Recognising Children’s Rights in the Constitution:
The Thirty-First Amendment to the Constitution (Children)

October 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 (UNCRC). It aims to improve the lives of all children under 18, through securing the necessary changes in Ireland’s laws, policies and services.

**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

**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.

<table>
<thead>
<tr>
<th>Alcohol Action Ireland</th>
<th>Irish Traveller Movement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amnesty International Ireland</td>
<td>Irish Youth Foundation (IYF)</td>
</tr>
<tr>
<td>Ana Liffey Drug Project</td>
<td>Jesuit Centre for Faith and Justice</td>
</tr>
<tr>
<td>Arc Adoption</td>
<td>Junglebox Childcare Centre F.D.Y.S.</td>
</tr>
<tr>
<td>Assoc. for Criminal Justice Research and Development (ACJRD)</td>
<td>Kids’ Own Publishing Partnership</td>
</tr>
<tr>
<td>Association of Secondary Teachers Ireland (ASTI)</td>
<td>Kilbarrack Youth Project</td>
</tr>
<tr>
<td>ATD Fourth World – Ireland Ltd</td>
<td>Lifestart National Office</td>
</tr>
<tr>
<td>Barnardos</td>
<td>Marriage Equality – Civil Marriage for Gay and Lesbian People</td>
</tr>
<tr>
<td>Barretstown Camp</td>
<td>Mary Immaculate College</td>
</tr>
<tr>
<td>BeLonG To Youth Services</td>
<td>Matt Talbot Community Trust</td>
</tr>
<tr>
<td>Bessborough Centre</td>
<td>Miss Carr’s Children’s Services</td>
</tr>
<tr>
<td>Border Counties Childcare Network</td>
<td>Mothers’ Union of Ireland</td>
</tr>
<tr>
<td>Catholic Guides of Ireland</td>
<td>Mounttown Neighbourhood Youth and Family Project</td>
</tr>
<tr>
<td>Catholic Youth Care</td>
<td>MyMind</td>
</tr>
<tr>
<td>Child and Family Research Centre, NUI Galway</td>
<td>National Association for Parent Support</td>
</tr>
<tr>
<td>Childminding Ireland</td>
<td>National Children’s Nurseries Association</td>
</tr>
<tr>
<td>Children in Hospital Ireland</td>
<td>National Organisation for the Treatment of Abusers (NOTA)</td>
</tr>
<tr>
<td>City of Dublin YMCA</td>
<td>OPEN</td>
</tr>
<tr>
<td>COPE Galway</td>
<td>National Parents Council Post Primary</td>
</tr>
<tr>
<td>Crosscare Drug and Alcohol Programme</td>
<td>National Parents Council Primary</td>
</tr>
<tr>
<td>Crosscare Teen Counselling</td>
<td>National Youth Council of Ireland</td>
</tr>
<tr>
<td>DIT – School of Social Sciences &amp; Legal Studies</td>
<td>One Family</td>
</tr>
<tr>
<td>Doras Luimni</td>
<td>One in Four</td>
</tr>
<tr>
<td>Down Syndrome Ireland</td>
<td>OPEN</td>
</tr>
<tr>
<td>Dublin Rape Crisis Centre</td>
<td>Parentline</td>
</tr>
<tr>
<td>Dun Laoghaire Refugee Project</td>
<td>Parentstop</td>
</tr>
<tr>
<td>Early Childhood Ireland</td>
<td>Peter McVerry Trust</td>
</tr>
<tr>
<td>Educate Together</td>
<td>Psychological Society of Ireland</td>
</tr>
<tr>
<td>School of Education, UCD</td>
<td>Rape Crisis Network Ireland (RCNI)</td>
</tr>
<tr>
<td>Enable Ireland</td>
<td>Saoirse Housing Association</td>
</tr>
<tr>
<td>EPIC (formerly IAYPIC)</td>
<td>SAOL Beag Children’s Centre</td>
</tr>
<tr>
<td>Focus Ireland</td>
<td>Sevenoaks Early Education Centre</td>
</tr>
<tr>
<td>Forbairt Naionraí Teoranta</td>
<td>Society of St. Vincent de Paul</td>
</tr>
<tr>
<td>Foróige</td>
<td>GLEN - Gay and Lesbian Equality Network</td>
</tr>
</tbody>
</table>
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 (UNCRC). One of the founding objectives of the Alliance back in 1995 was to seek constitutional reform for children, and the Alliance has engaged in extensive advocacy on this issue, in particular over the past seven years.

On 19 September 2012, the Government published the Thirty-first Amendment to the Constitution (Children) Bill 2012, which contains the text of a proposed amendment to strengthen children’s rights within the Constitution of Ireland.\(^1\) The Alliance warmly welcomes the amendment wording and is calling for a YES vote on referendum polling day, Saturday 10 November 2012. The Alliance is joining Barnardos, ISPCC and Campaign for Children to work as Yes for Children, a national campaign for a YES vote. We believe this referendum is an historic opportunity for the People of Ireland to ensure that this generation of children, and future generations, are better protected, respected and heard.\(^2\)

*Bunreacht na hÉireann / Constitution of Ireland* – was enacted in 1937. It is the fundamental law of the State: all our laws, policies and services must be compatible with the Constitution. The Constitution underpins the interaction between the State and its citizens, including children and gives direction to the Oireachtas and the courts on how to balance competing rights and interests. The Constitution also aims to reflect our societal values. It 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.

At present, children do have rights under the Constitution, they 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) and in appropriate circumstances, children are entitled to the Fundamental Rights set out in Articles 40 to 44\(^3\) as well as certain unenumerated rights that are not listed in the Constitution but that have been read into it by the Courts. In addition to these rights, 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).

However, there is a lack of child-specific rights within the Constitution to address children’s needs that are different from, and additional to, those of adults. Child-specific rights or children’s rights are human rights for all children and young people under 18 years of age. They 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.

Acknowledgement of the need for constitutional reform for children is not new; it was first discussed in the Oireachtas over 30 years ago. Since then, calls have been repeated in a series of official reports, and Court cases have served to highlight the inadequacy of the current constitutional recognition afforded to the rights of children.

In addition, in the wake the Ryan Report, the Roscommon Child Care Case and the recent Child Death report, the public has voiced their desire that we put in place more effective child protection system.

---

1 The Thirty-first Amendment to the Constitution (Children) Bill 2012 Bill and the Explanatory Memo are available on [www.childrensrights.ie](http://www.childrensrights.ie) or on the referendum website of the Department of Children and Youth Affairs [www.childrensreferendum.ie](http://www.childrensreferendum.ie). The Children’s Rights Alliance has also produced a *Children’s Referendum: A Legal and Policy Overview*, September 2012 which is available on our website.

