



**Briefing Note on the Final Report of the Joint Committee
on the Constitutional Amendment on Children**

Prepared for Alliance Member Organisations

March 2010

On 16 February 2010, the Joint Committee on the Constitutional Amendment on Children published its Third and Final Report, *Proposal for a constitutional amendment to strengthen children's rights*.¹

The Children's Rights Alliance has compiled this Briefing Note to provide an overview of the Committee's Report. It aims to inform our member organisations, and is subject to change. It does not represent the official response of the Alliance to the Committee's Report.

The Briefing Note contains:

1. Background to the work of the Committee
2. Overview of the Final Report of the Committee
3. The Committee's Proposed Text for a Constitutional Amendment
4. **Alliance Analysis of the Committee's Recommendations**
 - 4.1 Recognition of the Individual Rights of Children and of the Rights of Parents in Respect of their Children
 - 4.2 Setting the Threshold for State Intervention and the Threshold for the Adoption of Children
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1. BACKGROUND TO THE WORK OF THE COMMITTEE

The Joint Committee on the Constitutional Amendment on Children was established on 22 November 2007, in line with a commitment in the June 2007 *Programme for Government*, to deepen political consensus on the wording for a constitutional amendment to strengthen children's rights. The Committee's terms of reference were to examine, and consider, the proposal for a constitutional amendment to strengthen children's rights contained in the Twenty-Eighth Amendment of the Constitution Bill 2007, and to make recommendations to the two Houses of the Oireachtas. The Committee was originally due to submit its report and recommendations in March 2008 (four months from the date of its establishment). However, this deadline was extended five times with the Committee sitting for a total of 27 months.

¹ Government of Ireland (February 2010) *Joint Committee on the Constitutional Amendment on Children, Third Report, Twenty-eighth Amendment of the Constitution Bill 2007, Proposal for a constitutional amendment to strengthen children's rights, Final Report*, Dublin: Stationery Office. It can be also accessed at: <http://www.childrensrights.ie/files/JtCommConstAmendChildren-ThirdReport160210.pdf>

The Committee met on 62 occasions: in 15 public sessions and 47 private sessions. The Committee published two interim reports: the First Interim Report in September 2008 and the Second Interim Report in May 2009.²

2. OVERVIEW OF THE FINAL REPORT OF THE COMMITTEE

Structure of the Report

The Final Report of the Joint Committee on the Constitutional Amendment on Children runs to 177 pages; it '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'³.

The Report is divided into ten sections:

- Sections 1 – 3 contain background and other contextual information on the work of the Committee;
- Section 4 presents text for a proposed constitutional amendment on children's rights;
- Section 5 presents a summary of the Committee's recommendations;
- Section 6 considers the existing law relating to children in order to understand the effect of any amendment on the current position; it examines the statute and case law concerning adoption, guardianship, care proceedings, custody and access to children, education and the right of the child of unmarried parents to financial provision;
- Sections 7 – 8 consider and analyse the wording of the proposed amendment set out in the Twenty-eighth Amendment of the Constitution Bill 2007, summarising the most frequently discussed themes of the 175 written submissions and six oral submissions it received.⁴ Section 8.2 discusses the UN Convention on the Rights of the Child in detail and Appendix E reproduces the Convention in full;
- Section 9 considers whether it is possible to incorporate any or all of the proposed amendment provisions in the 2007 Bill into Irish Law by way of ordinary legislation; it also considers whether the 2007 proposals were necessary or would have any effect on existing law;
- Section 10 presents the conclusions of the Committee and its rationale for the wording it has proposed as a constitutional amendment.

Next Steps

It is understood that the Committee's Report will be tabled for discussion at Cabinet. To aid the discussion of Cabinet members, the Report will be referred to the Attorney General, Paul Gallagher SC, for his consideration and advice. Following discussion at Cabinet, informed by the advice of the Attorney General, the Government will take a decision on how it wishes to proceed.

The Alliance will continue to call on the Government to act on the Committee's recommendations and set a date for a referendum to strengthen children's rights. Furthermore, the Alliance will call on the Government to begin drafting Heads of Bill to outline the legislative changes that would follow the successful passage of a children's rights referendum. This will give voters a better understanding of the impact of an amendment and will help clarify issues likely to be debated in the run-up to the referendum.

