Children’s Referendum: A Legal and Policy Overview

September 2012
The Children’s Rights Alliance 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. We aim to improve the lives of all children under 18, through securing the necessary changes in Ireland’s laws, policies and services.

Membership
The Alliance was formally established in March 1995. Many of its member organisations are prominent in the children’s sector – working directly with children on a daily basis across the country. The Alliance’s policies, projects and activities are developed through ongoing collaboration and consultation with its member organisations.

Vision
Ireland will be one of the best places in the world to be a child.

Mission
To realise the rights of children in Ireland through securing the full implementation of the UN Convention on the Rights of the Child.
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1. Introduction

The Children’s Rights Alliance 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. We aim to improve the lives of all children under 18 years, through securing the necessary changes in Ireland’s laws, policies and services.

One of its founding objectives of the Alliance upon its establishment in 1995 was to seek an amendment to the Constitution of Ireland to strengthen the rights of children. Since we were established we have engaged in extensive advocacy on this issue, in particular during the past seven years.

The purpose of this Paper is to raise awareness among the Alliance member organisations and parliamentarians of the need for constitutional reform for children and to provide a legal and policy overview of the likely components of the amendment to be put before the People this autumn.

2. Children’s Rights

Children's rights are human rights for all children and young people under 18 years of age. They are child-specific and take into account the vulnerable situation of children, in that they are largely dependent on adults for their care and are often powerless to vindicate their own rights.

Children’s rights in Ireland flow from a number of sources, primarily:

- The Constitution of Ireland
- The European Convention of Human Rights
- The Charter of Fundamental Rights of the European Union
- The UN Convention on the Rights of the Child and other international human rights treaties
- Relevant legislation

2.1 The UN Convention on the Rights of the Child

In 1989 the UN General Assembly adopted the Convention on the Rights of the Child in recognition of the specific rights and vulnerabilities of children and to promote greater protection of children around the world. Ireland, which ratified the Convention in 1992, is among 193 States that have ratified the Convention. By doing so, Ireland committed itself to promote, protect and fulfil the rights of children as outlined in the articles of the Convention. With just the US, Somalia and South Sudan yet to ratify the Convention, it is the most widely-accepted human rights treaty in the world. Every five years, the progress of each State in implementing the Convention is examined by the UN Committee on the Rights of the Child.

The Convention provides benchmarks or signposts that help States make better decisions and achieve more successful outcomes for children and their families. There are four principles which underpin the implementation of all other rights contained in the Convention:

- Protection against discrimination (Article 2) – which includes discrimination against a child on the basis of the child’s parentage
- The best interests of the child (Article 3) – the State is required to ensure that in all matters affecting a child, the best interests of that child are a primary consideration
• The right to survival and development (Article 6) – the State is required to ensure the child’s survival and development to the greatest extent possible
• Listening to the child (Article 12) – that in decisions affecting them, the views of the child are considered

Other key rights contained in the Convention include the rights to:
• protection from abuse and neglect (Article 19)
• health and health services (Article 24)
• be adopted (Article 21)
• an adequate standard of living (Article 27)
• education (Article 28 and 29)
• play, rest and leisure (Article 31)

2.2 Children’s Rights and the Rights of the Family

Parents and families are central to a child’s life. The rights of parents and children are inextricably linked. In most cases, a child’s rights are vindicated by his or her parents. Strengthening rights for children in the Constitution will help empower parents to ensure that the State upholds their children’s rights and takes decisions that are in the child’s best interests. A children’s rights perspective recognises that children are individuals and are not the property or possession of an adult. The UN Convention on the Rights of the Child clearly sets out the relationship between children’s rights and the child’s family.

The UN Convention on the Rights of the Child:
• explicitly recognises the family as the “fundamental group of society and the natural environment for the growth and wellbeing of...children” (Preamble)
• acknowledges that parents have the “primary responsibility” for their child’s upbringing and development (Article 18)
• affirms that the family itself requires protection and assistance to fulfil its responsibilities and places a duty on States to support parents in rearing their children (Article 18)
• states that children have a right to know and be cared for by their parents (Article 7)
• explicitly discourages the separation of children from their families (Article 9)
• provides 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)
• provides for the principle of evolving capacity which means that the State must respect the rights of parents to exercise the rights of young children on their behalf and that this responsibility is gradually transferred to the child as their capacity develops. It also provides for parents to guide their children in the exercise of their rights (Article 5)

2.3 Children’s Rights and Child Protection

A fundamental human right is the right to be protected from abuse and exploitation. In relation to children, Article 19 of the UN Convention on the Rights of the Child provides that children have the right to be protected from abuse and neglect including:
[...] all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Child protection, and putting in place a robust national child protection system, is integral to upholding children’s rights. Furthermore, keeping children safe is best achieved by creating a society that fully respects children and builds children’s capacity to protect themselves. A society that respects children is one which values prevention and early intervention and thus actively supports families in their parenting role.