2 Yes for Children is a national campaign led by Barnardos, Children’s Rights Alliance, ISPCC and Campaign for Children calling for a YES vote in the children’s referendum. See [www.yesforchildren.ie](http://www.yesforchildren.ie).

3 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.
The purpose of this paper is to provide an analysis of the amendment wording in terms of its objectives and likely impact if the referendum is passed, paying particular attention to the UN Convention on the Rights of the Child. The paper also examines how the wording translates recommendations made by the Joint Committee on the Constitutional Amendment on Children.

The inclusion of a stand-alone article dedicated to children in our Constitution – both the rights it contains and the presence of the Article itself – will send a clear message that Ireland values children and wishes this to be reflected in our laws and court decisions. Article 42A gives explicit expression to the rights of children as individuals; such rights are currently given only a passing reference in the Constitution. The amendment will bring about a rebalancing of the text of the Constitution with a more extensive reference to, and visibility of, children’s rights. This greater focus on children’s constitutional rights should be reflected in more child-centred judicial decisions and legislation.

The Joint Committee on the Constitutional Amendment on Children, chaired by Mary O’Rourke, examined the issues at the heart of the children’s referendum over a two year period. Their final report of February 2010 included all party consensus on proposed wording for the amendment. In its 2011 Programme for Government, the Government committed to hold a referendum “along the lines recommended by the All-Party Oireachtas Committee”. The provisions of Article 42A are examined in this paper in light of how they match up to the wording proposed by the Committee.

The children’s referendum has the potential to be a turning point given the history of abuse experienced by many children in Ireland. Keeping children safe is best achieved by creating a society that fully respects children and builds their capacity to protect themselves. A society that respects children is one which listens to children, and values prevention and early intervention by actively supporting families.

---


5 The Committee did not propose to introduce a new, additional article, instead it proposed that Article 42 be replaced in its entirety. Three of the provisions in the Committee’s wording – Articles 42.3, 42.7 and 42.8 – were replications with minor modifications of existing provisions in Article 42. These three provisions are not amended in the 2012 wording and so are not addressed in this paper.
2. Amendment Wording

The Thirty-first Amendment to the Constitution (Children) will, if passed, introduce a new article into the Constitution and will repeal (delete) an existing provision under Article 42 (Article 42.5). The new article, Article 42A, entitled ‘Children’ will be a stand-alone article, which will sit between Articles 42 and 43.

ARTICLE 42A – Children

1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2. 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4. 1° Provision shall be made by law that in the resolution of all proceedings –

   i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
   ii) concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.
If passed, the Children’s Referendum will insert a new article into the Constitution. The new article, ‘Children’, will be numbered Article 42A and will sit between Articles 42 and 43.

**Article 42A.1** recognises that all children have rights and pledges to protect those rights by law. It allows the courts to identify rights for children on a case-by-case basis. This provision will enable the courts to develop new thinking in relation to children’s rights and to break with past decisions, some of which have resulted in bad outcomes for children.

**Article 42A.2** contains two parts. **Article 42A.2.1** clarifies how and when the State can step in to protect children. It is an amended version of an existing article in the Constitution (Article 42.5), which it will replace. Importantly, it shifts the trigger of intervention from focusing solely on the parents’ failure to the impact of that failure on the child. It provides a strong constitutional foundation for our child protection system, by providing the State with the power to act when the “safety or welfare” of a child “is likely to be prejudicially affected”.

This new wording should encourage the State to intervene earlier in families that are struggling to offer them support and better protect the child. Importantly, it also contains safeguards to protect against over-intervention by the State, by including the phrases “exceptional cases” and “proportionate”. It provides, for the first time, the same threshold of protection to all children, regardless of whether their parents are married or unmarried.

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

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

This provision could provide hundreds of children among the 2,000 in long-term foster care (defined as over five years), with the opportunity of a second chance of a stable and permanent family life, through adoption. Alongside the amendment wording, the Government published draft legislation to show what will change in the area of adoption, if the referendum is passed. Under this draft legislation, there must have been a continuous failure on the part of the parents towards the child for a period of at least three years. There must also be no reasonable prospect of the parents resuming care of the child, and the child must have been living in the home of their prospective adoptive parents for a minimum continuous period of 18 months. A further requirement is that the child must be in the custody of, and have a home with, those wishing to adopt him or her (i.e. the foster parents) for a continuous period of at least 18 months.

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

**Article 42A.4** contains two parts. This article is unique to the Constitution in that it legally obliges the Oireachtas to define these rights and to make sure that relevant legislation is in place.
Article 42A.4.1° commits the Oireachtas to legislate to ensure that the best interests of the child will be “the paramount consideration”, in certain areas of decision-making affecting a child. This means those decisions will be determined based on what is best for the child in question. It applies only to child protection and care proceedings brought by the State and proceedings concerning adoption, guardianship or custody of, or access to, any child.

Article 42A.4.2° commits the Oireachtas to legislate to provide that the views of the child are heard and taken into account in the proceedings listed in 4.1 (children in care, child protection, adoption, guardianship, custody and access cases). This will require that the views of the child are heard when key decisions are made about their lives. It does not mean that the child’s views will be the determining factor in the case but that child’s views will be considered by the judge and given due weight according to the child’s age and maturity. At present, the views of the child are heard on an ‘ad hoc’ basis, and whether the child is given the opportunity to be heard or not largely depends on the type of case before the court and the judge hearing the case. Such gaps will be addressed by this new wording.

The section contains an analysis of Article 42A under each of its provisions.

| Article 42A.1 | Recognising the Rights of All Children |

**Article 42A.1:**
The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

**What does it do?**
- Recognises that all children have rights
- Pledges that the State will protect these rights by law
- Enables the courts to identify and elaborate on the rights of the child over time on a case-by-case basis
- Could potentially strengthen the protection of children in other areas if read with other laws.

**What is the likely impact?**

1. **Gives children a place within the Constitution**
   Article 42A.1 imposes an explicit obligation on the State to recognise the “natural and imprescriptible” rights of all children, and, in so far as this is practicable, to protect and vindicate those rights. It will function as a framework provision, from which the other rights in the article will flow. It represents a significant advance on the existing constitutional position and provides a stronger basis for children’s individual rights than currently exists under Article 42.5 or Article 40.

