

1. CHILDREN'S CONSTITUTIONAL RIGHTS

Chapter Grade

C+

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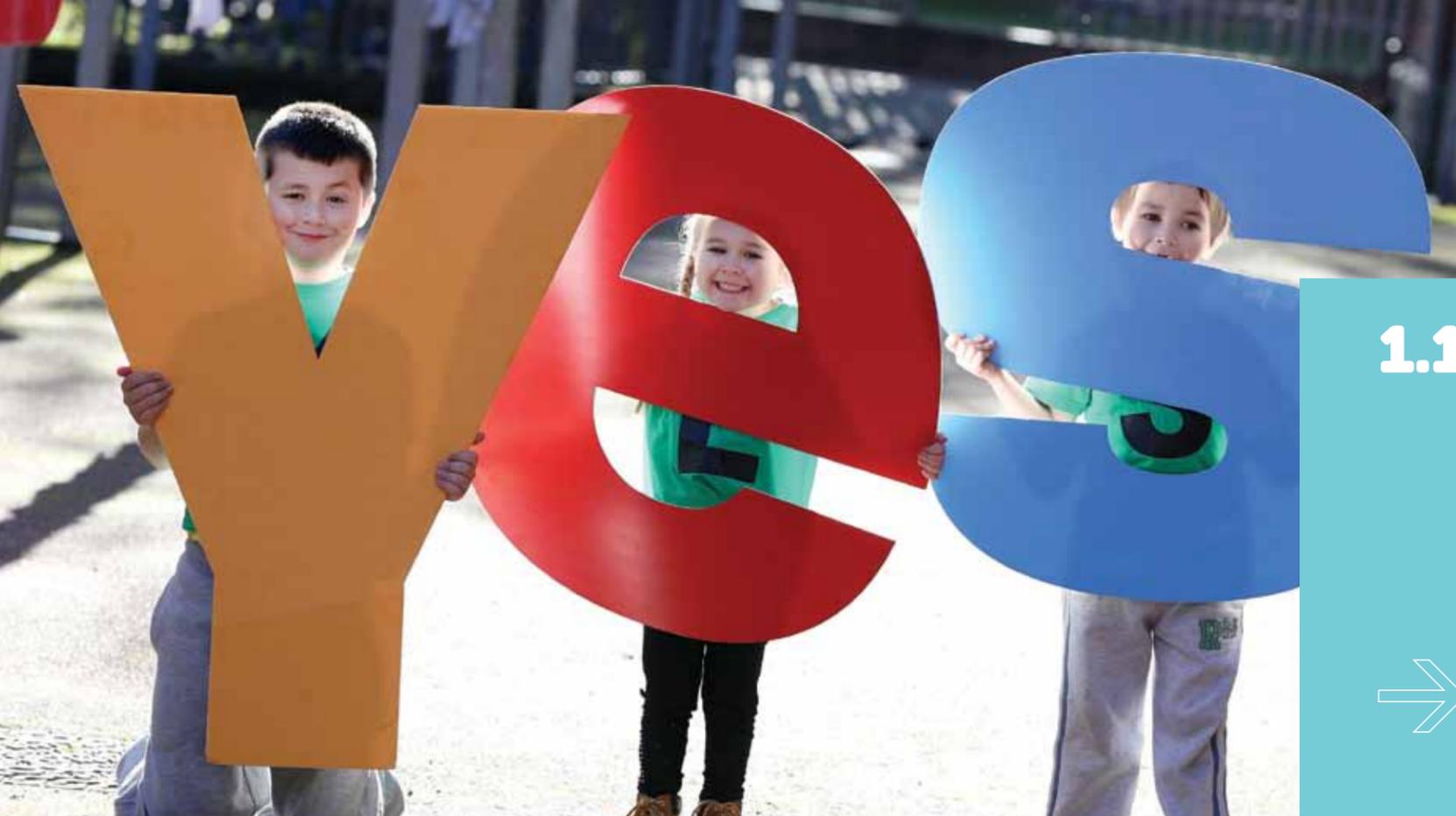
Disadvantage begets more disadvantages. Just think of one of the 1,600 homeless children. She is temporarily placed in a hotel miles away from school. Her mother has to spend what little she has on bus fares to school and poor quality food but can't afford the trip to the Speech and Language Therapist. The child misses her appointment and her speech continues to worsen so she falls behind in her schoolwork and the inequality gap grows. Protecting every child's right to housing, health, education and social security would be an important step towards protecting these children. And we could do this if we enshrine economic, social and cultural rights in the Irish Constitution.”