Listening to the views of children is key to empowering a child to speak up or/and protect themselves in situations of abuse or exploitation. The right of the child to be informed, to be heard in proceedings that impact on their lives, and to have their evolving capacities respected, all help to strengthen a child’s protective abilities. Through these rights, a child’s self-confidence and esteem can be boosted, their perception of the right to be protected is enhanced and their capacity to protect themselves is increased.

3. Children’s Rights in the Constitution

3.1 What is the Constitution and why is it important?

Bunreacht na hÉireann – The Constitution of Ireland, enacted in 1937, is the fundamental law of the State. It sets out how Ireland should be governed and the structures of the State, such as the Oireachtas, Courts and President. It guarantees a range of personal rights or ‘Fundamental Rights’, such as the right to be held equal before the law and the right to personal liberty. It underpins the interaction between the State and individuals, by giving direction to the Oireachtas and the Courts on how to balance competing rights and interests. All our laws, judicial decisions, policies and services must be compatible with the Constitution. The Constitution also aims to reflect our societal values – to make visible issues of importance to society and to be a statement of our cultural identity and aspirations. The Constitution comprises 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.

3.2 What constitutional rights do children have at present?

Children do have rights under the Constitution at present. Children are granted some of the same rights as other individuals living in the State, such as the entitlement to acquire citizenship (Articles 2 and 9). In appropriate circumstances, children are entitled to the Fundamental Rights set out in Articles 40 to 44. In addition, there are two constitutional rights specifically related to children: the right to free primary education (Article 42.4) and the ability of the State to intervene when parents fail their child (Article 42.5). The Courts have also interpreted the Constitution to include certain unenumerated rights to which the child is entitled.

3.3 What are unenumerated rights?

Article 40.3.1° of the Constitution has been interpreted by the High Court and the Supreme Court as giving rise to rights that are not explicitly stated in the text of the Constitution. Such rights are commonly referred to as unenumerated rights. For example, in Ryan v Attorney General, Justice Kenny stated that the “right of bodily

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1 In re Article 26 and the Adoption (No. 2) Bill 1987 [1989] IR 656 the court found that a child is entitled, where appropriate, to the rights contained in Articles 40 to 44.
integrity” can be read into Article 40.3.1, even though the right is not expressly mentioned in that provision. He attributed the source of the unenumerated rights to the “Christian and democratic nature of the State”.  

However, like almost all of the rights in the Constitution, unenumerated rights are not absolute and can be limited or restricted through judicial interpretation or legislation. In addition, as unenumerated rights are not expressed in the text of the Constitution, they have been considered to be unspecified and vague. This has led the Supreme Court in recent times to show reluctance in identifying new unenumerated rights, or to give effect to (enforce) previously identified unenumerated rights, in particular where the right is a socio-economic right. The Court has instead signalled its preference to rely on the rights explicitly stated in the text of the Constitution. It has cited the doctrine of the Separation of Powers as the basis for its reasoning on this issue – in other words that the court’s identification of unenumerated rights is an encroachment on the powers of the Legislature (Oireachtas) or the Executive (Government).

The Courts have identified certain unenumerated rights to which the child is entitled, including 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
- to have decisions in relation to guardianship, custody or upbringing, taken in the interests of his/her welfare
- to be placed and maintained in secure residential accommodation so as to ensure, so far as practicable, his or her appropriate religious and moral, intellectual, physical and social education

The courts have been particularly reluctant to identify or enforce unenumerated rights in relation to children. As a result the catalogue of unenumerated rights listed above has not been expanded upon in recent years. In cases such as TD v Minister for Education and Sinnott v Minister for Education, the Courts have signalled their preference to rely on the rights explicitly stated in the text of the Constitution. The Courts have cited the doctrine of the separation of powers as the basis for its reasoning on this issue – in other words that the Court’s identification of unenumerated rights is an encroachment on the powers of the Oireachtas.

Furthermore, in the event of a conflict between the express or unenumerated rights which children have under Article 40.3 and the rights of the marital Family under Articles 41 and 42, the Courts have found that the rights of the Family prevail.

3.4 Which constitutional rights do families have in relation to their children?

Article 41 outlines the rights of ‘the family’. It provides that 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’. It also provides that the State ‘guarantees to protect the Family...’ and to ‘guard with special care the institution of Marriage, on which the Family is founded...’. The courts have interpreted references to the ‘family’ to mean only the family based on marriage and that the rights of the family belong not to individual members of the family but to the family unit as a whole.