   The location in a new and separate article of an explicit stand-alone provision on children’s “natural and imprescriptible rights” increases the status afforded to children’s rights within the Constitution. The courts interpret the legal status of individuals on the basis of the weight given to their rights under the Constitution. By explicitly recognising the rights of children in the Constitution, it will be possible for such rights to be taken into account and applied consistently by the courts. The inclusion of an express statement on the rights of the child will provide the courts with the power to balance a range of rights – the personal rights of parents; the rights of the child; the rights of the family; and the rights of the State (as guardian of the common good). This will not create an automatic supremacy of rights as all rights will be considered in the decision-making process.

2. **Applies to all children**
   The amendment equally applies to “all children” and not just to citizens. However, the wording does not include an explicit or general prohibition on discrimination. Article 2 of the UN Convention on the Rights of the Child obliges the State to ensure that the child is not discriminated against on the basis of “the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” The wording does make clear elsewhere (Article 42A.2.1) that children of unmarried and married people should be treated equally.

   Presently, protection from discrimination is protected under Article 40.1 of the Constitution which provides that: “All citizens shall, as human persons be held equal before the law”. This concept has also been further developed under Article 40.3. However, the Irish courts have narrowly interpreted this provision and have ruled that it only prohibits arbitrary or blatant discrimination.\(^6\) The majority

---

\(^6\) O'B v S [1984] IR 316 at 335.
of the Constitutional Review Group from 1996 recommended that Article 40.1 should be amended to include a specific prohibition against discrimination.\[7\] Given that this is a broader issue affecting all individuals in Ireland, including children, it is recommended that the Constitutional Convention review Article 40.1.

Article 42.1.1 of the Joint Committee on the Constitutional Amendment on Children recommended that there should be an obligation on the State to “cherish all the children of the State equally”. The inclusion of such language would be problematic given the difficulty of interpreting the word “cherish” from a legal perspective. This provision was omitted from the Amendment wording and no other equality provision was put forward.

3. Recognises a child’s “natural and imprescriptible rights”

Under Article 42A.1 the State “recognises and affirms the natural and imprescriptible rights of all children”. The existing Article 42.5 contains a passing reference to respecting the “natural and imprescriptible rights of the child” in the context of child protection concerns within married families. *Imprescriptible rights* are rights that cannot be lost by the passage of time through a failure to use or exercise them.\[8\] *Natural rights* are rights that you are born with. They exist independent of any man-made law, they exist as a feature of our humanity. The Supreme Court has commented that: “The Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority...”\[9\]

The phrase “as far as practicable” is also used in Article 42A.1. It is also contained in 40.3.1 of the Constitution, which guarantees the personal rights of individuals.\[10\] It is essentially a limitations clause indicating that rights are not absolute and can be limited or restricted through judicial interpretation or legislation. If passed, though the rights of the child are not absolute, the State will be bound to respect them insofar as it reasonably can be expected to do so. The State could attempt to use this provision to deny a right on the basis of resource limitations or it could be used to challenge the denial of a specific right and thus require the State to show that the recognition of that right is not practicable for a particular reason. The phrase “as far as practicable” is also used in Article 42A.4.2 in relation to hearing the views of children.

This provision sets out in a more visible way, the obligations of the State to recognise children as individual rights holders and repeats this in the new provision on child protection. But again there is a distinction between how rights are reflected in the UN Convention on the Rights of the Child and in this provision. The married family have rights in respect of their child which are “inalienable and imprescriptible” and Article 42A.1 is designed to provide balance between two competing sets of rights. Perhaps the rationale for retaining the language of “natural and imprescriptible rights” stems from how the rights of the family are expressed in Article 41.1 (“inalienable” and “imprescriptible” rights) which will remain unaltered.

In relation to Article 42A.1, the Irish Human Rights Commission has noted that the language of this provision is vague and unclear as it does not set out or refer directly to the rights that the State is obliged to protect and vindicate.\[11\] The Ombudsman for Children has observed that one of the reasons for recommending the inclusion of specific rights derived from the UN Convention on the Rights of the Child is to avoid the imprecise scope and status of unenumerated rights.\[12\]

---

7 The draft wording from the Constitution Review Group recommends that: “No person shall be unfairly discriminated against, directly or indirectly, on any ground such as sex, race, age, disability, sexual orientation, colour, language, culture, religion, political or other opinion, national, social or ethnic origin, membership of the travelling community, property, birth or other status. Party Oireachtas Committee on the Constitution (July 1996) Report of the Constitutional Review Group, Dublin: Stationery Office at p.205.

8 The term “imprescriptible” has been employed in the Constitution only in relation to (marital) family rights in Articles 41 and 42.


10 Article 40.3.1 states “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”


4. Allows for the development of a new jurisprudence

Article 42A.1 should initiate a new phase in constitutional interpretation whereby the courts can identify and elaborate on the rights of the child over time on a case-by-case basis. It should also bring greater clarity and consistency to decisions as the judiciary will be able to enumerate (list) the rights of the child based solely on Article 42A. This new jurisprudence can be independent of Articles 40, 41 or 42, thus offering the judiciary an opportunity to either build on these provisions and existing jurisprudence or, where appropriate, to dislodge previous jurisprudence.

It will also allow the courts an opportunity to incorporate into their judgments the principles and jurisprudence of the UN Convention on the Rights of the Child and the European Convention on Human Rights. However, Article 42A.1 does not make specific reference to the general principles of the UN Convention namely, that children should be protected from discrimination (Article 2); their best interests should be a primary consideration in matters affecting them (Article 3) and their voice should be heard in matters affecting them (Article 12). The Minister for Children and Youth Affairs, Frances Fitzgerald, TD, in her Dáil statement on the Bill said that: “They include the entire range of rights that any human being enjoys, in particular, children in their formative years”. Without any specific reference to the UN Convention on the Rights of the Child there is no guarantee that the courts will rely on the Convention to identify rights for children.

It should be noted that, as Article 41 remains unaltered, the amendment will have no impact on the constitutional definition of the ‘family’ as a married heterosexual couple or on the special protection provided to marriage under the Constitution. Article 42, which sets out the rights and duties of parents in relation to their children, also remains unaltered save for the repeal of Article 42.5. It will be a matter for judicial interpretation as to how Article 42A will be read against Articles 41 and 42.

How does it compare with the recommendations of the Joint Committee?

The Joint Committee proposed the following provisions:

42.1.2 The State recognises and acknowledges the natural and imprescriptible rights of all children including their right to have their welfare regarded as a primary consideration and shall, as far as practicable, protect and vindicate those rights.