Fergus Finlay, Chief Executive, Barnardos

Duty on States to Provide for the Rights of Children

By ratifying the UN Convention on the Rights of the Child, States agree to undertake all appropriate legislative, administrative and other measures to ensure the implementation of the rights set out in the Convention. In relation to economic, social and cultural rights, States are obliged to undertake such measures to the maximum extent of their available resources.

Summary of Article 4 of the UN Convention on the Rights of the Child



1.1

Children's Referendum

GOVERNMENT COMMITMENT

The *Programme for Government 2011-2016* commits to establishing a process to ensure that the Constitution meets the challenges of the 21st century [...]. It also promises to give priority to specific constitutional amendments, including:

- > A referendum to amend the Constitution to ensure that children's rights are strengthened, along the lines recommended by the All-Party Oireachtas Committee.



Progress: Some

'Children's Referendum' receives a 'B+' in Report Card 2016. This is an increase on last year's 'B-' grade. This year's grade recognises that the amendment to strengthen children's constitutional rights was signed into law in April 2015. It also recognises that at District Court level, training on children's issues is now included in the induction training for new judges and a training needs-analysis has been undertaken.

This is the final year of the Report Card series under the *Programme for Government 2011-2016*. The Government committed to hold a referendum to amend the Constitution of Ireland to ensure that children's rights are strengthened, along the lines recommended by the All-Party Oireachtas Committee. In 2012, the People of Ireland voted 58 per cent to 42 per cent in favour of the Thirty-First Amendment to the Constitution. However, there was a delay of almost three and a half years before the

amendment was written into law. The delay was due to a legal challenge.¹ The Supreme Court dismissed the appeal on 24 April 2015,² and the Thirty-First Amendment to the Constitution Act 2012 was signed into law by the President of Ireland on 28 April 2015.³

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1 The challenge was taken by Joanna Jordan and related to the publication of a government funded booklet/website on the children's referendum. (*Jordan v Minister for Children and Youth Affairs & Others* [2013] IEHC 625). Parts of the booklet/website were found to be unconstitutional because they breached the McKenna principles (*McKenna v An Taoiseach (No. 2)* [1995] 2 IR 10) which prohibit the spending of public monies to espouse a particular perspective in a referendum (*McCrystal v Minister for Children and Youth Affairs, the Government of Ireland, Ireland and the Attorney General* [2012] IESC 53.) The Court also found that material contained a misstatement as to the effect of the referendum. Jordan relied upon this case to argue that the Government booklet/website had a material effect on the referendum outcome and interfered with the democratic process. However, Jordan's appeal was unsuccessful.
 2 *Jordan v Minister for Children and Youth Affairs & Ors* [2015] IESC 33.
 3 Department of Children and Youth Affairs, 'The Referendum Relating to Children' <http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/Child_Welfare_Protection/ChildrensReferendum.htm> accessed 28 January 2016.