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5 TD v Minister for Education [2001] 4 IR at 259.
6 TD v Minister for Education [2001] 4 IR at 259.
**Article 42** sets out the rights and duties of parents in relation to their children, and provides for the child’s right to free primary education. It provides that 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’. Article 42.5 empowers the State, in exceptional circumstances, to limit the rights of the family where there has been parental failure with a view to protecting the rights and interests of children. Article 42.5 is the basis for our child protection laws and system. When a court looks at the circumstances of a child of married parents, it grants a rebuttable presumption that the child’s best interests are served within his or her own family.

Under Articles 41 and 42, the family is granted rights in relation to its children which are:

- **inalienable** = absolute, not transferable to another power and incapable of repudiation
- **impresscriptible** = cannot be lost by the passage of time
- **antecedent and superior to all positive law** = above all law created through legislation or through judicial decisions

### 3.5 Do all children enjoy the same constitutional rights?

No, the courts have interpreted ‘the family’ to mean the family based on marriage. The rights of children of marital and non-marital families are not treated in the same manner in the Constitution. A child born to married parents derives his or her rights from the provisions of Article 41 (Family) and Article 42 (Education), whereas a child born to parents who are not married to one another derives his or her rights from the personal rights provision under Article 40.3.

The courts have made varying judicial interpretations of the constitutional protection afforded to children of parents who are not married to each other. For example, the Supreme Court has ruled that while an unmarried mother is automatically the guardian of her child, the relationship of mother and child does not constitute a ‘family’ within the terms of the Constitution. The Court has also ruled that a father of a child born outside marriage has “no natural right to either the custody or society of his child” and that while the relationship between a father and a child born outside marriage could be acknowledged, it should not be treated as on a par with the rights of the father in a constitutional (i.e. marital) family.

### 3.6 What countries give rights to children in their Constitution?

Globally, a number of States have included provisions on children within their national constitutional texts. This is a growing trend reflecting awareness of the importance of children’s rights. At least 25 countries have constitutional provisions on children and the family, including Portugal, Spain, Finland, Bulgaria, Hungary, and Poland. Extracts are included in Appendix 4.

At European level, children’s rights are recognised in the Charter of Fundamental Rights of the European Union (Article 24). In addition, the Council of Europe has recommended that States guarantee children’s rights through explicit recognition in constitutional text.

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# 4. The Amendment

## 4.1 Key Milestones in the History of the Amendment

Acknowledgement of the need for constitutional reform is not new; indeed it was first discussed in the Oireachtas over 30 years ago. Constitutional change to strengthen children’s rights has repeatedly been called for in a series of official reports. Furthermore, there have been a large number of court cases concerning child welfare, particularly over the past ten years, which serve to highlight the inadequacy of the current constitutional recognition afforded to the rights of children. In the wake the Ryan Report, the Roscommon Child Care Case and the recent Child Death report the public has voiced their desire that greater protection be afforded to children. Some key milestones in the history of the upcoming amendment are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tr>
<td>1976</td>
<td>The need for constitutional reform for children was first discussed in the Oireachtas over 30 years ago, by Senator Mary Robinson (later President of Ireland), during the 1976 debate on the powers of the Adoption Board which were addressed in the Sixth Amendment to the Constitution.</td>
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<td>1993</td>
<td>The Report of the Kilkenny Incest Investigation, chaired by Catherine McGuinness SC, called for constitutional reform for children. The report examined the State’s failure to adequately investigate claims of child abuse, and concluded that “…the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the rights of parents than to the rights of children”.</td>
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<td>1998 &amp; 2006</td>
<td>The UN Committee on the Rights of the Child, the monitoring body for the UN Convention on the Rights of the Child, examined Ireland’s progress on two occasions. On both occasions, in 1998 and again in 2006 the UN Committee called on Ireland to incorporate children’s rights into its domestic law.</td>
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<td>2005</td>
<td>The Ombudsman for Children, Emily Logan, first called for an amendment to the Constitution to include children’s rights in 2005 and has since repeated this call numerous times.</td>
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<td>2006</td>
<td>The then Taoiseach, Bertie Ahern, TD, announced the Government’s intention to hold a children’s referendum “to put the rights of children in a central place in our Constitution”.</td>
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<td>2007</td>
<td>On 19 February, the then Minister for Children, the late Brian Lenihan, TD published Government wording for an amendment in the form of The Twenty-Eighth Amendment to the Constitution Bill 2007. The Dáil was dissolved weeks later and following the 2007 General Election an Oireachtas Committee was established to secure political consensus on wording to be put before the People. The 2007 Programme for Government stated that “the fundamental law of our land should fully reflect our commitment to value and protect childhood” and calls for “a new dedicated Article on Children” in the Constitution.</td>
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<td>2007 &amp; 2011</td>
<td>The European Commissioner for Human Rights, Mr Thomas Hammarberg in 2007 and again in 2011 urged the Government to include the best interests principle at constitutional level.</td>
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<td>2010</td>
<td>In February, the Oireachtas Committee published its final report which contained a second set of proposed wording – which had all-party support. (See Appendix 2)</td>
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<td>2011</td>
<td>Shortly before the dissolution of the Dáil in January 2011, the then Minister for Children and Youth Affairs, Barry Andrews, TD, produced, but did not publish, a third set of wording. This wording had received Cabinet approval, although, due to the timing of the General Election, was not formally published. All of the main political parties committed to a children’s referendum in each of their 2011 General Election manifestos. A commitment to hold a children’s referendum is included in the Fine Gael/Labour Programme for Government, 2011.</td>
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<tr>
<td>2012</td>
<td>On 18 September, Taoiseach Enda Kenny, TD, announced Saturday 10 November as polling date for a children’s referendum. Wording to be published on Wednesday 19 September.</td>
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14 Speech by An Taoiseach, Bertie Ahern TD, Eve of Ard Feis Event, City West Hotel, Dublin, 3 November 2006.