2 For further information see Children's Rights Alliance (January 2010), *Briefing Note: Joint Committee on the Constitutional Amendment on Children and Related Work of the Children's Rights Alliance*.
<http://www.childrensrights.ie/files/BriefingNoteJtCommConstAmend0110.pdf>

3 Government of Ireland (February 2010) *Joint Committee on the Constitutional Amendment on Children... Final Report*, p. 1.

4 Appendix 4 contains a listing of 14 references made to oral and written submissions made by the Alliance to the Committee.

3. THE COMMITTEE'S PROPOSED TEXT FOR A CONSTITUTIONAL AMENDMENT

The Joint Committee on the Constitutional Amendment on Children achieved all party consensus on wording for a proposed amendment to the Constitution to strengthen children's rights. The Committee proposes a series of amendments to Article 42 and renaming the Article from 'Education' to 'Children'.

The Committee recommends that the existing Article 42 of the Constitution be replaced with an amendment, which would be a revised and expanded version of the 2007 proposed amendment.⁵ The amendment proposed by the Committee will comprise:

1. *The insertion of new sections:* There are five new provisions recognising the individual rights of children. Two of these are entirely new – Article 42.1.1 and Article 42.2. The remaining three – Articles 42.1.2, 42.1.3 and 42.6 – contain elements that appeared in the 2007 wording.
2. *The modification of existing sections:* There is a recalibration of the existing Article 42.5 of the Constitution – which sets the threshold for state intervention – to form a new provision, Article 42.4. This new provision mirrors Article 42(A) 2.1 of the 2007 wording. In addition, there has been some modification and relocation of Article 42.1 which recognises the rights of parents in respect of their children (this is now moved to Article 42.3).
3. *The retention but relocation of existing sections:* The four sections of the Constitution relating to the provision of education for children have been retained but rearranged and renumbered within the new Article 42 (Article 42.3.1 has become Article 42.7.1; Article 42.3.2 has become 42.7.2; Article 42.2 has become 42.7.3; and, Article 42.4 has become Article 42.8.)

Relationship between Article 41 and Article 42

The Committee examined the issue that the continued existence of Article 41 of the Constitution may conflict with or undermine any proposed amendment to Article 42. The Committee felt that it was 'not feasible to alter or remove the existing Article 41'⁶ and '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'.⁷ The proposed amendment '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...'⁸

The Committee acknowledges that depending on the judicial interpretation Article 41 may 'modify, or even negate, the effect of the proposed wording in certain circumstances'.⁹ The Committee was concerned that parents should 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 [and] 'felt that the continued existence of Article 41 provided that assurance to parents'.¹⁰

5 In February 2007, the Government presented the Twenty-eighth Amendment of the Constitution Bill 2007 to Dáil Éireann. For the full text of this Bill, see Appendix 7.5, p. 21 of this document.

6 Government of Ireland (February 2010) *Joint Committee on the Constitutional Amendment on Children... Final Report*, p. 81.

7 *Ibid.*, p. 81.

8 *Ibid.*, p. 110.

9 *Ibid.*, p. 110.

10 *Ibid.*, p. 111.

The Committee Proposed Text for a Constitutional Amendment

The Joint Committee on the Constitutional Amendment on Children proposes the following amendment be inserted into the Constitution as a revised Article 42, entitled 'Children':

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.¹¹

¹¹ *Ibid.*, pp. 15–108.

4. ALLIANCE ANALYSIS OF THE COMMITTEE'S RECOMMENDATIONS

This section contains Alliance analysis of the Committee's recommendations and proposed text for a constitutional amendment on children's rights. It is broken into three sections:

- 4.1 Recognition of the individual rights of children and of the rights of parents in respect of their children
- 4.2 Setting the threshold for State intervention and the threshold for the adoption of children
- 4.3 Providing for the education of children

4.1 Recognition of the Individual Rights of Children and the Rights of Parents in Respect of their Children

Overview

This section covers the proposed Article 42.1.1, 42.2, 42.3, and Article 42.2. The first two provisions, Article 42.1 and Article 42.2, provide for the constitutional recognition of children as individual rights-holders. The Committee expressed concern that the 'rights of children are often considered primarily in the context of their membership of a family'.¹² These provisions contain a non-discrimination guarantee and recognise a child's right to be heard, protected, cared for, and educated.