IN THE NEWS

THE CHILDREN'S REFERENDUM WILL NOT HAVE TO BE HELD AGAIN

The Journal.ie, 24 April 2015

THE SUPREME COURT has ruled that the Children's Referendum should not be re-run. A High Court petition taken by Joanna Jordan from Dun Laoghaire to overturn the result of the 2012 referendum was previously rejected. It ruled the Government's conduct – specifically using State monies to publish an unbalanced information campaign – did not impact on the outcome of the referendum. Her appeal against this decision was unanimously dismissed by the seven-judge panel today. The judgement outlined how the significant voting margin (58% voted yes and 42% voted no) was a significant factor. "Applying the test to the circumstances of these appeals, the Court finds it has not been established that it is reasonably possible that the actions of the Minister materially affected the outcome of the referendum as a whole," the judges explain. The High Court will now

have to endorse the result of the referendum before the President can sign it into law. It is understood this could happen in the next seven days. The Minister for Justice Frances Fitzgerald also welcomed today's decision. "It is important that citizens have the opportunity to bring concerns to our courts as happened in this case," she said in a statement. "This is a new era for how we as a society view our children. No longer seen and not heard, children are now recognised by our Constitution as individual rights holders deserving of protection by our laws irrespective of their family form." [...]

The Children's Rights Alliance said: "For many hundreds of children in long term foster care today's judgement opens the way for them to finally find a permanent and secure family through adoption by their foster parents." [...]

By Christina Finn

While the Government has met its commitment to hold the referendum, the amendment did not fully reflect the wording proposed by the Joint Committee on the Constitutional Amendment on Children which had all-party support, as promised in the *Programme for Government* commitment.⁴ The Joint Committee, established in 2009, was tasked with reviewing the Twenty-eighth Amendment of the Constitution Bill 2007, which set out proposed text for a constitutional amendment on children, and making recommendations as they deemed appropriate to the Oireachtas.⁵ The Committee published its final report in 2010 and set out detailed proposed wording that goes well beyond the 2007 wording.

In a number of key areas the Committee's wording was stronger than that of Article 42A. The Committee framed the right of a child to have their views heard as a direct constitutional right applying to administrative and judicial proceedings, while Article 42A only provides that the State must legislate for this right and is confined to judicial proceedings.⁶ The Committee specifically identifies the right of the child 'to such protection and care as is necessary for his or her safety and welfare' and 'to have his or her welfare regarded as a primary consideration', this is not included in Article 42A. The Committee included the clause that states that adoption law 'shall respect the child's right to continuity in its care and upbringing';⁷ this was not included under Article 42A.

In other areas Article 42A improves on the wording proposed by the Committee. The Oireachtas is obliged under Article 42A to enact legislation in the area of adoption reform,⁸ while the Committee's wording would have only enabled the Oireachtas to provide for such reform. Importantly Article 42A.2.1⁹ reshaped the Committee's proposal in relation to child protection to shift away from the failure of the parents and the reasons for that failure to instead focusing on the child and the impact of the parents' failure on their safety and welfare. It also includes a safeguard against over-intervention by the State by stating that any intervention take place only in 'exceptional circumstances'.

On balance, the Committee's proposed wording would have provided greater constitutional protections to a wider range of children's rights.

The UN Committee stresses the importance of clarifying the extent of the applicability of the UN Convention on the Rights of the Child in states where 'the Convention "has been given constitutional status" or has been incorporated into domestic law'.⁹ There has been some attempt to give effect to the constitutional amendment in practice. In April 2015, the Government gave effect in legislation to key provisions of the constitutional amendment (including those relating to the best interests and to a more limited extent to the views of the child) under the Children and Family Relationships Act 2015,¹⁰ an historic piece of legislation that makes long

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overdue reforms to Irish family law. However, the relevant legislation to give effect to the provisions on adoption under Article 42A.2.2⁹ and Article 42A.2.3⁹ of the amendment has not been progressed so the law remains unaltered.¹¹

Supporting the Judiciary: Now that Article 42A is part of the Irish Constitution, it will be the role of the judiciary to interpret its provisions. The judiciary should be supported to upskill themselves on substantive children's rights issues under the amendment and on improving the process for children who are involved in the judicial system. This would mean that judges are better equipped to interpret cases in light of the constitutional amendment and children's access to justice would be enhanced.