15 Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Ireland from 26 to 30 November 2007, para. 3.1.

16 Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, *following his visit to Ireland from 1 to 2 June 2011*, para. 5.
4.2 Reports Calling for Constitutional Reform

Constitutional change to strengthen children’s rights in the Constitution has been repeatedly called for in a series of official reports, including:

- 1980 – Task Force on Child Care
- 1993 – Kilkenny Incest Investigation report
- 1996 – Constitution Review Group
- 1998 – Commission on the Family
- 2006 – All-Party Oireachtas Committee on the Constitution
- 2006 – Joint Committee on Child Protection
- 2006 – UN Committee on the Rights of the Child, Concluding Observations on Ireland
- 2006 – Advice of the Ombudsman for Children
- 2010 – Joint Committee on the Constitutional Amendment on Children
- 2012 – Fifth Report of the Special Rapporteur on Child Protection

4.3 How the Constitution is Amended

Article 46 of the Constitution provides that any part of the Constitution can be amended – the text can be changed, added to, or repealed. The Constitution states that any proposal of wording for an amendment must be initiated as a legislative Bill in Dáil Éireann. The Bill must be passed by both Houses of the Oireachtas (Dáil and Seanad), and can then be submitted for decision by the People in a referendum.

**Step 1:** Wording agreed by the Oireachtas

**Step 2:** Wording put to the People in a Referendum vote

**Step 3:** If the majority of the votes cast are in favour of the proposed amendment, the President of Ireland will sign the amendment into law and at this point, the Constitution will be formally amended.

A referendum is a secret ballot vote, seeking a ‘yes’ or ‘no’ vote. If a simple majority of the votes cast (over 50%) are in favour of the proposed amendment, the President of Ireland will sign the amendment into law and at this point, the Constitution will be formally amended. There is no minimum turn-out required for a constitutional referendum to be considered valid.

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Referendum Commission

The Referendum Commission is an independent body, the role of which is to explain the subject matter of referendum proposals, to promote public awareness and encourage the electorate to vote at the poll. The Commission is chaired by a former member of the High Court or the Supreme Court or by a serving member of the High Court. The Chairperson is appointed by the Chief Justice at the request of the Minister for the Environment, Community and Local Government. There are four ex-officio members: the Clerk of Dáil Éireann, the Clerk of Seanad Éireann, the Ombudsman and the Comptroller and Auditor General.

Polling Day

Polling day is set by an Order of the relevant Minister, in this case the Minister for the Environment, Community and Local Government. The official announcement of the polling day will happen once the Bill has been passed by both Houses. Polling day must be between 30 and 90 days of the making of the appointment order. The Taoiseach has indicated that polling date will be Saturday 10 November 2012.

Eligibility to Vote

To vote in a referendum:

- You must be an Irish citizen
- You must be at least 18 years
- Your name must be on the Register of Electors

History of Amendments

Thirty-three proposals to amend the Irish Constitution have been put to the people since the first referendum in 1959. Twenty-four have been approved and nine have been rejected.
5. Why Constitutional Reform is Needed

There are four problems we believe the amendment should address.

Problem 1: Poor decision-making for children
Problem 2: We fail to support families and adequately protect children
Problem 3: No mechanism to hear the child in cases affecting their lives
Problem 4: Abandoned children cannot be adopted

Each of these four problems is addressed below.

5.1 Best Interests as a Tool for Decision-Making

What’s the problem? = poor decision-making for children

When a court or other body is asked to make a key decision about a child of married parents, it is blocked from putting the child’s interests at the centre of its decision, resulting in poor decision-making for these children. This is not the case for children of unmarried parents.

Why is it a constitutional issue?