Article 42.1.3 imposes a constitutional requirement that in resolving disputes concerning the guardianship, adoption, custody, care or upbringing of a child, the child's welfare and best interests 'shall be the first and paramount consideration'. Article 42.1.2 provides that 'in all other matters engaging children's rights',¹³ the child's welfare shall be regarded as a primary consideration.

These rights, when read together, will act as a guide to the courts on how to balance competing constitutional rights if a conflict arises between the interests of parents or the State and the interests of the child. It does not impose a hierarchy of rights, in which children's rights take precedence over those of the child's parent/s or the marital family. The explicit acknowledgement of the right of children to be protected, kept safe and heard will also help foster a new societal attitude to children.

The use of the term 'including', in Article 42.1 and Article 42.2, allows the courts over time to elaborate additional rights for children – rights not currently specified in the Constitution (referred to as 'unenumerated' rights).¹⁴

The Committee's wording strengthens and expands on the wording published in the Twenty-Eighth Amendment of the Constitution Bill 2007 (Articles 42(A) 1 and 42(A) 4). It builds on the 2007 provisions and proposes the insertion of new text. The changes reflect the position advocated by the Alliance.

Article 42.1.1 *The State shall cherish all the children of the State equally*

This proposed provision provides a constitutional guarantee of equality / non-discrimination for all children, which encapsulates the Alliance's vision for Ireland: that it be one of the best places in the world to be a child. It is a new constitutional provision, the inclusion of which was advocated by the Alliance. It echoes the often recited phrase, 'cherishing all the children of the nation equally', from the 1916 Proclamation.¹⁵ This phrase is close to the hearts of the Irish people, and is likely to

¹² *Ibid.*, p. 113.

¹³ *Ibid.*, p. 113. 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'.

¹⁴ *Ibid.*, pp.113–114.

¹⁵ The Provisional Government of the Irish Republic (1916) *Proclamation of the Irish Republic*

resonate with voters.¹⁶ The phrase is modified slightly with the substitution of the phrase ‘State’ for ‘Nation’; although the term ‘Nation’ does appear in the Constitution (Articles 1 – 3), its inclusion in this context is considered to be problematic.

The Committee noted that in judicial decisions children of non-marital families continue to have fewer rights to proper provision and accommodation than children born to a marital family.¹⁷ The Committee believes ‘that there should be no discrimination between children, based on the marital status of their parents or otherwise’; and that this should be stated explicitly in the Constitution.¹⁸

Article 42.1.2 *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.*

This proposed provision recognises that children have natural and imprescriptible rights as individuals – including the right to have their welfare regarded as a primary consideration – and pledges the State to protect and vindicate those rights, as far as practicable.¹⁹

Article 42.1.3 *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.*

This proposed provision imposes a constitutional requirement that the welfare and best interests of the child shall be the first and paramount consideration in the resolution of all disputes concerning the guardianship, adoption, custody, care or upbringing of a child. The inclusion of the terms ‘welfare’, ‘care’ and ‘upbringing’ give constitutional backing for the existing legislative provisions under the Guardianship of Infants Act, 1964 (S.3) and the Child Care Act, 1991 (S.3 & 24).

Article 42.2 *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.*

This proposed provision provides for explicit, and some express, rights for children as individuals. It provides for the right of the child to such protection and care as is necessary for his or her safety and welfare; the right of the child to an education; 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. The Committee acknowledges that these rights are set out in the UN Convention on the Rights of the Child and the EU Charter of Fundamental Rights and Freedoms.²⁰

The Committee views ‘the right of the child to be heard as an important and valuable right which will benefit children’.²¹ In addition, it considers 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.’²²

16 The Proclamation originally intended the phrase to mean all the people of the Nation, but in this context it will refer to all children, in other words all those under 18 years of age.

17 Examples include the financial provision for children of unmarried parents in circumstances where the parents have separated. Government of Ireland (February 2010) *Joint Committee on the Constitutional Amendment on Children... Final Report*, p. 105.

18 *Ibid.*, p. 112.

