

#### 4. CONCLUDING COMMENTS

Strengthening the rights of children in the Constitution is not a theoretical exercise: it has the potential to have a real and positive impact on the lives of all children and their families in Ireland now and in the future.

The need for change in the current constitutional provisions which affect children has been recognised in a series of official reports and is also evident in the large number of cases concerning child welfare that have come before the Supreme Court, especially over the last ten years. The intention to hold a referendum to amend the Constitution is therefore a significant and welcome development.

The amendment should make children's rights visible within the Constitution and reinforce Ireland's commitment to truly valuing childhood and respecting children.

It should aim to fill gaps that currently exist in the constitutional protection of children's rights: to grant children, as individuals, constitutional recognition in their own right; to give explicit recognition to the paramount importance of the principle of 'best interests of the child', so that both the legislature and the courts are given guidance in balancing competing rights; and to ensure that children are treated equally, regardless of the type of family in which they are living.

In recognition of their special, and sometimes vulnerable, status, the constitutional amendment should also aim to ensure that children are entitled to the right to know and be cared for by their parents; to be protected from abuse; and to have their voice heard in matters that affect them.

Amending the Constitution to uphold the rights of children will facilitate the introduction of new legislation and the modernisation of the family law system. It will promote the provision of services to support children and families. It will also provide a mechanism to end 'roadblocks' within the legal system that stand in the way of children who cannot be cared for by their own parents having a stable environment in which to grow and develop. Constitutional, and consequent legislative, change will promote attitudinal change that will impact on the operation of the legal system, the provision of services and administrative practices.

Moreover, the amendment of the Constitution will provide an important impetus to further progressing the implementation in Ireland of the UN Convention on the Rights of the Child and of the European Convention on Human Rights.

Reforming the Constitution is a fundamental step in creating an Ireland where children are respected and protected. However, a constitutional amendment is only one step – *albeit* of critical importance: to make real the rights enshrined in the Constitution will require significant legislative change and additional investment of resources and services to ensure that all children in Ireland are safe, secure, educated, protected, and enabled to reach their full potential.

#### For further information contact:

**Children's Rights Alliance**  
4 Upper Mount Street  
Dublin 2  
Tel: +353.1.662 9400  
Fax: +353.1.662 9355  
Email: [info@cra.iol.ie](mailto:info@cra.iol.ie)  
[www.childrensrights.ie](http://www.childrensrights.ie)



## The Constitution and Children:

### A Position Paper on the Proposed Referendum on Children's Rights

Summary

January 2007

#### 1. INTRODUCTION

On 3 November 2006, the Taoiseach, Bertie Ahern TD, announced that the Government intends to hold a referendum to strengthen the protection of children's rights in the Constitution.

The Children's Rights Alliance, a coalition of over eighty non-governmental organisations, was invited by the Minister for Children, Brian Lenihan TD, to undertake consultation with the non-governmental sector to inform the Government's formulation of wording for the constitutional amendment.

The Alliance carried out this consultation during November and December 2006 and the findings of the consultation were brought together in a report, entitled *The Constitution and Children: A Position Paper on the Proposed Referendum on Children's Rights*. This report was presented to the Minister for Children on 9 January 2007 and is available at [www.childrensrights.ie](http://www.childrensrights.ie).

#### 2. THE CONSTITUTION AND CHILDREN

Children have rights under a number of Articles of the Constitution:

**Article 40 (Personal Rights)** provides for a series of fundamental rights for all citizens, including "where appropriate" children. These include the right to equal treatment and freedom of expression. It also provides for the protection of unenumerated rights, which has been interpreted by the courts as giving rise to rights not expressly stated in the Constitution.

**Article 41 (The Family)** provides constitutional protection for the family. The courts in their interpretation of this article have ruled that the 'family' means the family based on marriage; the rights of the family belong not to individual members of the family but to the family unit as a whole; and that same-sex marriage is not recognised within the definition of the family in the Constitution.

**Article 42 (Education)** provides for the rights and duties of parents in relation to the education and general upbringing of their children and entitles children to free primary education. Under **Article 42.5**, the State is given the power in exceptional circumstances to intervene in family life when it is necessary to protect the rights and interests of children. A number of recent decisions of the Supreme Court have, however, placed strict limitations on the ability of the State to intervene.

Children have few individual rights under the Constitution and in many instances their rights result from their membership of a family. In addition, the unenumerated rights of children which have been made explicit as a result of court interpretations of Article 40.3.1 (which provides for the protection of unenumerated rights) are not absolute: they can be limited or restricted through legislation or judicial interpretation. In the event of a conflict between the rights of the child (under Article 40) and the rights of the family (under Articles 41 and 42) the courts have found that the rights of the family prevail.

### 3. RECOMMENDED PRINCIPLES TO UNDERLIE AN AMENDMENT

The Alliance believes the following fourteen principles should be reflected in the proposed amendment. These principles reflect Ireland's obligations under the United Nations Convention on the Rights of the Child, which Ireland ratified in 1992; the recommendations of various official reports; and the views of the organisations which participated in the consultation process.

#### 1. Express Rights for Children

**The amendment should include a statement that the State values and respects childhood, and will facilitate children to reach their full potential.**

The courts interpret the legal status of individuals on the basis of the weight given to their rights under the Constitution. As the rights of children (as individuals rather than members of a family) are not explicitly stated in the Constitution, it is often not possible for the child's rights to be taken into account by the courts. The inclusion of express rights for children 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) – but it will not create an automatic hierarchy of rights.