42.2 The State guarantees in its laws to recognise and vindicate the rights of all children as individuals including: i) the right of the child to such protection and care as is necessary for his or her safety and welfare; ii) the right of the child to an education; iii) the right of the child’s voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child’s age and maturity.

The Committee’s general recognition of the rights of the child is reflected in the amendment wording. However, the Committee’s wording went further by specifically identifying the right of the child to have his or her welfare regarded as a primary consideration. It is a significant disappointment that this has not been carried forward into the amendment wording and framed as a general ‘best interests’ provision. As mentioned above, a key principle of the UN Convention on the Rights of the Child is that the child’s best interests should be a primary consideration in matters affecting him or her (Article 3).

The Committee explicitly referenced three rights – the right to protection; the right to education; and the right of the child to have his views heard in court and administrative proceedings affecting him or her. The amendment wording partially covers the right to protection under Article 42A.4.1 and voice of the child – albeit in a more restricted format – under Article 42A.4.2, and is silent on the right to education.

**Article 42A.2**  
**State Intervention**

Article 42A.2 contains two parts. The first part sets out how and when the State can intervene in family life to protect a child. The second part reforms our adoption laws to allow ‘abandoned’ children to be adopted in certain circumstances. Article 42A.2.2 (on involuntary adoption) must be read in conjunction with Article 42A.2.1 (on parental failure).

**Article 42A.2.1**  
**Protecting Children and Supporting Families**

*Article 42A.2.1:*

> In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

**What does it do?**

- Clarifies how and when the State can step in to protect children
- Shifts the trigger of intervention from focusing solely on the parents’ failures to the impact of that failure on the child
- Includes important safeguards to protect against over-intervention by the State, by including the phrases ‘exceptional cases’ and ‘proportionate’
- Provides, for the first time, the same type of protection to children, regardless of whether their parents are married or unmarried
- Provides a strong constitutional foundation for our child protection system and protects it from constitutional challenge

**Replacement of Article 42.5**

Article 42A.2.1 is an amended version of the existing Article 42.5 in the Constitution. Article 42A.2.1 will replace Article 42.5. The current Article 42.5 empowers the State in exceptional circumstances to limit the rights granted under Articles 41 and Article 42.1 in relation to their children.

**What is the likely impact?**

1. **Shifts the focus to the child**

   Article 42A.2.1 amends the terms under which the State can intervene in family life. It provides the State with power to act when parents fail in their parental duties to such an extent as that the “safety or welfare” of a child “is likely to be prejudicially affected”. The focus of the existing Article 42.5 is on parental failure “for physical or moral reasons”: this phrase is not replicated in the amendment wording. Article 42A.2.1 introduces consideration of the impact of parental failure on the child. It thus shifts the trigger of intervention from focusing solely on the parents’ failure to the impact of that failure on the children.

   A series of official reports into child protection have shown that the State has failed to adequately protect children and/or effectively support families by intervening too late, leaving children exposed to abuse and neglect.

---

14 Article 42.5 provides that: “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.”
Because the provision will allow for children to be better protected, for a more equitable type of protection to be applied to all children and for a more child-centred approach to child protection, it will better reflect the rights enunciated under the UN Convention on the Rights of the Child, in particular Article 19 which provides that the State shall take all appropriate measures to protect children from all forms of abuse and neglect.

The Convention recognises that parents have the “primary responsibility” for their child’s upbringing and development and that the family itself requires protection and assistance to fulfill its responsibilities and it also places a duty on the State to support parents in rearing their children under Article 18. This new provision is an opportunity to further implement the Convention in this respect.

2. Provides an equitable standard of protection

Articles 41 and 42 of the Constitution apply only to marital families. Repealing Article 42.5 and inserting a provision into the new Article 42A.2.1 with an explicit reference to parents “regardless of their marital status” will require the courts to provide an equitable standard of protection to all children. This provision will further the implementation of Article 2 of the UN Convention on the Rights of the Child which contains the right of the child to protection from discrimination, including on the grounds of his or her parents’ marital status.

3. Clarifies the threshold for State intervention

Article 42A2.1 clarifies what constitutes the threshold for State intervention by setting out that it is where parental failure is likely to prejudicially affect the child’s safety or welfare. If the referendum passes, this provision will replace the existing Article 42.5 as the legal basis for our child protection laws and system. The new test takes a broadly similar approach to Section 18 of the Child Care Act 1991 which provides for the making of a care order where the child is being abused or neglected; the “health, development or welfare” of the child is being, or is likely to be “avoidably impaired or neglected”. The new wording will help insulate the child care legislation from constitutional challenge, as the case law in this area has adopted a much narrower interpretation of when the State can intervene.15

There is no existing legal definition of the phrase “likely to be prejudicially affected”. It is assumed that the phrase will be interpreted to mean that the court will require evidence that it is reasonably probable that the safety or welfare of the child will be adversely affected or damaged. Legislation and judicial decisions will be crucial in shaping the precise nuance of the term “fail” in the context of a new constitutional rule on State intervention.

4. Changes the circumstances for rebutting the martial family presumption

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.16 This constitutional presumption does not apply to children of unmarried families. As Article 42.1 is not being amended, it is likely that the constitutional presumption will remain in place for marital families. However, the circumstances for rebutting this presumption will change as Article 42A.2.1 alters the circumstances in which the State can intervene in family life, by creating a more child-centred approach than under the existing Article 42.5.

5. Strengthens safeguards

The provision contains two important safeguards to protect against over-intervention by the State.

- Intervention will continue to take place only in ‘exceptional circumstances’: this key phrase which exists in Article 42.5 is retained in the new wording (trigger for intervention).
- The State must intervene by “proportionate means as provided by law” – see discussion below (means of intervention).

---

15 North Western Health Board v HW and CW [2001] 3 IR 623, commonly known as the PKU case.
16 The Supreme Court has interpreted Articles 41 and 42 as providing a constitutional presumption that the child’s interests are best served within the marital family.
6. Supports families

The best way for the State to protect and support children is to support their families. Article 42A.2.1 encourages the State to intervene earlier in families that are struggling, to offer them support and better protect the child before a situation escalates to crisis level. The provision also has the effect of protecting the rights of families because it requires that any intervention by the State in families shall be “proportionate” and regulated by law.