The Supreme Court has interpreted Articles 41 and 42 of the Constitution to mean that there is a constitutional presumption that the child’s interests are best served within the marital family. Hence, in any conflict between the interests of the marital family and the interests of the child, the rights of the family will take precedence. This presumption can only be rebutted in exceptional circumstances where the parents have failed the child for physical or moral reasons. Articles 41 and 42 thus preclude the courts from adopting the principle of the best interests of the child as the key principle guiding their decisions in cases affecting children. A different approach is taken to children of unmarried parents. When deciding a case involving children of unmarried parents, the best interests principle is taken as its premise. The court is not inhibited by the constitutional presumption and it does not presume that the child’s best interests are found with the parents. It considers the parents’ rights together with the welfare of the child.

Does the best interests principle not exist in legislation? Yes, but it is subordinate to the Constitution

The ‘best interests’ principle has existed in Irish domestic law as the ‘welfare’ test since the 1960s. However, the courts have found themselves blocked by the Constitution when trying to apply the test in certain cases for children from married families. The ‘welfare’ principle is contained in our child law, for example:

- In custody, guardianship and access cases, a court must consider the welfare of the child as the first and paramount consideration in any proceedings before it (Section 3, Guardianship of Infants Act 1964).
- The HSE must regard the welfare of the child as the first and paramount consideration while also having regard to the rights and duties of the parents (Section 3, Child Care Act 1991 (as amended)).

relating to the care and protection of a child, the court must also consider the ‘welfare’ of the child as the first and paramount consideration (Section 24, Child Care Act 1991).

- In adoption proceedings, the Adoption Authority or a court must have regard to the welfare of the child as the first and paramount consideration (Section 19, Adoption Act 2010). In adoption cases where parental consent is being dispensed with, the High Court must be satisfied that it is in the best interests of the child to grant the authorisation for the adoption (Section 54, Adoption Act 2010).

How are children affected by the status quo?

When a court or other body is blocked from putting the child’s interests at the centre of its decision it can result in poor decision-making for the children and children can be left unprotected. The 2006 case of N v. HSE\(^27\) (often referred to as the Baby Ann case) is often cited as an example of how the marital status of the child’s parents impacts on judicial decision making. There is also concern that access arrangements are not sufficiently governed by the principle of the best interests of the child. As a consequence, there are instances where the courts do not appear to have taken sufficient account of child welfare and protection issues when deciding access arrangements and so make an order for access arrangements that may be unsafe or unsuitable for the child. The operation of the in camera rule in private law proceedings means that there is no systematic monitoring of how such decisions are being made.

Who is Affected?

This issue potentially affects thousands of children each year who are involved in in care, guardianship, access, custody and adoption proceedings.

What is the best interests principle?

The principle of ‘best interests’ of the child is a tool to guide decision-making in cases involving children. It involves considering a holistic view of what is best for children and, depending on the age and maturity of the child, should incorporate the child’s own views. This will mean better decisions for children as their interests will be considered as a key element rather than being excluded from the process. It is also the accepted criterion for any assessment of State intervention in family life under Article 8 of the European Convention on Human Rights.\(^28\)

\(^{27}\) [2006] 4 I.R. 374

5.2 Protecting Children and Supporting Families

What’s the problem? = Failure to effectively support families and adequately protect for children

The Constitution is currently blocking the effective operation of our child protection system.
- In many cases, the State has failed to protect children by intervening at too late a stage in cases of abuse and neglect
- A different standard of intervention is applied to children, depending on whether their parents are married or unmarried.

Why is it a constitutional issue? = Articles 41 and 42

The current wording of Article 42.5 provides that the State is to intervene to protect a child in “exceptional circumstances” where the parents have failed in their duties for physical or moral reasons. The Supreme Court has interpreted Articles 41 and 42 to mean that there is a constitutional presumption that the child’s interests are best served within the marital family unless there are compelling reasons to the contrary. The threshold for state intervention in the family means that short of a total failure of the parent’s duties, effectively amounting to a risk to the life of the child, it can be very difficult for the State to intervene to support children and families. By the time they can do so, the child may already have been exposed to abuse or neglect.

The constitutional presumption in favour of the married family means that in cases involving children from unmarried families, the State can intervene at an earlier stage as the same presumption does not apply. This means that a different level of protection is afforded to children depending on the marital status of their parents.

How are children affected by the status quo?

Under the Constitution, it is only possible for the State to step in when families have completely failed, or where the child’s life is in immediate danger. This is often too late and may leave children exposed to abuse and neglect.

An amendment to reflect the duty of the State to intervene to uphold children’s rights would place an onus on the State to undertake initiatives to prevent abuse and to proactively support vulnerable children and families. The State should take all possible actions to support such families that are struggling so as to enable them to care for their children in their home environment. Furthermore, when a child is placed in care, the State should 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.

Who is affected?

Overwhelmingly, the best place for a child is with their family, and the Constitution reflects this. However, the sad reality is that some families can be damaging or dangerous for children. In those cases, the State must have the power to fulfil its duty to intervene to support families and to protect children, regardless of the parent’s marital status.