19 *Ibid.*, p. 60. Natural rights or human rights are not created by law; the Constitution confirms their existence and gives them protection. Imprescriptible rights cannot be lost by the passage of time or abandoned by non-exercise.

20 *Ibid.*, p. 114.

21 *Ibid.*, p. 114.

22 *Ibid.*, p. 114.

The third provision provides for the recognition of the rights of parents in respect of their children. It is an amended version of the existing Article 42.1 of the Constitution.

Article 42.3 *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.*

This proposed provision acknowledges that a child's parents are the primary and natural carers, educators and protectors of their child's welfare. The State 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.

This provision mirrors the existing Article 42.1 of the Constitution. It broadens the provision, in line with existing case law, to include the role of the child's parents as not only educators but also 'carers' and 'protectors of the welfare of a child'. It also replaces the phrase 'the Family' with 'the child's parents'.

The Committee modified this provision as a means of responding to contributors who wished the amendment to acknowledge that the child's parents are the primary vindicators of their children's rights.²³

²³ *Ibid.*, p. 67.

4.3 Setting the Threshold for State Intervention and the Threshold for the Adoption of Children

Overview

The fourth, fifth and sixth provisions address the threshold for State intervention in family life to secure the welfare of a child, and also the considerations under which a child can become eligible for adoption.

The Committee's wording strengthens and expands on the wording published in the Twenty-Eighth Amendment of the Constitution Bill 2007 (Article 42(A) 2.1, 42(A)2.2 and 42(A) 3). The changes made reflect the position advocated by the Alliance. Article 42.5 (on involuntary adoption) must be read in conjunction with Article 42.4 (on parental failure).

Article 42.4 *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.*

This proposed provision is an amended version of the existing Article 42.5 of the Constitution. It provides for the same standard of protection for all children, irrespective of their parents' marital status. The Committee expressed concern that 'children of marital parents are less protected from harm within the family than children of non-marital parents.'²⁴ Two new terms are introduced – 'proportionate' and 'supplement'.

Inclusion of the Terms 'Proportionate' and 'Supplement'

'Proportionate':

- The insertion of the term 'proportionate' is intended to ensure that if the State intervenes in family life it does so by proportionate means.²⁵ The doctrine of proportionality is a well-established principle in both Irish and European law – it involves establishing a balance between competing claims and considerations.²⁶ In the context of State intervention in family life, the term 'proportionate' will require that any action taken must constitute the minimum intervention necessary to secure the child's welfare; must interfere least with the right to family life; and must be proportionate to its objectives. These conditions are intended to safeguard against disproportionate State intervention.²⁷ The inclusion of the term 'proportionate' should also support best practice by ensuring that proceedings to take a child into care should only be embarked upon as a measure of last resort, after a range of other family supports and interventions have been considered or undertaken. Furthermore, the requirement that intervention be 'proportionate' should mean that when a child is placed in care, an onus is placed on the State to take all actions necessary to ensure that the child is able to return to his or her family at the earliest opportunity, with the proviso that this is in the child's best interest.²⁸

'Supplement':

- The insertion of the term 'supplement' is intended to enable the State to intervene to 'support and protect families'.²⁹ It will permit the State to provide support for, and assistance to, parents in situations where this is more appropriate than removing the child

²⁴ *Ibid.*, p. 105.

²⁵ See also the Children's Rights Alliance *Note on the Legal Doctrine of Proportionality* (2007) available at <http://www.childrensrights.ie/pubs/Children'sRightsAllianceNoteonDoctrineofPropotionality.doc>

²⁶ For an exposition of the principle of proportionality in Irish law see Costello J. in *Heaney v. Ireland* [1994] 3 IR 593 (see also *Rock v. Ireland* [1997] 3 IR 484; *Cox v. Ireland* [1992] 2 IR 503). The concept is also central to the European Convention on Human Rights, see *Johansen v. Norway* [1996] 23 EHRR 23 and *K and T v. Finland* [2003] 36 EHRR, which make clear that the deprivation of parental rights and access should only occur in exceptional circumstances and where the range of alternatives is manifestly unsuitable.

²⁷ The more far reaching and severe the interference, the stronger the reasons required to justify it. Hence, weightier reasons will be needed to justify a prohibition on contact between a parent and a child in care, than for example, a restriction on such contact.