Under Article 42A.2.1, the term “proportionate” will replace the term “appropriate” found in Article 42.5. The doctrine of proportionality is a well-established principle in both Irish and European law – it involves establishing a balance between competing claims and considerations. The term, “proportionate”, reflects the existing requirement when dealing with the issue of interference with or encroachment upon a constitutionally protected right that action “must be no more than is reasonably required in order to secure that the constitutional right in question is protected and vindicated”. Justice Costello set out the proportionality test in the case of Heaney v. Ireland:

The objective of the impugned provision must be of sufficient importance to warrant overtaking a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
(b) impair the right as little as possible, and
(c) be such that their effects on rights are proportional to the objective

The definition of proportionality was further explored in the Meadows case, which referred to exploring alternative measures, which have the same objective, but are less restrictive on the rights of the person in question. In the context of Article 42A.2.1, the proportionality test will require that any action taken constitutes the minimum intervention necessary to secure the child’s “safety or welfare” and is one that interferes least with the rights of married parents under Article 41 and 42 or the individual rights of an unmarried parent under Article 40.

Article 42A.2.1 comprises three key elements – it refocuses the provision on the child’s “safety or welfare”, maintains the phrase “In exceptional cases” and inserts the term “proportionate”. Its impact should be that the default position in child care proceedings will be family support. This new approach will require increased investment, both human and financial, in family support services.

The amendment has the potential to support best practice by ensuring that in all child care proceedings a range of family supports and other supportive interventions should be fully explored and exhausted prior to taking a child into care. Proceedings to take a child into care should only be embarked upon as a measure of last resort.

Furthermore, when a child is placed in care, an onus should exist that the State 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. It is worth noting in this context that about one third of the children who came into care in 2010 were discharged from that care within a year. In relation to the European Convention on Human Rights, see Johansen v. Norway [1996] 23 EHRR 23 and K and T v. Finland [2003] 36 ECHR, which make clear that the deprivation of parental rights and access should only occur in exceptional circumstances and where the range of alternatives is manifestly unsuitable.

17 In relation to the European Convention on Human Rights, see Johansen v. Norway [1996] 23 EHRR 23 and K and T v. Finland [2003] 36 ECHR, which make clear that the deprivation of parental rights and access should only occur in exceptional circumstances and where the range of alternatives is manifestly unsuitable.
How does it compare with the recommendations of the Joint Committee?

The Joint Committee proposed the following provision:

*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.*

The language used in the amendment wording differs significantly from the Committee’s wording in that the focus shifts from the failure of the parents and the reasons of that failure towards the child to the impact of the failure of the parents on the child’s safety and welfare. This is a more child-centred approach than the existing provision under Article 42.5 or the Committee’s proposed formulation.

There is however similarities between the two sets of wordings, both refer to ‘proportionate’ means of intervention that will be determined by legislation, and both include an explicit reference to the provision applying regardless of the marital status of the child’s parents.

The Committee’s wording has proposed that the term ‘supplement’ be added so that the State would be empowered to “supply or supplement the place of the parents”. This change was not adopted in the amendment wording, it was considered that the term ‘supplement’ is implied in the interpretation of the existing definition of the term ‘supply’ under Article 42.5, and its inclusion may undermine the existing operation of supervision orders.

The amendment wording has retained the phrase “in exceptional cases” which appears in the existing Article 42.5. The Committee omitted this phrase from it wording. The phrase is considered to be a key safeguard to protection against over-intervention by the State in family life. Its retention is welcomed.

The amendment wording also differs from the Committees in that it maintains the phrase “but always with due regard for the natural and imprescriptible rights of the child” which is used in the existing Article 42.5. The Committee had not included this phrase in their wording.
**Article 42A.2.2**  
**Adoption of Children in Long-Term Care**

**Article 42A.2.2:**  
*Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child, and where the best interests of the child so require.*

**What does it do?**

- Commits the Oireachtas to bring in a law to allow a child the opportunity of being adopted, where their parents have met a high threshold of failure towards their child
- Requires the Oireachtas to set out, through legislation, the length of time that parents are to have failed the child in order for that child to be eligible for adoption
- Provides that such adoptions can only take place where it is in the best interests of the child and where all other options have been explored and failed.

**What is the likely impact?**

1. **Gives certain children in care the opportunity of adoption**  
   Article 42A.2.2 addresses the current roadblock within the care and adoption system whereby it is virtually impossible for an ‘abandoned’ child to be adopted. It empowers the Oireachtas to introduce legislation to permit the adoption of any child, from either a marital or non-marital family, where parental failure towards the child has reached a high threshold.

   Articles 41 and 42 are currently blocking the effective operation of the Adoption Act 2010, which provides for the adoption of children in circumstances where the parents have failed to provide care for (or resume care of) their child. As far back as 1988, legislation was introduced to provide for the involuntary adoption of children. However, to guard against a breach of Articles 41 and 42, the Adoption Act, 1988 relied heavily on Article 42.5. An adoption could only occur:
   - where the High Court is satisfied that there has been a total failure, for physical or moral reasons, on the part of parents in their duty towards their child for the previous twelve months;
   - that the failure is likely to continue without interruption until the child reaches eighteen years;
   - and that the failure constitutes an abandonment of all constitutional rights on the part of the parents.

   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 marital families have also impacted on the adoption of children from unmarried families. In essence, the system is effectively stalled.

   This issue potentially affects hundreds of children among the 2,000 children who have been in long-term foster care (defined as over five years). Many of these children have grown up with little or no regular contact with their birth parents and a return to their birth family is not a realistic option – a return home may not be possible or safe. These children find themselves in a legal limbo. Although they no longer have regular contact with their birth parents, they legally ‘belong’ to them and are not ‘free’ for adoption. For some of these children the possibility of adoption represents a ‘second chance’ for a stable and permanent family life.

   The provision will allow for the further implementation of the UN Convention on the Rights of the Child in Irish law by bringing our laws more in line with Article 20 of the UN Convention which enunciates the child’s right to alternative care if he or she cannot remain in their family environment.
and critically if it is in the child’s best interests to do so. This will apply to all children equally, regardless of the marital status of their parents and so will allow the State to more fully implement the non-discrimination provision in the Convention under Article 2.

2. Provides permanency for certain children in care
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 for the child. 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, and be supported by, their foster families after they turn 18 years of age. State support for children in care ends at 18 years or 21 years if studying full-time. 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 may be granted increased autonomy in relation to certain issues. Many children in long-term foster care 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.

3. Sets a new test for involuntary adoptions
Head 12 of the Heads of the Adoption (Amendment) Bill 2012 propose to amend Section 54 of the Adoption Act 2010 to set out a new test for such adoptions, comprising the following steps:

1. Failure on behalf of the parent/s has led to a child being taken into care as provided for under Article 42A.2.1.

2. Satisfy the new test:
   - A continuous failure on the part of the parents towards the child for at least three years, and that such failure is likely to prejudicially affect the safety or welfare of the child
   - There is no reasonable prospect that the parents will be able to care for the child
   - The failure constitutes an abandonment on the part of the parents of all parental rights and constitutional rights
   - Adoption is considered to be a proportionate means by which to provide for the parenting of the child.

