



“The fact that the Convention has recommended the lower voting age of 16 means that the result is even more positive than expected, given that the group was initially asked to consider 17... it is to be welcomed that Ireland is showing leadership on this rather than following in the wake of our neighbours.”

James Doorley, Deputy Director, National Youth Council of Ireland

Chapter 1:

Children's Constitutional Rights

Grade B



In The News

Challenge to Children's Referendum dismissed by High Court

By Sinéad O'Carroll

THE HIGH COURT has dismissed a challenge to the Children's Referendum which passed in November last year.

Justice Paul McDermott rejected Joanna Jordan's petition in his judgement today, stating that she failed to provide evidence that unconstitutional behaviour – in the form of a use of public money to fund an unbalanced information campaign - affected the outcome of the vote on 10 November.

He said the onus was on the challenger to prove the government's information campaign, which was subject to a successful Supreme Court challenge, had such an impact on the electorate as to produce a majority in favour of the proposal.

Jordan had unsuccessfully argued that she merely had to claim it had an impact on the Referendum as a whole – and not on the result.

The Children's Referendum passed by a margin of 58 per cent to 42 per cent based. Turnout on the day was quite low at 33.49 per cent.

Speaking at the Four Courts, Barnardos, the Children's Rights Alliance and the Irish Society for Prevention of Cruelty to Children (ISPCC) welcomed the decision.

"We strongly welcome today's detailed and thorough judgment by the High Court to accept the validity of the Children's Referendum. The people of Ireland clearly voted in favour of amending the Constitution that will make a positive difference in children's lives, especially those most vulnerable," noted Fergus Finlay of Barnardos.

"Children have waited long enough so now we must begin to put in place the legislation and policy that will ensure children's best interests are taken into account and their voices heard."

TheJournal.ie, 18 October 2013

1 | Children's Constitutional Rights

Overall
Grade **B**

Duty on States to provide for the rights of children

By ratifying the UN Convention on the Rights of the Child, States agree to undertake all appropriate legislative, administrative and other measures to ensure the implementation of the rights set out in the Convention. In relation to economic, social and cultural rights, States are obliged to undertake such measures to the maximum extent of their available resources. | Summary of Article 4 of the UNCRC

The Children's Rights Alliance has awarded the Government a 'B' grade in Children's Constitutional Rights, a fall from last year's 'A' grade. This reflects the fact that the positive referendum result has effectively stalled due to a legal challenge so the Government has been unable to progress its implementation of the Amendment. The Constitutional Convention did not specifically focus on rights impacting on children or young people and did not formally consult with them or incorporate their views into its findings. Separately the Chairman of the Constitutional Convention, Tom Arnold, was invited to preside over the proceedings of a Children and Young People's Constitutional Convention which was run by Youth Work Ireland and the Voices of Youth Group.¹

Ireland operates a dualist common law system, and under Article 29.6 of the Irish Constitution international agreements ratified by Ireland only take effect in domestic law if the Oireachtas (Irish Houses of Parliament) specifically provides for this through legislation. So although Ireland signed and ratified the UN Convention on the Rights of the Child (UNCRC) in 1992, the Convention did not automatically become part of Irish law. Law reform since 1992 has incorporated some aspects of the Convention into domestic law on an issue by issue basis. For example, the Children Act 2001 brought into Irish law the principle that detention of a young offender should be a measure of last resort, mirroring the language used in the UNCRC on the right to freedom from torture and deprivation of liberty (Article 37). To be compliant with the implementation of rights provision (Article 4) of the Convention, the principle and provisions of the Convention must be fully reflected in all Ireland's laws, policies and practice.

The UN Committee on the Rights of the Child's 2006 *Concluding Observations* on Ireland note with regret that the recommendations made in its 1998 report have not yet been fully addressed. In particular, it highlighted those rights related to the status of the child as a rights-holder, the adoption of a child rights-based approach in policies and practices and the failure to incorporate the UN Convention into domestic law and urged the Government to make every effort to progress these actions as a matter of priority.²

The Irish Constitution is the fundamental legal document of the State and it sets out how we, as a country, view and value children. The passage of the children's referendum in 2012 was a vital step towards the full implementation of the UNCRC in Ireland. The Amendment provides an explicit recognition to children as rights holders and progresses implementation of the right to non-discrimination (Article 2); the best interests of the child (Article 3); the voice of the child (Article 12); the right to protection (Article 19); the right to alternative care (Article 20) and adoption (Article 21). The timely and full implementation of this constitutional amendment will help to foster a culture that actively protects and safeguards the rights of children.