The Committee for Judicial Studies has not yet developed any specific programme in relation to the constitutional amendment on children.¹² However, the President of the District Court has completed a needs-analysis on the training required by judges in light of the passage of the Children and Family

Relationships Act 2015 and has included training on children's issues in the induction training for new judges.¹³ With the support of the Committee, judges have attended a number of training seminars and events in specific areas including on the Children and Family Relationships Act 2015 and the EU Victims Directive.¹⁴ These initiatives are warmly welcomed and should be expanded to adopt best practice in the field which involves scenario-based training by experts and judicial peers.¹⁵

The Council of Europe *Guidelines on Child-Friendly Justice* provide an important blueprint for how professionals can enhance their daily practice in the courts to ensure that children's rights are protected when they engage with the judicial system.¹⁶ The Irish judicial system should be reformed to reflect the principles of the Guidelines and to ensure that practical measures are put in place to ensure that the experiences of children with the system is participatory,¹⁷ that the rule of law applies to children as it does to adults,¹⁸ that children are properly informed¹⁹ and that their best interests are a primary consideration in decisions affecting them.²⁰ Implementation of the guidelines is an important step towards ensuring that judges, lawyers and all professionals dealing with children in the courts are appropriately trained and equipped to respect their rights under the provisions of the Constitution or the legislation brought in to give it effect, such as the Children and Family Relationships Act 2015.

4 *The Programme for Government 2011-2016* commitment is not clear as to whether the intention is for the Constitution to be amended along the lines of the 2006 All-Party Oireachtas Committee on the Constitution with regard to the Family or the 2010 Joint Committee on the Constitutional Amendment on Children which had all-party support. Due to the fact that the 2010 report was published the year before the *Programme for Government* commitment was made and because it had all-party support, we understand the commitment to refer to the latter Committee's work which can be found here: Government of Ireland, *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* (Government of Ireland 2010).

5 Government of Ireland *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* (Government of Ireland 2010) 2.

6 Article 42A.4.2⁹ applies only to proceedings 'brought by the State...for the purpose of preventing the safety and welfare of any child from being prejudicially affected' or 'concerning adoption, guardianship, or custody of, or access to, any child'.

7 The Committee noted that the objective of the phrase was 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'. This was omitted from Article 42A meaning that there is no obligation for legislation in this area to refer to the continuity of care of a child. Government of Ireland, *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* (Government of Ireland 2010) 84.

8 Article 42A.2.2⁹ of the Irish Constitution and Article 42(5) of the proposed wording of the Joint Committee on the Constitutional Amendment on Children. Articles 42A.3 of the Irish Constitution and Article 42(6) of the proposed wording of the Joint Committee on the Constitutional Amendment on Children. Government of Ireland, *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* (Government of Ireland 2010) 100-102.

9 UNCRC 'General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)' (2003) UN Doc CRC/GC/2003/5 para 19.

10 The Children and Family Relationships Act 2015 is discussed in detail in section 6.3 of this report.

11 The Adoption (Amendment) Bill 2012 which was drafted to give effect to Articles 42A.2.2⁹ and 42A.3 has not been enacted.

12 The Committee for Judicial Studies has responsibility for the continuing education of the Judiciary. The budget for the Committee was increased by €25,000 to €250,000 in 2015, but remains far short of its 2009 budget of €500,000. Communications received by the Children's Rights Alliance from the Courts Service on 2 February 2015 and 10 December 2015.

13 Communication received by the Children's Rights Alliance from the Courts Service on 10 December 2015.

14 *ibid*. The EU Victims Directive is Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

15 European Judicial Training Network, 'Good Judicial Training Practices, Innovative Training Methodology, Best practices in the training of judges and prosecutors, e.g. Small Teams – The Business of Judging and Real Case Study, Developed in Real Time through the use of Video Conferencing' <http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/IT_33_England%20and%20Wales_EU_en.pdf> accessed 28 January 2016.