²⁸ *K. and T. v Finland*, judgment of 27 April 2000, (2001) ECHR 465.

²⁹ Government of Ireland (February 2010) *Joint Committee on the Constitutional Amendment on Children... Final Report*, p. 80.

from their custody in order to meet the child's needs; for example, providing supervision and/or support to the family may be sufficient to safeguard the child.

Background to the State Threshold

- At present, Article 42.5 applies only in circumstances where the family is deemed to have completely failed in their duty towards their child and the parental failure meets a threshold defined by case law. The Committee expressed concern that the threshold for State intervention, in the case of marital children in particular, was too high.³⁰
- Under the current constitutional provision, the State is only empowered to intervene on behalf of a child through the replacement (or supply) of the parents' role where a situation of parental failure has already arisen. It is not empowered to intervene to address a temporary or sporadic, but substantial, risk with child or family support. Children who may require and benefit from intervention before the point of parental failure are not entitled to it. Thus at present the State may be aware that a problem exists but must wait until the situation deteriorates before it can intervene. This scenario leaves children in potentially damaging situations, and inhibits good practice.

Impact of the proposed Amendment on the Threshold for State Intervention

- The proposed provision – including the terms 'proportionate' and 'supplement' – will permit the State to intervene proportionately 'not only to supplant [replace] the place of parents if necessary, but to supplement [support] them where appropriate'.³¹
- Through this provision 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.'³²

Article 42.5 *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.*

This proposed provision allows for legislation to be enacted to permit the adoption of any child, from either a marital or non-marital family, where there has been a failure on the part of parents in relation to their parental duty towards their child. The Committee recommends that alongside this provision there should be legislative safeguards outlining that the adoption can only take place where the parents have failed the child for a period of time set out in law, and where the best interests of the child require that such an order be made. It further recommends that the proposed legislation in this area 'is published with the draft constitutional amendment, to enable the electorate make an informed decision on the proposal'.³³

³⁰ *Ibid.*, p. 73.

³¹ *Ibid.*, p. 80.

³² *Ibid.*, p. 115.

³³ *Ibid.*, p. 86.

Article 42.5 should be read in conjunction with Article 42.4; this provides that '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'.³⁴

Threshold for adoption of children of marital families

The high threshold for State intervention under the existing Article 42.5 was applied in the Adoption Act, 1988, to guard against a breach of Articles 41 and 42, and has been narrowly interpreted by the judiciary. The result is that the availability of adoption, as a care option, is severely limited for children who have been effectively abandoned by their parents who are married to each other. This issue affects approximately 2,000 children who have been in foster care for a significant number of years and who have grown up with little or no regular contact with their birth parents but who are not eligible for adoption, and thus a 'second chance' of a stable and secure family life.

Article 42.6 *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.*

This proposed provision allows for legislation to be enacted that will permit the adoption of any child, including children of married couples. The provision is framed to reflect the two steps of the adoption process – the voluntary placement for adoption and the adoption of the child.

The existing provisions of the Constitution do not permit a married couple to voluntarily give their child up for adoption. The Alliance is not aware of the numbers of children currently affected by this issue. Possible cases may include the adoption of a child at the request of the parents due to their acknowledged inability to care for their child on a long-term basis as a result of serious disability, terminal illness or some other reason.

The provision provides that, when considering the welfare of a child in the context of such an adoption, the court shall 'respect the child's right to continuity in its care and upbringing'. This insertion is '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.'³⁵

The Committee recommends that any legislation introduced on foot of this provision 'would have to require that both parents consent to any placement of their child for adoption'.³⁶ It recommends also that the proposed legislation in regard to voluntary placement for adoption should be published in advance of a referendum so as to inform consideration of the proposed constitutional amendment.³⁷

³⁴ *Ibid.*, p. 85.

³⁵ *Ibid.*, p. 117.

³⁶ *Ibid.*, p. 86.

³⁷ *Ibid.*, p. 116.

