This does not mean that the child’s views will be the determining factor in the case. Rather, the child’s views will be considered by the judge and given due weight according to the child’s age and maturity. At present, the views of the child are heard on an ‘ad hoc’ basis, and largely depend on the type of case before the Court and the judge hearing the case. Such gaps will be addressed by this new wording.

### **Why is the Constitution so important?**

The Constitution is the fundamental law of the State and guarantees a range of personal rights. It is a proclamation of our values as a society and underpins the interaction between the State and its citizens, including children. The Constitution contains 50 Articles that can only be changed by referendum. Constitutional rights can be expanded upon by the High Court and the Supreme Court through their interpretation of constitutional law. All our laws, policies and services must be compatible with the Constitution.

### **Do children currently have rights under the Constitution?**

Yes, children do have rights under the Constitution. Where appropriate, children are entitled to the same fundamental rights (under Articles 40 to 44) as are granted to all individuals living in the State. Children have just one explicit right: the right to free primary education (Article 42.4). Thus, there is a lack of child-specific rights within the Constitution to address children’s needs that are different from, and additional to, those of adults. It can be said that children are almost invisible within the Constitution and the Children’s Rights Alliance, therefore, believes that this amendment is needed to strengthen children’s constitutional rights.

### **What will NOT be changed by a children’s rights amendment?**

Our understanding is that the constitutional amendment on children rights will have:

- No impact on the definition of the ‘Family’ under the Constitution. The ‘Family’ will continue to mean only a heterosexual, married couple.<sup>1</sup>
- No impact on the special protection provided to the ‘Family’ under Article 41.

### **What is the interplay between children’s and parents’ rights?**

The rights of parents and children are inextricably linked. The UN Convention on the Rights of the Child (UNCRC), which Ireland ratified in 1992, clearly recognises the family as the “fundamental group of society and the natural environment for the growth and wellbeing of...children”.<sup>2</sup> It acknowledges that parents have the ‘primary responsibility’ for their child’s upbringing and development (Article 18). It affirms that the family itself requires protection and assistance to fulfill its responsibilities and places a duty on States to support parents in rearing their children (Article 18).

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1 Murray v Ireland [1985] I.R. 532.

2 UN Convention on the Rights of the Child (1989) <http://www.ohchr.org/english/law/crc.htm>.

The Convention also states that children have a right to know and be cared for by their parents (Article 7); it explicitly discourages the separation of children from their families (Article 9) and says that where children are separated from their parents the State has an obligation to try to ensure contact between them is maintained in accordance with the best interests of the child (Article 9.3). It should also be remembered that many parents must become ‘children’s rights champions’, fighting tooth and nail to ensure that their child’s needs – for example, for education or healthcare – are adequately met.

### **How are the Courts interpreting the existing Constitutional provisions relating to children?**

The Courts have interpreted Article 40.3.1 as giving rise to rights that are not explicitly stated in the text of the Constitution – referred to as unenumerated rights.<sup>3</sup> Judicial interpretation has revealed certain unenumerated rights to which the child is entitled, such as the right “to be fed and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being”.<sup>4</sup>

However, unenumerated rights are not absolute and can be limited or restricted through judicial interpretation or legislation. In addition, the unspecified and vague nature of unenumerated rights has led the Supreme Court, in recent times, to show reluctance to recognise or give effect to unenumerated rights and instead it has reverted to its reliance on the express rights within the Constitution. The Court has cited the doctrine of the separation of powers as the basis for its reasoning on this issue – that it is for the legislature, not the judiciary, to articulate these rights. Recent decisions indicate a trend towards the limiting of constitutional protections afforded to children.<sup>5</sup>

### **Are all children treated the same under the Constitution?**

No. The rights of a child from a married family flow from Articles 41 (Family) and 42 (Education) with a rebuttable assumption that the best interests of the child lies within the marital family, while the rights of a child from an unmarried family flow from the child’s ‘personal rights’ under Article 40.3. Children’s rights are, therefore, determined by the marital status of the child’s parents.

### **Who else has recommended constitutional change?**

Constitutional change has been repeatedly called for in a series of official reports: including, in 1980 by the Task Force on Child Care; in 1993 by the Kilkenny Incest Investigation report; in 1996 by the Constitution Review Group; in 1998 by the Commission on the Family; in January 2006 by the All-Party Oireachtas Committee on the Constitution; in November 2006 by the Joint Committee on Child Protection and in the report of the Joint Committee on the Constitutional Amendment on Children in February 2010.<sup>6</sup> At an international level, the UN Committee on the Rights of the Child in 1998, and again in 2006, added its voice to these calls to strengthen the position of children’s rights in the Constitution.<sup>7</sup> Furthermore, there have been a number of High Court and Supreme Court cases concerning child welfare, particularly over the past ten years, which have given rise to concern that the courts are unable, because of the current constitutional position, to afford sufficient weight to the rights of the child, so as to act in the best interests of the child.

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3 Ryan v Attorney General [1965] IR 294 and subsequent cases

4 G v. an Bord Uchtála [1980] IR 32 at 56.

5 Sinnott v Minister for Education [2001] 2 I.R. 545; T.D. (A Minor) v. Minister for Education, Ireland, the Attorney General, the Eastern Health Board and the Minister for Health and Children [2001] 4 I.R. 259

6 Task Force on Child Care Services (1980) *Final Report to the Minister for Health/Task Force on Child Care Services*, Dublin: Stationery Office; *Kilkenny Incest Investigation: Report presented to Mr. Brendan Howlin TD, Minister for Health by South Eastern Health Board* (1993) Dublin: Stationery Office; *Report of the Constitution Review Group* (1996) Dublin: Stationery Office; *Strengthening Families for Life, Final Report of the Commission on the Family* (1998) Dublin: Stationery Office; The All-Party Oireachtas Committee on the Constitution (2006) *Tenth Progress Report: The Family*, Dublin: Stationery Office; Houses of the Oireachtas Joint Committee on Child Protection (2006) *Report on Child Protection*.

7 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Ireland*. U.N. Doc. CRC/C/IRL/CO/2, 29 September 2006. In addition, at European level, the Council of Europe has recommended that States guarantee children’s rights through explicit recognition in constitutional texts (See Council of Europe, Parliamentary Assembly (1996), Recommendation 1268 on a European Strategy for Children). Children’s rights are also recognised in the Charter of Fundamental Rights of the European Union (Article 24).

## Proposed New Article 42A – Children

1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.
2. 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.  
  
2° Provision shall 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 duty towards the child and where the best interests of the child so require.
3. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.
4. 1° Provision shall be made by law that in the resolution of all proceedings -
  - i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
  - ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.  
2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

### Keep in touch with us!

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