16 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* (Council of Europe, 2011).

17 *ibid* para III A.

18 *ibid* para III E.

19 *ibid* para III A.

20 *ibid* para III B.

Children's Referendum

Immediate Actions for 2016



ENACT LEGISLATION TO GIVE EFFECT, WHERE NECESSARY, TO THE OUTSTANDING PROVISIONS OF ARTICLE 42A OF THE IRISH CONSTITUTION. Now that the amendment has become law, the Government should enact legislation to give effect to provisions relating to adoption under subsections 2.2 and 3 of the amendment. Provisions in relation to hearing the views of children in childcare and family law proceedings need to be strengthened to ensure they are compliant with Article 42A.

CONDUCT AN AUDIT OF LAWS, PRACTICES AND POLICIES TO DETERMINE OUTSTANDING GAPS IN THE IMPLEMENTATION OF THE COUNCIL OF EUROPE GUIDELINES ON CHILD-FRIENDLY JUSTICE.

To identify gaps in compliance with the *Guidelines on Child-Friendly Justice* in ensuring that children's rights are protected in the justice system, an audit should be undertaken and areas of poor implementation addressed.

1.2

Constitutional Convention

GOVERNMENT COMMITMENT

The *Programme for Government 2011-2016* commits to establishing a Constitutional Convention to consider comprehensive reform with a brief to consider and report within twelve months on:

- > Possible reduction of the voting age.
- > Other relevant constitutional amendments that may be recommended by the Convention.



Progress: Complete

'Constitutional Convention' is awarded a 'C-' in Report Card 2016, a drop from the 'B-' grade awarded in 2015. While the Programme for Government 2011-2016 commitment has been achieved in this area, at the end of 2015, there was no clarity as to whether or how the work of the Constitutional Convention will be progressed with regard to potentially lowering the voting age and including greater protection of economic, social and cultural rights in the Constitution.

This is the final year of the Report Card series under the *Programme for Government 2011-2016*. The Government's objective in this area was to establish a Constitutional Convention, and prioritise the holding of a referendum to reduce the voting age and to address other relevant constitutional amendments that may be recommended by the Convention. The Government has made significant progress in meeting its commitment. It established a Constitutional Convention which examined the potential reduction of the voting age and other issues.²¹ Its establishment was important because it engaged ordinary citizens in the future of the Constitution.

Voting Age: In line with its terms of reference, the Constitutional Convention considered eight different questions, including whether the voting age should be reduced. The Convention recommended that the voting age be reduced to 16 years. In the *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014-2020*, the Government committed to holding a referendum on the voting age.²²

In January 2015, the Taoiseach confirmed that the Government would hold just two further referenda in its lifetime – on marriage equality and lowering the age for eligibility for presidential candidates.²³ This meant that a referendum to implement other recommendations made by the Constitutional Convention would not go ahead and resulted in the recommendation relating to lowering the voting age from 18 years to 16 years effectively being stalled.²⁴

²¹ The Convention met for over two years between December 2012 and February 2014. It comprised 100 members – 66 citizens drawn from the electoral register, 29 Oireachtas members and four members from the Northern Ireland Assembly.

²² Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014-2020* (Department of Children and Youth Affairs 2014), Commitment 5.4.

²³ An Taoiseach, Enda Kenny TD, Dáil Debates, Order of Business, 14 January 2015.

²⁴ Stephen Collins, 'Coalition abandons plan for poll on younger voting age' *The Irish Times* (Dublin, 15 January 2015).