This amendment has the potential to strengthen families by improving the entitlements of children and placing an onus on the State to support children and their families before the situation escalates to crisis level.
5.3 Listening to the Views of Children

What’s the problem? = no mechanism to hear the child in cases affecting their lives

In general, the views of children are not considered in judicial and administrative decisions affecting them. In judicial cases relating to children, all parties involved in the case have an entitlement to be heard except for the child. This contrasts with the good practice that exists through consultation and participation work with children being undertaken across the country, for example by the Departmental Children and Youth Affairs, Dáil na nÓg, Comhairle na nÓg and many youth organisations.

Why is listening to the views of children important?

The principle of listening to the views of the child is widely accepted as going hand in hand with the principle of the best interests of the child and safeguarding children from abuse. If the principle were included in the amendment the impact would be significant. It would ensure that where a decision relates to a child, that child would have the opportunity to have their opinion on the decision heard by the deciding body. The child’s views would be given due weight in accordance with their age and maturity. This does not mean that the child’s views are the deciding factor: ultimately, the decision rests with the judge or relevant professional. It would provide an impetus to the implementation of current legislative provisions for hearing the views of children and for the continued development of administrative practices to facilitate children’s participation. It would also impact on the attitudes of society, and in particular those working with children, to create an environment conducive to enabling the voice of the child to be heard. The litany of child protection reports over the past two decades demonstrate what happens when we as a nation do not listen to our children.

How are children affected by the status quo?

Currently, there are serious gaps and inconsistencies in relation to children being heard in legal and administrative proceedings that affect them. Some children may have their voice heard in legal proceedings involving them either by direct input, independent representation or through the appointment of a Guardian ad Litem. However, this is not automatic and it is not an option for many children. There has been a failure to develop and implement a comprehensive Guardian ad Litem service. The provision in the Children Act, 1997 to enable the appointment of a Guardian ad Litem in private family law proceedings has not yet been commenced, thereby denying children a voice in highly contentious custody and access cases affecting them. Furthermore, whilst a Guardian ad Litem can be appointed in public law cases (care proceedings and child protection cases), the appointment is not automatic. There is also a lack of statutory guidance as to the role and functions of a Guardian ad Litem.

Who is affected?

Although we all hope that we will never end up in court or involved with the authorities, each year thousands of children and their families find themselves in such circumstances, in particular in care, guardianship, custody, access and adoption proceedings or as a witness or victim of a crime.

5.4: Reform our Adoption Laws

What’s the problem? = Abandoned children cannot be adopted

It is virtually impossible for an abandoned child to be adopted, in particular if their parents are married.

Why is it a constitutional issue?

Article 41 of the Constitution is blocking the effective operation of the Adoption Act 2010, which provides for the adoption of children of married parents. The criteria for a child to be adopted under the Act were written in a way that would not breach Article 41 – the complete abandonment of the parents’ constitutional rights towards their children, which has been proven to exist for the previous 12 months and which will continue to exist until the child turns 18 years of age. The threshold of complete and permanent parental failure is set so high that in practice it is unachievable, and hence, only a handful of adoptions of children of married parents have been granted. The criteria set down for married children are also impacting on the adoption of children from unmarried families.

How are children affected by the status quo?

The sad reality exists that for some children it is not possible or safe for them to live with their birth parents. Generally, such children spend their childhoods in the care system and upon reaching 18 years of age must leave care and fend for themselves – often with little or no support from the State or extended family. Abandoned children from married parents live in a legal limbo. These children, although they no longer have regular contact with their married parents, nevertheless ‘belong’ to them and are not ‘free’ for adoption. Certain children, for whom a return to their birth families is not an option, are thereby denied the opportunity through adoption for a ‘second chance’ of a permanent, secure and caring family life.

Why is adoption important for abandoned children?

Many children experience a wonderful childhood in foster care and become a central part of their foster family. However, foster care is not the same as adoption. Foster care involves the transfer of legal custody, but it does not involve the transfer of legal guardianship which remains with the birth parents and this can have considerable implications. A foster child lives in constant uncertainty of being returned to his or her birth parents at any time, of not knowing where they will live, or whether they will be welcome to remain with their foster families after they turn 18. Foster children are not automatically entitled to inherit from their foster parents. Permission must be sought from a social worker for day-to-day family decisions such as permission for the child to participate in a school trip, or for medical treatment, or the issuance of a passport, though foster carers of more than five years have increased autonomy in relation to certain issues. Many children in long term foster desire a permanent solution to their care needs and also the ability to use the same surname as their foster parents and foster siblings – to belong to their foster family.

Who is affected?

The exact number of children affected by this issue is not known. However, we do know that there are over 6,200 children in care. The vast majority of children in care (91%) live in foster care and of those 46% live in foster care with relatives. A third of those in care, approximately 2,000 children, are in care long term – for more than five years – and many have little or no contact with their birth parents. It is estimated that over 600 children in care on a long term basis are from marital families.