4.4 Providing for the Education of Children

The seventh and eighth provisions of the proposed Articles provide for the education of children. Apart from two changes, the provisions replicate existing constitutional provisions under Article 42 (Article 42.3.1, 42.3.2, 42.2 and 42.4). The two changes are:

1. The location of the provisions has been rearranged and renumbered within Article 42.
 - Article 42.3.1 has become Article 42.7.1.
 - Article 42.3.2 has become 42.7.2.
 - Article 42.2 has become 42.7.3.
 - Article 42.4 has become Article 42.8.
2. A minor grammatical change is made to the current Article 42.2: the term 'this' is deleted. This is merely a technical alteration as this provision, in its new position of Article 42.7.3, would, otherwise, not make sense.

Article 42.7.1 *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.*

Article 42.7.2 *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.*

Article 42.7.3 *Parents shall be free to provide education in their homes or in private schools or in schools recognised or established by the State.*

Article 42.8: *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.*

These provisions recognise, among other things, the right of parents to provide education for their children in their homes or in private schools established or recognised by the State; that parents cannot be obliged, against their conscience, to send their children to a State school or schools designated by the State. They also provide that children must receive a certain minimum education and oblige the State to provide free primary education.

The Committee commented that 'these existing constitutional provisions are of considerable legal, social and cultural value, and should be re-enacted in the proposed new Article 42'.³⁸

³⁸ *Ibid.*, p. 117.

5 SUMMARY OF THE COMMITTEE'S RECOMMENDATIONS

The Joint Committee on the Constitutional Amendment on Children makes 14 recommendations in its Report.³⁹ Below is a synopsis of the Committee's recommendations:

1. A proposal to amend the Constitution – to enshrine and enhance the protection of the rights of children – be put before the people in a referendum.
2. The existing Article 42 be amended to include an express recognition of children's rights, while also expressly recognising the child's parents as the primary and natural carers, educators and protectors of the welfare of their child.

In relation to the proposed wording of an amendment, it recommends that it:

3. Specifically state that the State, in its laws and actions, shall cherish all the children of the State equally and shall not discriminate between children.
4. Specifically require 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. Specify that the threshold for intervention is identical for children of marital and non marital families.
6. Require 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, it recommends that:
 - The adoption of a child should be permitted where parents fail for a prescribed period of time in their responsibilities towards the child, and where the child's welfare so requires.
 - Marital parents should be able to voluntarily place children for adoption.
 - Proposed adoption legislation should be published in advance of a referendum.
8. Provide 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. Provide 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. 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. 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 (UNCRC).⁴⁰

³⁹ The full text of the summary recommendations can be found at Government of Ireland (February 2010) *Joint Committee on the Constitutional Amendment on Children... Final Report*, Section 5, pp. 19-22.

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 the 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. The Committee notes that there is a lack of access to source information relating to cases under the Child Care Act 1991. Such cases are heard in the District Court where Judgments are rarely written and there is no facility for recording such Judgments; hence it is not possible to access records to assist in ascertaining how these cases are decided.

In general, those reporting on Family Law cases are permitted to sit in and take notes, 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 those involved in the case.

The Committee recommends that a similar arrangement should be put in place for District Court cases and, in particular, cases under the Child Care Act 1991. It believes that such a facility would be helpful for any future consideration by the Houses of the Oireachtas of issues relating to children.⁴¹

40 *Ibid.*, p. 72. The Committee expands on this recommendation by stating that ‘any of the UNCRC principles not adopted into the Constitution should be incorporated into Irish Law by appropriate means’.

41 *Ibid.*, pp. 21–22.

6. COMMITTEE'S CONSIDERATION OF 2007 PROPOSED WORDING

The Joint Committee on the Constitutional Amendment on Children received legal advice in relation to the wording for an amendment as proposed in the Twenty-eighth Amendment of the Constitution Bill 2007,⁴² and its potential impact on children; that advice is replicated below:

- (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.'⁴³

42 Appendix 7.5 contains the text of the amendment proposed in the Twenty-eighth Amendment of the Constitution Bill 2007.

43 *Ibid.*, pp. 55–57.

In light of the legal advice received, the Committee considered that the wording proposed in the Twenty-eighth Amendment of the Constitution Bill 'did not go far enough to achieve the aim of enhancing children's rights'.⁴⁴

The Committee expressed concern that the particular text proposed in the 2007 Bill:

- 'will not bring about equality for all children, irrespective of the marital status of their parents.
- that the rights of children will remain subservient to family autonomy, which may undermine the goal of strengthening children's rights.
- 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'.⁴⁵

In relation to the threshold:

The Committee holds 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'.⁴⁶

44 *Ibid.*, p. 57.