The National Youth Council of Ireland expressed disappointment at this move stating that up to 120,000 sixteen and seventeen year olds will be denied the right to vote in the next General Election as a result.²⁵

Economic, Social and Cultural Rights: Article 4 of the UN Convention on the Rights of the Child provides that with regard to economic, social and cultural rights, the State should take 'all appropriate legislative, administrative, and other measures for the implementation of the rights' to the maximum extent of their available resources.²⁶ The UN Committee on the Rights of the Child believes that it should be possible to invoke those rights directly before the Courts and that domestic law should set out socio-economic and cultural entitlements in 'sufficient detail to enable remedies for non-compliance to be effective.'²⁷ In line with the International Covenant on Economic, Social and Cultural Rights, even States with inadequate resources must 'strive to ensure the widest possible enjoyment of the relevant rights in the prevailing circumstances.'²⁸

A number of socio-economic rights are provided for under the Constitution of Ireland such as education and property rights.²⁹ Other socio-economic rights are set out in a Directive of Social Policy under Article 45 of the Constitution. The Directive includes the right to work and safeguards the 'economic interests of the weaker sections of the community.' Article 45 explicitly provides that it is intended as guidance for the Oireachtas and should not be enforceable before the courts.

In December 2013, the Constitutional Convention chose to consider economic, social and cultural rights and recommended to the Government,

by an overwhelming majority of 85 per cent, that these rights be given enhanced protection in the Constitution.³⁰ The UN Convention on the Rights of the Child contains many economic and social rights such as the right to health and health services (Article 24), the right to social security (Article 26) and the right to an adequate standard of living (Article 27), mirroring those set out in the UN International Covenant on Economic, Social and Cultural Rights. Establishing rights such as these at the constitutional level would mean that they have been enshrined in the fundamental law of the State and that all of our laws, policies and services would have to be in line with these provisions.

A Private Members Bill to insert the realisation of economic, social and cultural rights into the Constitution was introduced in December 2014.³¹ The Bill proposed that a referendum be held to ask the People of Ireland whether or not the State should be obliged in the Constitution to ensure that the economic, social and cultural rights would be protected, to the maximum extent of available resources, and to do so incrementally over time.³² If such provision was in the Constitution, children

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and their families could invoke those rights before the courts in cases where their rights were not being upheld by the State. For example, homeless families with children could seek a remedy before the courts because their right to housing was not being fulfilled by the State.

The Bill was opposed and defeated by the government parties in May 2015, over fears that such an obligation would be a drain on the State's resources.³³ Concern was also expressed that if such rights were enforceable in the courts, the judiciary would, in effect, be interfering with the power of the Oireachtas to determine how State revenue is to be collected and spent.³⁴

The terms of reference of the Constitutional Convention state that the Government will respond to each recommendation of the Convention within four months.³⁵ On 14 January 2016, over two years after the recommendation was made, the Minister of State at the Department of the Taoiseach, Paul Kehoe TD, said that the Report of the Convention relating to economic, social and cultural rights will be referred to an Oireachtas committee for consideration.³⁶ The Economic, Social and Cultural Rights Initiative, a coalition of civil society organisations, has welcomed the move, calling for 'transparent, inclusive and timely consideration by the Oireachtas Committee' and that the process should have a clear outcome.³⁷

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25 National Youth Council of Ireland, 'No referendum on voting age: Youth Council expresses disappointment but says campaign will go on' (15 January 2015) <<http://www.youth.ie/nyci/No-referendum-voting-age-Youth-Council-expresses-disappointment-says-campaign-will-go>> accessed 29 January 2016.

26 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (UNCRC) Art 4.

27 UNCRC 'General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)' (2003) UN Doc CRC/GC/2003/5 para 6, 25.

28 ibid para 8 and ICESCR, General Comment No. 3 on the Nature of States Parties Obligations (art 2 para 1) UN Doc HRI/GEN/1/Rev.6, para 11.

29 These can be found under Articles 42 and 43 of the Irish Constitution.

30 Convention on the Constitution, 'Convention on the Constitution chooses (i) Dáil Reform and (ii) Economic, Social and Cultural Rights for discussion at their final two meetings in February 2014' (17 December 2013) <<https://www.constitution.ie/AttachmentDownload.ashx?mid=922d30df-2067-e311-877e-005056a32ee4>> accessed 29 January 2016.