Legislation introduced on foot of this provision should provide parents with the right to challenge such an adoption and explicitly state that any such adoption must be in the child’s best interest. The Government have committed to publish proposed legislation in advance of a referendum.
Appendix 1: Articles 41 and 42 of the Constitution of Ireland, 1937

ARTICLE 41 – FAMILY

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

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

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

   i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years,

   ii. there is no reasonable prospect of a reconciliation between the spouses,

   iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and

   iv. any further conditions prescribed by law are complied with.

3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.
ARTICLE 42 - EDUCATION

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.
Appendix 2: Joint Committee on the Constitutional Amendment on Children Wording 2010

The Joint Committee on the Constitutional Amendment on Children published its final report in February 2010. Within this report it published text for a constitutional amendment, in which Article 42 of the Constitution is deleted in its entirety and replaced by a new 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.
Appendix 3: Information on the Standards in Public Office Commission

This material is a reproduction of a briefing note for Alliance member organisations on the Standards in Public Office Commission (Standards Commission), which was produced in July 2011. It provides member organisations with key information that will help guide them in their work, should they wish to support a ‘Yes’ referendum campaign.

If member organisations do not receive any donations for a ‘political purpose’ (see overleaf for definition) then leading up to, and during, a referendum campaign, they can freely engage in a campaign for a ‘Yes’ vote.

Should member organisations receive any donations over €126.97, then they must register with the Standards Commission as a ‘third party’ and open a political donations account (more information overleaf). Registration involves providing the Standards Commission with:

- the name and address of the third party and the name and address of the person responsible for its organisation, management or financial affairs (“responsible person”)
- a statement of the nature, purpose and estimated amount of donations to, and proposed expenses of, the third party during the year
- an indication of any connection the third party may have with any political party or candidate at an election or referendum or otherwise
- “It is an offence to fail to comply with any of SIPOC Requirements

Those member organisations that resolve not to accept any donations for a ‘political purpose’ exceeding the value of €126.97 (including being in receipt of professional services at reduced commercial rates or pro bono work) can:

- Publicly campaign for a ‘Yes’ vote in a referendum (public interviews, debates, social networking, etc.)
- Publicly campaign for a ‘Yes’ vote and participate in an activity of a ‘third party’ campaign.
- Join with other organisations to collectively call for a ‘Yes’ vote
- Endorse a ‘third party’ campaign
- Produce campaign material
- Provide briefing notes and explanatory documents to a ‘third party’ campaign
- Give permission for its logo to be used by a ‘third party’ campaign or other organisation
- Direct individuals to give donations to a named ‘third party’ campaign.
- Facilitate staff to work on a voluntary basis with a ‘third party’ on a campaign. Staff annual leave must be clearly documented. If a staff member works for the ‘third party’ whilst still receiving their salary this must be declared as a donation to the ‘third party’. In these circumstances, the legislative requirements in relation to donations and prohibited donations apply:
  - third party may not accept a donation or donations from the same person, in the same year exceeding an aggregate value of €6,348.69
  - donation of whatever value (other than an Irish citizen) who resides outside the island of Ireland
  - donation from a body corporate or unincorporated body of persons, which does not keep an office in the island of Ireland from which one or more of its principal activities is directed; and
  - donation exceeding the value of €126.97, if the name and address of the donor is not known

All of the activities listed above do not have a commercial value and therefore do not breach SIPOC requirements.
Political purposes means any of the following purposes, namely:

1. (I) to promote or oppose, directly or indirectly, the interests of a political party, a political group, a TD, a Senator or an MEP, or 
   (II) to present, directly or indirectly, the policies or a particular policy of a political party, a political group, a TD, a Senator, an MEP, or a third party, or 
   (III) to present, directly or indirectly, the comments of a political party, a political group, a TD, a Senator, an MEP, or a third party with regard to the policy or policies of another political party, political group, TD, Senator, MEP, third party or candidate at an election or referendum or otherwise, or 
   (IV) to promote or oppose, directly or indirectly, the interests of a third party in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to a policy or policies or functions of the Government or any public authority;
2. to promote or oppose, directly or indirectly, the election of a candidate at a Dáil, Seanad or European election or to solicit votes for or against a candidate or to present the policies or a particular policy of a candidate or the views of a candidate on any matter connected with the election or the comments of a candidate with regard to the policy or policies of a political party or a political group or of another candidate at the election or otherwise; 
3. otherwise to influence the outcome of the election or a referendum or campaign referred to in paragraph (i)(IV) of this definition.

An individual or group, therefore, which accepts a contribution exceeding €126.97 in value, which has been given for the purposes of supporting the individual's/group's campaign in relation to the children's referendum, will be required to register with the Standards in Public Office Commission as a third party and to comply with the requirements set out below for third parties.