1 Youth Work Ireland, Young People's Constitutional Convention Saturday <http://www.youthworkireland.ie/what-we-do/news/young-peoples-constitutional-convention-saturday> [accessed 16 December 2013].

2 United Nations Committee on the Rights of the Child (2006) *Concluding Observations: Ireland* (CRC/C/IRL/CO/2 paragraph 9).

1.1 Children's Rights Referendum

Grade B

Government Commitment

The *Programme for Government* commits to establishing a process to ensure that the Constitution meets the challenges of the 21st century, by addressing a number of specific urgent issues as well as establishing a Constitutional Convention to undertake a wider review. It also promises to give priority to specific constitutional amendments, including:

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

Progress

Frozen

What's happening?

The legal challenge to the Constitutional Referendum on Children is currently under appeal to the Supreme Court and is due for hearing in 2014. The Constitutional Convention has been meeting to consider areas for potential Constitutional reform.

Children's Rights Referendum: The Government committed in its 2011 *Programme for Government* to hold a referendum to amend the Constitution to strengthen children's rights.³ On 19 September 2012, the Government published the Thirty-First Amendment to the Constitution Bill, which contained the text of a proposed constitutional amendment. On 10 November 2012, the referendum was held and the People of Ireland voted 58% to 42% in favour of the Thirty-First Amendment. Turnout was low at 33.5%.

The Amendment was carried despite a Supreme Court ruling on 8 November 2012, just two days before polling, which upheld a complaint by Dublin engineer Mark McCrystal.⁴ He claimed that parts of the Government's referendum materials and advertisements breached the 1995 McKenna Supreme Court judgment, which prohibits the spending of public monies to espouse a particular view in a referendum.⁵ The Court made a declaration that the Government had 'acted wrongfully' by spending public monies on referendum material that was 'not fair, equal or impartial'.⁶ The Court did, however, find that the Government acted in good faith in its production of the materials. The Court did not order the Government to cease distributing and publishing the material: the Government took such action itself prior to the ruling being handed down.

³ Government of Ireland (2011) *Programme for Government 2011*, Dublin: Stationery Office, p.17.

⁴ *McCrystal v Minister for Children and Youth Affairs, the Government of Ireland, Ireland and the Attorney General* [2012] IESC 53 (8 November 2012).

⁵ *McKenna v An Taoiseach* (No. 2) [1995] 2 IR 10.

⁶ *McCrystal v Minister for Children and Youth Affairs, the Government of Ireland, Ireland and the Attorney General* [2012] IESC 53 (8 November 2012). The Court also found that material contained a misstatement as to the effect of the referendum.

On 19 November 2012, relying in part on the McCrystal ruling, the High Court granted leave for a legal challenge to the referendum result. Mr Justice McDermott handed down judgment on 18 October 2013 in the case taken by Dublin homemaker Joanna Jordan. She argued that the breaches of the McKenna judgment as found in the McCrystal case were 'so egregious and serious' that they were likely to have had a material effect on the outcome of the referendum. She also contended that proceeding with the referendum two days after the McCrystal ruling 'exacerbated the effect of the unconstitutional conduct', which in turn further interfered with the democratic process. However, the High Court held that Ms Jordan had not succeeded in proving, on the balance of probabilities, that the Government's information booklet, website and advertising had a material effect on the referendum result. The Judge highlighted that the McCrystal judgment was a 'short, focused and definitive condemnation' of the unconstitutional manner in which public funds were spent. The extensive coverage of the McCrystal ruling was considered by the Court to have been reflective of this and also to have given rise to public debate and discussion on the matter.

On 24 October 2013, an appeal was filed with the Supreme Court along with an application for a priority hearing which will take place in 2014.⁷ A stay has been placed on the Order to confirm the provisional referendum certificate which means that the Amendment Bill – containing the text of the Amendment passed by the People of Ireland – continues to be frozen until the case is decided upon.