#### 2. Equality and Non-Discrimination

**The amendment should aim to ensure that all children will be treated equally and that direct or indirect discrimination of any kind will be prohibited in all actions concerning children.**

At present the rights of children of marital and non-marital families are not treated equally in the Constitution. A child born to married parents derives his or her rights from the provisions of Articles 41 and 42, whereas a child born to parents who are not married to one another derives his or her rights from the personal rights provision in Article 40.3. The Alliance believes that the constitutional rights of all children should be protected irrespective of their parent's marital status, sexual orientation or nationality.

#### 3. Best Interests

**The amendment should include an express requirement that in all actions concerning children the best interests of the child shall be the paramount consideration.**

The principle of 'best interests' of the child will provide that in a case where the wishes of parents are in conflict with the interests of the child, the courts will be able to base their judgment on what is deemed to be in the best interests of the child. This will remove the *automatic* presumption under the current constitutional provisions that the best interests of the child lie within the marital family.

At present, in any conflict between the interests of the marital family and the interests of the child the courts have found the rights of the family should prevail. The 'best interests' principle is of particular importance in family law decisions concerning a child in State care or a child subject to adoption proceedings; cases where a child's welfare or health is substantially at risk; and cases concerning guardianship, access, custody and continuity of upbringing.

#### 4. Right to be Heard

**The amendment should provide for the right of every child to be heard in matters that affect him or her and to have his or her views given due weight in accordance with age and maturity.**

Hearing children's voices is particularly important within the legal and care systems, in school settings and in health and social services.

#### 5. Societal Position and Authority of Parents and the Family

**The amendment should respect the societal position and authority of parents and the family.**

The Alliance believes it is possible to give greater protection to children without diminishing the very important role of the family: the rights of the family and the rights of the child are not mutually exclusive. Furthermore, the Alliance believes this amendment has the potential to strengthen families by improving the entitlements of children and placing an onus on the State to support children and their families.

#### 6. Right to Family Life and Continuity of Care

**The amendment should include the right of every child to be cared for by his or her parents or family, or to appropriate alternative care and protection when either temporarily or permanently deprived of his or her family environment, and to continuity in his or her upbringing.**

Recognition of the need to support families and of a child's need to experience stability and to continuity in arrangements for his or her care, would provide an impetus for the further development of a range of child and family support services.

#### 7. Protection from Abuse

**The amendment should expressly state the right of every child to be protected from all forms of physical, emotional and sexual abuse or exploitation.**

This would place a responsibility on the State to take all measures, through the criminal justice system and through support, care and therapeutic services, to prevent abuse and to respond to the needs of victims of abuse.

#### 8. Duty of the State to Intervene to Uphold the Child's Rights

**Article 42.5 should be recalibrated to enable the State to fulfil its duty to intervene when necessary to uphold the child's rights.**

Normally, the best interests of a child are promoted by and within his or her family. Unfortunately, in some cases families can be unintentionally, or in rare instances intentionally, damaging places for children. In cases where children require protection, the State must be adequately empowered to fulfil its duty to intervene to support and assist families or, as a measure of last resort, to remove a child from his or her family.

#### 9. Adoption of Children of Marital Families

**The amendment should empower the Oireachtas to enact laws that will allow for the adoption of children irrespective of the marital status of the child's parents.**

To comply with Articles 41 and 42 of the Constitution, the law lays down strict conditions for the adoption of children of parents who are married – that the parents must be deemed to have failed in their duty towards the child for physical or moral reasons for the previous twelve months, that this failure is likely to continue without interruption until the child reaches eighteen years, and that the failure constitutes an abandonment on the part of the parents of all parental rights. In contrast, if the child's parents are not married to one another the child's eligibility for adoption does not have to meet such strict criteria. Addressing this issue is particularly important for the several hundred children of married parents who have been in long-term foster care for a significant period but who can not be adopted by their foster families.

#### 10. Right to Identity

**The amendment should provide for the right of every child to have his or her identity protected, and to know his or her parents, as far as is practicable.**

Currently, whereas children of married parents are registered under both the father's name and the mother's maiden name, children of parents who are not married are registered under the mother's name with the registration of the father's name being optional. There is need for legislative reform to address this and other issues such as the registration of children born through assisted human reproduction. There is also a need to reform the adoption system to provide for the introduction of an 'open or semi-open' system of adoption.

#### 11. Definition of the Child

**The amendment should define a child as any person up to eighteen years of age.**

The Constitution does not contain a definition of the child. However, it does set eighteen years as the age for entitlement to vote.

#### 12. The Language of Rights and Compliance with the UN Convention

**The amendment should use the language of rights and be fully compliant with the UN Convention on the Rights of the Child.**

Using the language of rights is important as it explicitly states the rights to which children are entitled. Without a rights-based approach, it will not be possible to challenge a failure to protect children's rights in a court or elsewhere.

#### 13. Unambiguous Language

**The amendment should be expressed in clear and concise language.**

The language used should be unambiguous within a legal context, readily understandable by the general public, and as far as possible, should be relevant both now and in the future.

#### 14. Exclusion from Armed Forces

**The amendment should prohibit the conscription or recruitment of those under eighteen years into the armed forces.**

At present, the minimum age for voluntary recruitment in Ireland is seventeen years and sixteen years for apprentices. Current regulations and practice cannot guarantee that young people under eighteen years will not take part in hostilities, become a target of attack or be sent to serve aboard.