45 *Ibid.*, p. 57.

46 *Ibid.*, p. 57.

7. APPENDICES

7.1: Extract from Irish Constitution

Under the Irish Constitution, the key provisions that relate to children and the family are contained in Articles 41 and 42. Below are extracts of relevant provisions from these two Articles.

THE FAMILY

ARTICLE 41

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.

EDUCATION

ARTICLE 42

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.

7.2: Terms of Reference of the Joint Committee

The Joint Committee on the Constitutional Amendment on Children was established by resolutions of Dáil Éireann and Seanad Éireann of the 22 November 2007 with the following Orders of Reference:⁴⁷

- (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;
[The Committee recommended in its First Interim Report that this be addressed by legislation.]
 - (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;
[The Committee recommended in its Second Interim Report that this be addressed by legislation.]
- (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.

⁴⁷ Joint Committee on the Constitutional Amendment on Children, Orders of Reference (22 November 2007) http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-ConAmendChildren/Orders_of_Reference/document1.htm [accessed 02 March 2010]

7.3: References to the Children's Rights Alliance in Final Report

The following references are made to the Children's Rights Alliance in the Committee's Report:

- P60 reference to the Alliance and others concern at the use of natural law terms in the Constitution as these have been found to be problematic and ambiguous;
- P61 reference to the Alliance recommendation that an explicit vindication of children's rights be added to the wording of the Bill;
- P63 reference to the Alliance and others support for the full incorporation of the UN Convention on the Rights of the Child into the Constitution, or use of the UNCRC as a template for children's rights, or the inclusion of specific Articles from the UNCRC provisions in the Constitution. Also reference to Alliance and others recommendation that children's rights should be enumerated;
- P64 reference to the Alliance recommendation to specific rights and certain socio-economic rights are included in the Constitution, and that specific provisions of the UNCRC be incorporated;
- P70 reference to the Alliance recommendation to adopt certain provisions of the UNCRC, specifically Articles 2, 7, 8, 12 and 19 and that this incorporation 'must not limit the constitutional protection of other unenumerated rights of the child';
- P77 reference to the Alliance statement that due to Article 41 and 42, children are not equal before the law and the best interest principle is hindered by an automatic presumption that a child's best interest lies within the marital family. The Alliance also commented that it is parents who champion their child's rights and they need the Constitution to acknowledge those rights;
- P78 reference to the Alliance requiring State to 'support vulnerable families' and that a 'proportionate' response would involve intervention (removal of a child) only as a last resort;
- P79 reference to oral statement by Jillian van Turnhout that we need to move from a model that waits for failure. We should compel the State to support families at a much earlier stage;
- P82 reference to amending the threshold for making adoption orders in cases of parental failure. The Alliance recommends the inclusion of the term 'shall' rather than the permissive 'may';
- P83 reference to oral statement by Jillian van Turnhout regarding the need for reform given the virtual impossibility of abandoned children of marital parents being adopted/placed for adoption. Reference to Alliance recommendations to strengthen wording for such as amendment;
- P85 reference to Committee's decision not to support Alliance recommendation to reword Article 42(A) 2.2, on the grounds that the wording is in keeping with existing constitutional provisions.
- P89 reference to Alliance, along with the ISPC, recommendation that rewording of Article 42(A) 2.2 that would oblige the Oireachtas to enact legislation;
- P93 reference to the Alliance supporting the inclusion of the 'best interests' of the child principle, as it is in keeping with the UNCRC, and is more far reaching than the limited concept of 'welfare'. Reference to Alliance and other calling for best interest principle to apply to all matters concerning children;
- P95 reference to the Alliance stating that consideration needs to be given as to whether Article 41 would continue to present an obstacle to securing best interests of the child in the Courts and reference to Alliance recommending that 'best interests' principle be inserted as a direct constitutional provision;
- Pxiii reference to written submissions;
- Pxix reference to oral submissions;
- Pxxi reference to Committee hearing, 6 February 2008 and;
- Pxxii reference to Committee hearing, 8 October 2008.