A further requirement is that the child must be in the custody of, and have a home with, those wishing to adopt him or her (i.e. the foster parents) for a continuous period of at least 18 months

4. Provides for key safeguards
The provision contains two important safeguards: the adoption can only take place where the parents have failed the child for a period of time set out in law, and where the best interests of the child require that such an order be made. It is clear that no adoption would be made where the child opposes the adoption or where a strong beneficial relationship with his or her birth parents or extended family exists and that family member opposes the adoption.

Key Statistics
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. Of these 2,000 children, there are potentially hundreds of children who have little or no contact with their birth parents and who could be eligible for adoption, if the amendment is passed. It should be remembered, however, that not

every child in long term care will be eligible, some children may not wish to be adopted (they may continue to have a relationship with their extended birth family), or there may also not be a willingness to adopt on the part of the foster family.

**How does it compare with the recommendations of the Joint Committee?**

The Joint Committee proposed the following provision:

> 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.

The Committee’s proposed provision is almost fully replicated in the amendment wording, with two exceptions. The amendment wording is stronger in that it provides that provision “shall” be made by law, whereas the Committee’s wording included the term “may”. Hence, under the amendment wording, the State is obliged to legislate whereas under the Committee’s wording, it was merely permitted to do so.

A second difference is that the amendment wording refers to the ‘duty’ rather than the ‘responsibility’ of the parents towards their child. The term ‘duty’ is the term used in the existing constitutional provision of Article 42.5.
Article 42A.3: Voluntary Adoption of Children

Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

What does it do?

- Commits the Oireachtas to legislate for the voluntary placement, and adoption, of any child, regardless of whether the child’s parents are married or unmarried
- Removes inequalities in adoption – ending the different treatment of children of married and unmarried families in the area of adoption
- The provision is framed to reflect the two steps which comprise the adoption process – the first being the placement of the child for adoption and the second the granting of the adoption order.

What is the likely impact?

1. Removes inequalities in adoption

At present, only children born to unmarried parents are eligible to be voluntarily placed for adoption by their parent/s. Article 41 and 42 has been interpreted to mean that married parents cannot voluntarily place their child for adoption or consent to an adoption. Article 42A.3 requires the Oireachtas to enact legislation to permit the voluntary placement for adoption and adoption of any child, hence it must include the children of married couples.

Situations may arise where a married family may wish to voluntarily place their child for adoption due to their acknowledged inability to care for their child on a long-term basis due to a serious disability or mental health issues, or terminal illness. A case may also arise whereby a married parent, now widowed, wishes to give their child up for adoption to facilitate them to adopt the child as a couple along with their new spouse. In essence, the first married family need to relinquish their rights in relation to the child before the new married couple can adopt the child. There is no other mechanism at present to allow for the adoption by a step-parent of such a child.

This provision allows the State to better implement Article 20 of the UN Convention on the Rights of the Child which relates to the provision of alternative care for children who are deprived of their family environment, and the requirement that all of the rights provided for under the Convention should be available to all children without discrimination of any kind under Article 2.24

2. Provides for key safeguards

The Government’s draft Heads of Adoption (Amendment) Bill 2012 proposes to amend the Adoption Act 2010 to give effect to this provision, if the referendum is passed. Safeguards already exist under the 2010 Act. For example, the Adoption Authority appoints an ‘authorised person’ to ensure that the parents’ consent is full, free and informed. A voluntary adoption cannot proceed under any circumstances if the parent does not consent. A parent or guardian can withdraw consent at any time up until the making of the adoption order, although this may be challenged in the High Court by the prospective adoptive parents.

In addition to these safeguards, the 2012 Bill includes that:

- In the case of a child of married parents, both parents (mother and marital father) must place the child for adoption and before doing so, will be counselled and given information

24 It will also impact positively on compliance with the 2007 European Convention on the Adoption of Children (Revised).
about the adoption process by an accredited body or by the HSE before the child is placed for adoption.

- Where parents have placed a child for adoption (step 1) and then fail, refuse or neglect to consent to the making of the adoption order (step 2), their consent can be dispensed with, on foot of an application to the High Court by the prospective adoptive parents. In such cases, the court must have regard to the relationship between the prospective adoptive parents and the child and the relationship between the child and his/her birth parents in deciding the case and the child’s best interest will be the paramount consideration for the court.

**How does it compare with the recommendations of the Joint Committee?**

The Joint Committee proposed the following provision:

- *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.*

The amendment wording is similar that proposed by the Committee, with two exceptions. The amendment wording is stronger in that it provides that provision “shall” be made by law, whereas the Committee’s had included the term “may” in this phrase. Hence, under the amendment wording, the State is obliged to legislate whereas under the Committee’s wording, it was merely permitted to do so.

The Committee’s wording included an explicit reference that the law “shall respect the child’s right to continuity in its care and upbringing.” The Committee noted that the objective of this 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.”

Reference to the ‘continuity of care’ is omitted in the amendment wording. However, the draft adoption legislation includes a requirement on the court to consider the relationship between the child and his or her prospective adoptive parents and birth parents. Respect for the child’s ‘continuity of care’ is line with Article 20 of the UN Convention on the Rights of the Child states that: “when considering [care] solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background”.

Article 42A.4 contains two parts. The first part commits the Oireachtas to bring in a law to ensure that the best interest of the child is the paramount consideration in certain proceedings. The second part commits the Oireachtas to bring in a law to ensure that the views of the child be ascertained and given due weight in accordance with the age and maturity of the child in the same proceedings.

The provision applies only to specified proceedings, those:
- brought by the State in child care and child protection proceedings or
- that concern the adoption, guardianship or custody of, or access to, any child.

It is likely that the provision will apply to only judicial proceedings, with one exception that being the making of adoption orders and the recognition of intercountry adoptions carried out by the Adoption Authority (Article 37.2 of the Constitution recognises the authority of such decisions).

Article 42A.2.1 (Child Protection) should be read in conjunction with Article 42A.4 (Best Interests and Views of the Child). Both make references to the care and child protection proceedings in which the State limits parental rights in order to protect a child.