Constitutional Convention: On 1 December 2012, the inaugural meeting of the Constitutional Convention was held. It comprises 100 members: 66 citizens drawn from the electoral register, 29 members of the Oireachtas and four from the Northern Ireland Assembly. To date, the Convention has considered eight possible amendments: reducing the Presidential term from seven to five years; lowering the voting age from 18 to 17 years; a review of the Dáil electoral system; giving Irish citizens resident outside the State the right to vote in Presidential elections; a provision for same-sex marriage; amending the clause on the role of women in the home; increasing the participation of women in politics; and the removal of the offence of blasphemy from the Constitution. The Convention held a series of public meetings in Cork, Galway, Waterford, Dublin, Sligo, Athlone and Monaghan to collect the views of the public on the next phase of the Convention's work.⁸ The Convention has also completed reports on six issues to date⁹ and has decided to examine two additional issues in February 2014: Dáil reform and the inclusion of economic, social and cultural rights in the Constitution.¹⁰

In March 2013, the Convention considered the issue of a constitutional amendment to lower the voting age from 18 years. The majority, 52% of members decided in favour of reducing the voting age for all elections while 47% of members voted against the proposal. Members also indicated their preference for the new voting age: 48% favoured 16 years, 38% supported 17 years while 14% had no opinion. In terms of reducing the minimum age required of a candidate standing for election, the majority voted against reducing the age which is currently 21 years.¹¹ Youth representatives from the National Youth Council of Ireland were invited to make a presentation to the Convention on this issue.

In April 2013, Youth Work Ireland and its Voices of Youth Group facilitated a Children and Young People's Constitutional Convention which assembled 50 young people from around the country to discuss constitutional reform, along the lines of that under deliberation by the Convention. The Chairman of the Constitutional Convention, Tom Arnold, was invited to chair the proceedings.¹² In addition to the issues under review by the Convention, the young people made a number of recommendations for the Convention to consider including making the right to free education effective and real, making the separation between Church and State clearer and changing the Preamble.

7 Brophy Solicitors, 'Supreme Court Appeal in Referendum Challenge' <http://brophysolicitors.blogspot.ie/2013/10/supreme-court-appeal-in-referendum.html> [accessed 16 December 2013].

8 Constitutional Convention Meeting Schedule <https://www.constitution.ie/Meetings.aspx> [accessed 16 December 2013].

9 Reports have been completed on voting age, Presidential term, role of women, same-sex marriage, Dáil electoral system and votes outside the State, all available at: <https://www.constitution.ie/Meetings.aspx> [accessed 17 December 2013].

10 The Convention on the Constitution, 'Convention on the Constitution chooses (i) Dáil Reform and (ii) Economic, Social and Cultural rights for discussion at their final two meetings in February 2014' [press release], 17 December 2013.

11 The Convention on the Constitution, First Report of the Constitutional Convention, March 2013; <https://www.constitution.ie/AttachmentDownload.ashx?mid=e1f8e128-2496-e211-a5a0-005056a32ee4> [accessed 16 December 2013].

12 Youth Work Ireland, Young People's Constitutional Convention Saturday <http://www.youthworkireland.ie/what-we-do/news/young-peoples-constitutional-convention-saturday> [accessed 16 December 2013].

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Comment

Children’s Constitutional Rights gets a ‘**B**’ grade in *Report Card 2014*, a fall from last year’s ‘**A**’ grade. This is due to the fact that the positive result of the referendum cannot yet be implemented and has been delayed. It also reflects the fact that some decisions have been made which will hopefully improve children’s constitutional rights through the Constitutional Convention, for example the examination of the inclusion of economic, social and cultural rights. However, it is regrettable that children and young people have not had a formal mechanism to feed into the Convention itself.

Children’s Rights Referendum: The judicial challenge to the Thirty-First Amendment Bill has effectively frozen the process of implementing the referendum result as it can only become law if the Court declares the petition before it to be null and void.¹³ The appeal to the Supreme Court, which will be heard in 2014, means that no law reform can take place to implement the referendum result until the case is decided.

The new article, Article 42A, will necessitate the introduction of specific legislation to ensure its implementation. Under Article 42A.2.2 the Oireachtas will have to legislate to allow for the adoption of a child in circumstances where the level of parental failure towards the child has reached an unacceptable threshold. Article 42A.4.1 also commits the Oireachtas to legislate to ensure that the best interests of the child will be ‘the paramount consideration’ in certain instances of decision-making affecting a child including child care proceedings brought by the State, adoption proceedings and in relation to guardianship, custody or access proceedings. Article 42A.4.2 requires legislation to be put in place to ensure that the views of the child are taken into account in relation to individual proceedings listed in Article 42A.4.1.

The General Scheme and Heads of Bill of the proposed Adoption (Amendment) Bill were published in September 2012, prior to the referendum. The provisions of the proposed Adoption (Amendment) Bill 2012 will change the criteria under which the High Court may authorise the making of an adoption order without parental consent. This will be in the case of a child where his or her parents have failed in their parental duty and where that child is in long term care with prospective adopters. The Bill will also provide for the voluntary placement for adoption of any child irrespective of the marital status of his or her parents.¹⁴ The Minister for Children and Youth Affairs, Frances Fitzgerald TD has expressed her intention to progress this legislation through the houses of the Oireachtas once the Referendum Bill is signed into law.¹⁵ It is not clear what other steps have been taken towards the preparation of the legislation necessitated by Article 42A.4.1 and Article 42A.4.2.