What is a "third party"?

A third party means any individual or group, other than a registered political party or election candidate, who or which accepts, in a particular calendar year, a donation exceeding the value of €126.97.

A donation means any contribution given for political purposes and includes all or any of the following:

- a donation of money
- a donation of property or goods
- conferring the right to use, without payment or other consideration, indefinitely or for a specified period of time, any property or goods
- the supply of services without payment or other consideration thereof
- the difference between the commercial price and the price charged for the purchase, acquisition or use of property or goods or the supply of any service where the price, fee or other consideration is less than the commercial price, or
- a donation received by way of a contribution made to the net profit from a fund-raising event organised for the benefit of a third party.
Appendix 4: Extracts of Global Constitutional Provisions on Children

This Appendix provides a sample of how children’s issues are reflected in the constitutions of other countries. A more comprehensive document that examines the constitutions of 25 countries can be found at http://www.childrensrights.ie/sites/default/files/information_sheets/files/GlobalConstitutionalProvisionsChildren081009_0.pdf.

Many of the jurisdictions listed below operate under a civil law system; Ireland on the other hand, operates under a common law system.

FINLAND – Constitution of Finland (1999)

Section 6 Equality

1) Everyone is equal before the law.

2) No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.

3) Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.

4) Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act.


Article 28: Children’s Rights

1) Parliament shall enact such laws as are necessary to ensure that -
   a) every child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents, except where those parents have effectively surrendered their rights and responsibilities in respect of the child in accordance with law;
   b) every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents;
   c) parents undertake their natural right and obligation of care, maintenance and upbringing of their children in co-operation with such institutions as Parliament may, by law, prescribe in such manner that in all cases the interest of the children are paramount;
   d) children and young persons receive special protection against exposure to physical and moral hazards; and
   e) the protection and advancement of the family as the unit of society are safeguarded in promotion of the interest of children.

2) Every child has the right to be protected from engaging in work that constitutes a threat to his health, education or development.

3) A child shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

4) No child shall be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs.

5) For the purposes of this article, “child” means a person below the age of eighteen years.


Children:

53. (1) Every child has the right—
   (a) to a name and nationality from birth;
   (b) to free and compulsory basic education;
   (c) to basic nutrition, shelter and health care;
   (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
   (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
   (f) not to be detained, except as a measure of last resort, and when detained, to be held—
       (i) for the shortest appropriate period of time; and
       (ii) separate from adults and in conditions that take account of the child’s sex and age.

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

Section 3: The State shall defend:
   (1) The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;
   (2) The right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development;
   (3) The right of the family to a family living wage and income; and
   (4) The right of families or family associations to participate in the planning and implementation of policies and programs that affect them.


Article 56: Rights of Children
1) Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity.
2) Children shall be guaranteed special protection from economic, social, physical, mental or other exploitation and abuse. Such protection shall be regulated by law.
3) Children and minors who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy the special protection of the state. Their position shall be regulated by law.


Article 28: Children
1) Every child has the right -
   a) to a name and a nationality from birth;
   b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
   c) to basic nutrition, shelter, basic health care services and social services;
   d) to be protected from maltreatment, neglect, abuse or degradation;
   e) to be protected from exploitative labour practices;
   f) 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;
   g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, 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;
   h) 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
   i) 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.

SPAIN – Spanish Constitution (1978)

Article 39: Family, Children
1) The public authorities shall assure the social, economic, and legal protection of the family.
2) The public authorities shall assure the complete protection of children, who are equal before the law regardless of their parentage and regardless of the marital status of their mothers. The law shall make it possible to investigate paternity.
3) Parents must provide their children, born in or out of wedlock, with assistance of every kind during the time they are minors and in other cases where it is legally proper.
4) Children shall enjoy the protection provided in international agreements which safeguard their rights.

Article 48: Participation of Youths
The public authorities shall promote the conditions for the free and effective participation by the young in political, social, economic and cultural development
Appendix 5: Key Documents on the Constitutional Amendment on Children


Children’s Rights Alliance Publications:


The Twenty Eighth Amendment of the Constitution, Submission to the Joint Committee on the Constitutional Amendment on Children (January 2008): [http://www.childrensrights.ie/sites/default/files/submissions_reports/files/SubJTCmmConstAmendmentChild310108_0.pdf](http://www.childrensrights.ie/sites/default/files/submissions_reports/files/SubJTCmmConstAmendmentChild310108_0.pdf)

## Appendix 6: Member Organisations of the Children's Rights Alliance

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<td>UNICEF Ireland</td>
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<td>Young Ballymun</td>
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<tr>
<td>Youth Advocate Programme Ireland (YAP)</td>
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<td>Youth Aftercare Support Service (YASS)</td>
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