The importance of the word “shall”

Article 42A.4 (and also Article 42A.3) contain the phrase “provision shall be made by law”. The use of “shall” rather than “may” is an unusual, but not unprecedented, construct. It places a mandatory constitutional obligation on the State to provide by law for the rights set out in these provisions. Article 42A amounts to an irreducible constitutional minimum protection for children which must be incorporated into the laws of the State and which cannot be removed from those laws without the consent of the People.

The use of “shall” will operate as a constitutional directive which judges will have to take this into account. It is unlikely that the courts will interpret these provisions as providing protection at merely a sub-constitutional level similar to that of the European Convention on Human Rights Act 2003. In the period before such provision is made by law, the courts are likely to interpret existing legislation in light of the new constitutional obligations but the State should act as quickly as possible to bring in the necessary legislative changes required to give effect to the various obligations imposed by Article 42A. A failure to make such provision in law is likely to give rise to a remedy to address such failure.

Article 42A.4 gives express constitutional recognition to two unenumerated rights – best interests and views of the child – which have already been found to exist by the High Court. The use of the phrase “provision shall be made by law” in this provision is unique to the Constitution in that it legally obliges the Oireachtas to define fundamental rights and to make sure that relevant legislation is in place.

Article 42A.4.1

**Best Interests of the Child**

**Article 42A.4.1**

* Provision shall be made by law that in the resolution of all proceedings -
  - i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
  - ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

**What does it do?**

- Commits the Oireachtas to bring in a law to ensure that the best interests of the child will be “the paramount consideration”, in certain areas of decision making affecting a child – care proceedings and child protection cases, adoption, guardianship, custody and access cases
- This means such decisions will be determined solely based on what is best for the child in question.

**What is the likely impact?**

1. **Provides constitutional backing for existing legislation**

   This provision reflects, albeit in an amended form, one of four general principles of the UN Convention on the Rights of the Child – the best interests principle. Article 3 of the Convention requires that in all actions concerning children, whether by the courts, administrative or legislative bodies, the best interests of the child should be “a primary consideration”.

   Article 42A.4.1 uses the phrase that the best interest will be “the paramount consideration”. This is a stronger phrase than used in the general best interest provision of the Convention under Article 3 but mirrors Article 21 which provides that in adoption cases where the phrase “the paramount consideration” is used. Although the framing of the best interest principle under Article 42A2.1 is strong, the range of proceedings it applies to is limited to judicial proceedings relating to care brought by the State and cases concerning adoption, guardianship, custody and access, much narrower than that covered by the Convention.

   The ‘best interest’ principle has existed in Irish law, as the ‘welfare’ test, since the 1960s. It is included as a core principle in the Child Care Act 1991 and the Adoption Act 2010. For the past 40 years, the Oireachtas has provided guidance to the courts with regards to disputes concerning the custody, guardianship of, or access to, a child under the Guardianship of Infants Act, 1964.

   Section 3 of the Guardianship of Infants Act 1964 provides that in considering an application for custody, the court must have regard to the welfare of the child as the “first and paramount consideration”. There is, however, no constitutional basis for Section 3; and it is considered vulnerable to constitutional challenge. This is due to a potential conflict between Section 3 and Articles 41 and 42 which grant “inalienable and imprescriptible” rights to parents in relation to their children. In addition, there is concern, among non-governmental organisations, that access arrangements are not sufficiently governed by the principle of the best interests of the child and that some arrangements may be unsafe or unsuitable for the child.

---

26 Section 3 of the 1964 Act is supplemented by Sections 13 to 16. Section 14 enables a parent or guardian to recover custody of a child from a third party unless there are circumstances of parental abandonment, desertion or misconduct. Section 15 enables the HSE to recoup from the parent any expenses incurred by bringing up or providing for the child. Section 16 further provides that where a parent was unmindful of parental duties in designated circumstances, the Courts must be satisfied that the parent is a fit person to have custody of the child.


28 The 1992 High Court case, *M.D. v G.D.*, found the granting of access orders to be a basic right of the child rather than a right of the parent/s Unreported, High Court, July 30, 1992.
2. Provides clarity on when the best interests of the child should be paramount

At present, where a dispute relating to the custody of a child takes place between any two parents, the court applies the standard of the “first and paramount consideration” of the welfare of the child, as set down in the Section 3 of the Guardianship of Infants Act 1964. However, considerable confusion has developed about the relevant standard to apply in a dispute between a parent or parents and a third party who has custody of the child (such as a foster carer, prospective adoptive parent or individual who has cared for the child, for example a grandparent).

The current position is that the 1964 Act must be read subject to Articles 41 and 42, in the context of a dispute between married parents and other parties. The primacy of the welfare of the child has not been accepted by the courts. Instead, the Supreme Court has insisted that in the absence of compelling reasons or physical or moral failure under Article 42.5 of the Constitution, a child must be returned to the married parents irrespective of the impact on the welfare of the child.

The need to give constitutional protection to the principle of the best interests of the child in custody disputes is evidenced by the inconsistent judicial interpretation applied in the case known as the ‘Baby Ann’ case. In the 2004 High Court F.N. case, Finlay-Geoghegan J. found that the best interests principle should be applied to decisions in relation to guardianship, custody or upbringing. This right was applied in 2006 by MacMenamin J. in the High Court case known as the ‘Baby Ann’ case, N. v. HSE, to justify a decision to grant custody of a child to her prospective adoptive parents, rather than her natural parents. McMenamin J.’s decision was, however, reversed by the Supreme Court on appeal, which preferred the orthodox constitutional approach to such issues, in which the rights of the child are presumptively vindicated by the child’s placement within his or her constitutional family.

As Article 42.1 is not being amended, the existing presumption that the best interests of the child are best served within the marital family remains. If the referendum is passed, the courts will have to balance the provisions of Articles 41, 42 and 42A together and attempt to harmonise the rights set out in those provisions. They will have to respect two constitutionally accepted principles that the best interests of the child is to be found within his or her marital family, and that under 42A.4.1 the best interests of the child is to be the paramount consideration in certain types of proceedings.

The right of the child to have their views ascertained and given due weight in certain proceedings (Article 42A.4.2) will also be important in determining whether the best interests of the child can and are to be found in the family.

How does it compare with the recommendations of the Joint Committee?

The Joint Committee proposed the following provision:

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.

The amendment wording limits the types of proceedings in which the best interests of the child are to be the paramount consideration, whereas the Committee’s wording used the more unspecific language of ‘disputes’ – this could be interpreted more broadly. The Committees’ reference to ‘care and upbringing’ of the child is replaced in the amendment wording with a narrower reference to proceedings “brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected”. On a positive note, the amendment wording has been extended to proceedings relating to ‘access’.

