Short Guide to the Children’s Referendum

October 2012

Who we are?
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). The Alliance has advocated for constitutional change for children since its foundation in 1995. The Alliance engages in a range of activities including publication of an annual Report Card, which tracks Government progress on its stated commitments to children.

Children’s Referendum
On 19 September 2012, the Government published the Thirty-first Amendment to the Constitution (Children) Bill 2012, which contains the text of a proposed constitutional amendment to strengthen children’s rights. If passed, the amendment will 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.

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.

5 Reasons to Vote Yes

1. For the first time, the Constitution will take a child-centred approach to the protection of all children and will allow the State to better support families that are struggling, rather than wait for a situation to reach crisis point.

2. Allow up to 2,000 children, currently in long-term State care, the opportunity to be adopted and given a second chance at a stable and permanent family.

3. Base child protection, care, adoption, guardianship, custody and access decisions on what is in the best interests of the child.

4. Ensure that judges listen to the views of children when making decisions in child protection, care, adoption, guardianship, custody and access cases.

5. Set out how we, as a country, now view and value children and help foster a culture that actively protects and safeguards children.
Summary Explanation of Amendment Wording

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 to child protection and care proceedings brought by the State, and to 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.

Frequently Asked Questions

What are children’s rights?
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.

Why is the Constitution so important?
The Constitution is the fundamental law of the State. It guarantees a range of personal rights, underpins interaction between the State and its citizens, and is a proclamation of our values as a society. All our laws, policies and services must be compatible with the Constitution.

Do children currently have rights under the Constitution?
Yes, children do have rights under the Constitution. Where appropriate, children are entitled to the same fundamental rights (under Articles 40 to 44) as are granted to individuals living in the State. Children also have two explicit rights: 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).

Are all children treated the same under the Constitution?
No, the rights of a child from a married family flow from Articles 41 (Family) and 42 (Education), with an assumption (which can be reversed if proved otherwise) that the best interests of the child lies within the marital family, while the rights of a child from an unmarried family flow from the child’s ‘personal rights’ under Article 40.3. Children’s rights are, therefore, determined by the marital status of the child’s parents.

Why do we need a change in the Constitution for children?
Although children already have rights under the Constitution, what is lacking are child-specific rights that recognise the needs of children that are different from, and additional to, those of adults. It can be said that children are almost invisible within the Constitution.

The lack of visibility for children in the Constitution, coupled with the express rights of the marital family, has placed restrictions on both the legislation that may be enacted and on the decisions of the courts. This situation is compounded by a lack of consistency in judicial interpretation of a child’s personal rights under Article 40.3. Furthermore, the Constitution is currently hampering the effective operation of the Adoption Act 2010, and other child care legislation is considered vulnerable to constitutional challenge.
Do we need a referendum to bring about change?
Yes, a referendum is needed to strengthen children’s rights. The Joint Committee on the Constitutional Amendment on Children spent two years examining the issue. They concluded their work in 2010 and found that some changes could be made by legislation but a referendum is needed for others.

The need for constitutional reform was first recognised in 1976 by the then Senator Mary Robinson. Since then, a series of official reports have advocated constitutional change, including the Kilkenny Incest Investigation Report in 1993, the Commission on the Family in 1998 and the All-Party Oireachtas Committee on the Constitution in 2006.

What will NOT be changed by the children’s rights amendment?
The amendment wording for the Children’s Referendum is not amending Article 41 so it will have:

- No impact on the definition of the ‘Family’ under the Constitution. The ‘Family’ will continue to mean only a heterosexual, married couple.¹
- No impact on the special protection provided to the ‘Family’ under Article 41.3.

Do children’s rights weaken parents’ rights?
No, parents are central to a child’s life, and their rights are inextricably linked. In most cases, a child’s rights are vindicated by his or her parents. Strengthening the rights of children in the Constitution will empower parents to ensure that their child’s rights are upheld by the State. This amendment is not an attack on parents or the family, nor is it a radical amendment. The rights of the marital family are very well protected in Article 41, which will remain unaltered if the Children’s Referendum is passed. To protect against over-intervention by the State, Article 42A.2.1° contains key safeguards by the inclusion of the phrases ‘exceptional cases’ and ‘proportionate’.

What is the UN Convention on the Rights of the Child and will the amendment incorporate it into Irish law?
The UN Convention on the Rights of the Child is the most widely ratified international human rights convention in the world. Only three states have not yet ratified it, the United States, Somalia and South Sudan. The amendment does not incorporate the full text of the UN Convention on the Rights of the Child into the Constitution. It does, however, bring into our Constitution certain aspects of the Convention – the best interests of the child and hearing the views of the child.

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

The Convention also states that children have a right to know and be cared for by their parents (Article 7); it explicitly discourages the separation of children from their families (Article 9) and says that where children are separated from their parents the State has an obligation to try to ensure contact between them is maintained in accordance with the best interests of the child (Article 9.3).

It should also be remembered that many parents are ‘children’s rights champions’, fighting tooth and nail to ensure that their child’s needs – for example, in education or in the healthcare system – are adequately met.

**Amendment Wording**

**Article 42A – Children**

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

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

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

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

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

   i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

   ii) concerning the adoption, guardianship or custody of, or access to, any child,

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

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

**Keep in touch with us!**

Children’s Rights Alliance  
31 Molesworth Street  
Dublin 2  
Ireland

**Phone** 00353-1-6629400  
**Website** www.childrensrights.ie  
**Facebook** www.facebook.com/childrensrightsalliance  
**Twitter** www.twitter.com/ChildRightsIRL  
**YouTube** www.youtube.com/user/cradub  
**Twitter Hashtag** #crref