References were also made to oral and written submission by many Alliance member organisations including:

- Amnesty International (Irish Section)
- Association of Secondary Teachers Ireland (ASTI)
- Barnardos
- Children in Hospital Ireland
- Dublin Rape Crisis Centre
- Focus Ireland
- International Adoption Association
- Irish Council for Civil Liberties
- Irish Preschool Play Association (IPPA), the Early Childhood Organisation
- Irish Association of Social Workers
- Irish Congress of Trade Unions
- Irish Society for the Prevention of Cruelty to Children (ISPCC)
- National Parents Council (Primary)
- National Youth Council of Ireland
- One Family (Support organisation for one-parent families)
- One in Four
- The CARI Foundation (Children At Risk In Ireland)
- Treoir (National Federation of Services for Unmarried Parents and their Children)
- Youth Work Ireland.

7.4: Interim Reports of the Committee

The Joint Committee on the Constitutional Amendment on Children Committee published two interim reports.

First Interim Report – Vetting and Soft Information

The Committee published its First Interim Report on 11 September 2008. The report specifically outlines the Committee's findings and recommendation on the proposal in the Bill 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. The Committee concluded that a constitutional amendment is not required to permit the Oireachtas to creating a statutory scheme to regulate and control records of criminal convictions and information including 'soft' information. It recommended the establishment of a statutory scheme for the vetting of all persons involved in working in any capacity with children; and the requirement of all agencies working with or involved with children to ensure that all of those working under their aegis, either in a paid or voluntary capacity, are subject to vetting.

The Report can be accessed at: <http://www.childrensrights.ie/files/JTCommConstAmend-1stReportSoftInfoVettingReport0908.pdf>

Second Interim Report – Absolute and/or Strict Liability Offences in relation to 'Statutory Rape'

The Committee published its Second Interim Report on 7 May 2009; the report focuses on the proposal in the 2007 Bill to provide for absolute and strict liability for sexual offences committed against or in connection with children. The Committee did not recommend amending the Constitution. The Committee instead recommended, among other things, the creation of a specific offence of child sexual abuse, raising the level an accused must reach in proving the existence of a mistake as to age in cases involving sexual offences against children, and that the burden of proof in such cases should fall on the accused. Overall, the Committee made 39 recommendations to strengthen the protection of children from sexual exploitation and sexual abuse, facilitate the appropriate prosecution of perpetrators and enhance the protection of child victims of sexual offences in the criminal justice process.

The Report can be accessed at: <http://www.childrensrights.ie/files/JtCommConstAmend-2ndReportSexualOffences0509.pdf>

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

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.
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.

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.

Children's Rights Alliance

The Children's Rights Alliance is a coalition of over 90 non-governmental organisations (NGOs) working to secure the rights and needs of children in Ireland, by campaigning for the full implementation of the UN Convention on the Rights of the Child. It aims to improve the lives of all children under 18, through securing the necessary changes in Ireland's laws, policies and services.

Our Membership

The Alliance was formally established in March 1995. Our membership, from which Board Members are elected at the Alliance's AGM, consists of a diverse range of groups, including child welfare agencies and service providers; child protection groups; academics; youth organisations; family support groups; human rights organisations; disability organisations; parent representative organisations; community groups and others interested in children's rights. The Alliance's policies, projects and activities are developed through ongoing collaboration and consultation with our member organisations.

Our Aims

- Bringing about a shared vision that will realise and protect children's rights in Ireland.
- Securing legislative and policy changes to give meaningful effect to the UN Convention on the Rights of the Child.
- Securing the effective implementation of Government policies relating to children.

Our Experience

- The Alliance is recognised for its participation in the international monitoring and reporting process of the UN Convention on the Rights of the Child, including the publication of two shadow reports critically evaluating progress made by the Irish State to implement the Convention's provisions into domestic law, policies and services.
- In 2006, the Alliance was the sole Irish NGO commentator reporting to the UN Committee on the Rights of the Child.
- The Alliance is a designated Social Partner within the Community and Voluntary Pillar.
- The Alliance has played an important role in influencing the development of several key initiatives for children, including the publication of a National Children's Strategy; the establishment of the Office for the Ombudsman for Children; and the inclusion of children's rights in the EU Charter of Fundamental Rights.

The Children's Rights Alliance is a registered charity – CHY No. 11541

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