¹³ Referendum Act 1994, Section 40(2).

¹⁴ General Scheme Of Adoption (Amendment) Bill 2012. <http://www.dcy.gov.ie/documents/publications/GeneralSchemeAdoptionBill19thSept12.pdf> [accessed 20 January 2014].

¹⁵ Minister for Children and Youth Affairs, Frances Fitzgerald TD, Parliamentary Questions, Written Answers, 17 December 2013 [53852/13].

Report Card 2013 recommended that the Minister for Justice and Equality should provide funding to the Judicial Studies Institute to enable members of the Bench to engage in studies on children's rights to advance the interpretation of the Children's Amendment. The Committee for Judicial Studies held its national conference of judges in November 2012 with its main focus on various aspects of children's rights and the 2013 conferences of the Supreme, High, Circuit and District Courts, each focused on the voice of the child in legal proceedings.¹⁶ It remains to be seen what further judicial studies will be delivered following the decision of the Supreme Court and what the budget will be for any such training.¹⁷

Constitutional Convention: The Constitutional Convention is a welcome development. However, the exclusion of children and young people under 18 years from representation within the Convention, as well as the lack of focus on matters affecting children, is regrettable. The presentations made by young people to the Convention, during its discussion on the issue of lowering the voting age, was a positive step. However, the Youth Work Ireland event held in April 2013 demonstrated that children and young people have valuable opinions to contribute in relation to wider constitutional change and it is regrettable that their voices were not heard on all eight issues under discussion. The Chairman of the Convention attended and engaged with the Young People's Constitutional Convention, but unfortunately there was no formal mechanism to enable him to ensure that these views and recommendations were fed into the main Convention process. Any future public consultations of this kind should include a mechanism by which the views of children and young people can be heard and included in a formal manner.

The decision to examine economic and social rights in the final meeting of the Constitutional Convention is to be warmly welcomed. Economic and social rights are intrinsically linked to the enjoyment of fundamental human rights but are currently mostly considered to be non-justiciable (not capable of being challenged) before the Irish Courts. This means that decisions made when implementing laws and policies affecting housing, social security and health are not covered under the Constitution. The UN Convention on the Rights of the Child contains many economic and social rights such as the right to health and health services (Article 24) the right to social security (Article 26) and the right to an adequate standard of living (Article 27). The Constitutional Convention will provide a unique opportunity for economic and social rights to be examined and debated. A decision to include economic and social rights within the Constitution would bring full implementation of the rights contained in the UN Convention on the Rights of the Child one step closer.

16 Communication received by the Children's Rights Alliance from the Committee for Judicial Studies, 5 December 2013.

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Immediate Actions for 2014

Enact comprehensive legislation as required under the Constitutional Amendment

Should the Supreme Court find that the children's referendum result is constitutional, four provisions of the new article will necessitate the introduction of specific legislation;¹⁸ a failure to legislate would be a constitutional breach. The Oireachtas should use the opportunity when drafting such legislation to address omissions from the Amendment, for example to provide for a broader set of circumstances under Article 42A.4 in the areas of best interests and voice of the child.

Support the Judicial Studies Institute to address the interpretation of the Amendment

The Minister for Justice and Equality should provide funding to the Judicial Studies Institute to enable members of the Bench to undergo judicial studies on the application of children's rights and on child-friendly justice to advance the interpretation of the children's Amendment.

Ensure an appropriate plan is in place should the Constitutional Amendment be struck down by the Supreme Court

Should the Supreme Court find that the children's referendum result is unconstitutional, the will of the People to insert a new Article 42A into the constitution will be frustrated. The Government should ensure that a contingency plan is in place to ensure the will of the people can be implemented, for example by re-holding the referendum.

Ensure that in future consultations with citizens the views of children are heard and incorporated in a formal manner

Children and young people have the right to be consulted and have their views heard so the lack of a formal mechanism for the Constitutional Convention to consider their views of should be noted and represent a learning experience. All future consultations should include a formal mechanism by which the views of children and young people can be heard.

¹⁸ These are on aspects of adoption (Article 42A.2.2 and Article 42A.3); best interests of the child (Article 42A.4.1); and hearing the views of the child (Article 42A.4.2).