33 Article 41.1 states 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.”
Article 42A.4.2 Views of the Child

Article 42A.4.2
Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

What does it do?

- Commits the Oireachtas to bring in a law to ensure the views of the child are taken into account in proceedings listed in 42A.4.1 (care proceedings and child protection cases, adoption, guardianship, custody and access cases)
- Does not mean that the child’s views will be the determining factor in the case. Rather, the child’s views will be considered by the judge and given due weight according to the child’s age and maturity.

What is the likely impact?

1. Provides children with an entitlement to be heard in certain proceedings
   At present, there are significant gaps and inadequacies in how children are heard in judicial and administrative proceedings that affect them. A child has no automatic right to be heard in such proceedings. For example, the appointment of a Guardian ad Litem in care proceedings and child protection cases is at the discretion of the judge and there is no statutory guidance on the role and functions of a Guardian ad Litem. 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. Some of these gaps will be addressed by this new wording.

   Article 42A.4.2 provides that in a case involving a child who is capable of forming his or her own views, these views are to be ascertained and given due weight having regard to the child’s age and maturity. This is limited to proceedings concerning adoption; care proceedings and child protection cases, and family law proceedings concerning issues of guardianship, custody and access.

2. Grants this entitlement to a child who can form their own views
   This provision providing that the views of the child are to be ascertained and conveyed to the court for consideration as part of the decision-making process by the judge. It provision reflects, albeit in an amended form, one of the four general principles of the UN Convention on the Rights of the Child – the principle relating to the participation of children in decisions that affect them. Article 12 of the Convention requires the State to provide an opportunity by which the views of children can be heard and given due weight in accordance with their age and maturity in decisions that affect them.

   Article 42A.4.2 provides that the views of a child will be heard in circumstances where the child is “capable of forming his or her own views”. This phrase mirrors the language of the Convention’s Article 12. It allows for a child who may be able to ‘form’ views but may have a difficulty ‘expressing’ those views, for example due to a disability or trauma experienced, to be supported to have their views ascertained and conveyed to the court.

---

34 Children may have their voice heard in legal proceedings affecting them by either direct input, independent legal representation or through the appointment of a Guardian ad Litem.
3. Provides that child’s views will be ascertained and given due weight
The provision states that the child’s views will be “ascertained and given due weight”. This is a two-step approach that provides for the ‘hearing’ of the views of the child by an adult and the subsequent weighing of the views of the child as conveyed by the adult to the Court on behalf of the child. The weight given to the views will depend on the child’s age and maturity. This does not mean that the child’s views are the deciding factor: ultimately, the decision rests with the judge.

4. Supports child-centred decision making and better child protection
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. 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. It is hoped that this provision will provide an impetus to the continued development of administrative practices to facilitate children’s participation, and will help create an environment conducive to enabling the voice of the child to be heard in Irish society.

How does it compare with the recommendations of the Joint Committee?

The Joint Committee proposed the following provision:

> The State guarantees in its laws to recognise and vindicate the rights of all children as individuals including [...]  
> - 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.

In the amendment wording the views of the child provision is found in its own sub-article, as opposed to as part of a list of enumerated rights in the Committee’s wording. While it is not a direct constitutional right under the amendment wording, the State is under an obligation to legislate for the right.

The amendment wording is limited to the types of proceedings listed (children in care, child protection, adoption, guardianship, custody and access cases) which is narrower than the scope of the right in the Committee’s wording which extends to all administrative proceedings affecting the child. It is potentially further limited by the caveat that the right is available to only those children capable of forming his or her own views which is not reflected in the Committee’s wording.
5. After the Referendum

Constitutional change is a fundamental step towards creating an Ireland where children are respected, protected and heard. However, this amendment cannot solve all ills. Much work remains to be done. It is hoped that constitutional, and related legislative, change will help to promote an attitudinal shift that will ultimately impact on the operation of the legal system, budgetary decisions, the evolution of child-centred administrative and judicial practices and the provision of additional services to support children and their families. If the referendum is passed, the following measures will be needed to ensure the amendment lives up to its full potential:

1. Timely introduction of specific legislation to give effect to the constitutional provisions, in particular where the amendment places a mandatory obligation on the Oireachtas to legislate. It should specify how the provisions on adoption (42A.2.2 and 42A.3), best interests (42A.4.1) and hearing the views of children (42A.4.2) will operate in practice.

2. The amendment is a significant starting point in addressing the gaps in protections for children. A comprehensive Children’s Bill should be introduced as soon as possible after the referendum to address outstanding gaps, not addressed in the amendment. These include the child’s right to know his or her identity in a manner consistent with his or her best interests; and a reform of the law on guardianship.

3. Resources must be provided to support the implementation of the amendment, so that the new Child and Family Support Agency can fulfil its duty to protect children and to support struggling families; and to provide a mechanism to hear the views of the child in judicial proceedings that affect them as provided for in the amendment.

4. Provision should be made by the Minister for Justice and Equality to support the Judicial Studies Institute to instigate judicial education on the amendment.

5. In a welcome development, the text of the amendment reflects the language of the UN Convention on the Rights of the Child, in (Article 42A.4.1) (best interests principle) and Article 42A.4.2 (voice of the child). The judiciary and Oireachtas should build on this by relying on the Convention in its interpretation of the amendment, in particular when identifying ‘natural and imprescriptible rights’ for children (Article 42.A.1).

2. The amendment sets down a legal minimum standard. We call on the judiciary and the Oireachtas to build upon this standard in their interpretation of the amendment. For example, when drafting legislation as directed by Article 42A.4, we call on the Oireachtas to legislate for a broader set of circumstances, including that:
   - the best interests of the child will be the paramount consideration in child care and child protection proceedings brought by a child or third party against the State and in associated administrative proceedings
   - the best interests of the child will be a primary consideration in any judicial and administrative decisions concerning the child, not covered by the amendment
   - the views of the child should be considered in any judicial and administrative proceedings which have a direct impact on the child.

6. The fulfilment of the right to equality and non-discrimination under the Constitution remains problematic for both children and adults. Other issues remain, including equality between children and discrimination on the grounds of disability. Reform of the existing constitutional provision under Article 40.1 should be considered and addressed by the Constitutional Convention which is currently meeting to review aspects of the Constitution.
Appendix: Extracts from the Constitution of Ireland

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

THE FAMILY

ARTICLE 41

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

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

EDUCATION

ARTICLE 42

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.
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. It aims to improve the lives of all children under 18, through securing the necessary changes in Ireland's laws, policies and services.