31 Thomas Pringle TD, Dáil Debates, Thirty-Fourth Amendment to the Constitution (Economic, Social and Cultural Rights) Bill 2014: First Stage [Private Members], 17 December 2014.

32 Thirty-Fourth Amendment to the Constitution (Economic, Social and Cultural Rights) Bill 2014. Under the Bill, a constitutional amendment would have read: 'The State shall progressively realise, subject to its maximum available resources and without discrimination, the rights contained in the International Covenant on Economic, Social and Cultural Rights. This duty shall be cognisable by the Courts.' The International Covenant on Economic, Social and Cultural Rights is a human rights treaty which sets out fifteen substantive rights including the rights to health and adequate standard of living. Covenant on Economic, Social and Cultural Rights, (3 January 1967) 933 UNTS 3 (CESCR).

33 Dáil Debates, Thirty-Fourth Amendment to the Constitution (Economic, Social and Cultural Rights) Bill 2014: Second Stage [Private Members], 19 May 2015.

34 ibid. Similar concerns were expressed by the Constitutional Review Group in their decision not to recommend the inclusion of such rights in the Constitution in 1996. The All-Party Oireachtas Committee on the Constitution, *Report of the Constitution Review Group* (Government Publications, 1996) 207-211.

35 The Convention on the Constitution, 'Terms of Reference' <<https://www.constitution.ie/Convention.aspx> accessed> 28 January 2016.

36 Minister of State for the Department of the Taoiseach, Paul Kehoe TD, Dáil Debates, Convention on the Constitution: Final Report: Statements, 14 January 2016.

37 The ESC Rights Initiative is a coalition of civil society organisations that support strengthened economic, social and cultural rights protection in the Irish Constitution. The ESC Rights Initiative successfully campaigned for the inclusion of economic, social and cultural rights as an agenda item of the Constitutional Convention. ESC Rights Initiative, 'The ESC Rights Initiative welcomes the Government's decision to refer the Report of the Constitutional Convention on Economic, Social and Cultural Rights to an Oireachtas Committee for further consideration' (15 January 2016) <<http://www.communitylawandmediation.ie/blog/esc-rights-initiative-issues-press-release-on-the-governments-decision-to-refer-the-report-of-the-constitutional-convention-on-economic-social-and-cultural-rights-to-an-oireachtas-committee-for-further-consideration.1090.html>> accessed 26 January 2016.

Constitutional Convention

Immediate Action for 2016



ENSURE THAT THE RECOMMENDATION OF THE CONSTITUTIONAL CONVENTION TO ENHANCE THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE CONSTITUTION IS CONSIDERED BY AN OIREACTHAS COMMITTEE IN A TIMELY MANNER.

Consideration of the recommendation by an Oireachtas Committee should happen without delay in a transparent and consultative manner. The scope of the Committee's work should be clearly established in advance and any recommendation of the Committee should be acted upon in a timely manner.

2. RIGHT TO EDUCATION

Chapter Grade

B-

"The Budget 2016 announcements on the expansion of pre-school to all children under three and a new framework to support children with additional needs are to be welcomed. But childcare is still creaking at the seams as we play catch-up with the rest of Europe. If we want all children to have access to high quality childcare that is affordable and sustainable we really need the political will to continue to invest – at least €100 million additional funding each year."

Teresa Heeney, Chief Executive Officer, Early Childhood Ireland

Right to Education

Every child in Ireland has the right to access education and to be educated. The aim of the right to education goes beyond academic achievement to the development of the child's personality, talents and abilities to their fullest potential, and to providing them with the tools to live a full and responsible life within society.

Summary of Articles 28 and 29 of the UN Convention on the Rights of the Child