



**Presentation to the Joint Committee on the
Constitutional Amendment on Children**

6 February 2008

Good Afternoon Chair, Ministers, Deputies and Senators.

I would like to begin by expressing, on behalf of the Children's Rights Alliance, our appreciation to the Committee for the opportunity to make this presentation today. My name is Maria Corbett and I am the Alliance's Policy Director. I will deliver the presentation today as Jillian van Turnhout, the Chief Executive of the Alliance, is unfortunately losing her voice due to a bad cold, and so will save her voice for the questions and answers session.

Myself and Jillian are joined today by our colleague Róisín Webb, who is the Legal Policy Officer with the Alliance. Also attending in the public gallery are two members of the Alliance Board, Chairperson Dr. Nóirín Hayes and Deputy Chairperson Margaret Burns.

The Children's Rights Alliance brings together eighty non-governmental organisations concerned with the rights and needs of children in Ireland. We aim to improve the lives of all children under eighteen years, through securing the full implementation of the UN Convention on the Rights of the Child.

The Alliance believes strongly that the Committee should consider the proposed amendment as a 'children's rights' amendment and not, as it has been referred to in some quarters, as a 'child protection' amendment. The right of a child to be protected is, indeed, critically important. However, it is only one of the rights that children hold and which should be addressed by a constitutional amendment.

In the interests of brevity we will confine our comments today to a number of key issues under each of the provisions. We would, of course, welcome any questions you may have on any aspects of our written submission.

First of all, the Alliance believes that the amendment should go further than the 2007 Bill. The Alliance recommends that it should include express rights for children which encapsulate the key principles of the UN Convention on the Rights of the Child. These express rights should include a non-discrimination provision; the right of the child to be heard; the right to identity; and certain socio-economic rights. The amendment should also ensure that the best interests of the child is the paramount consideration in all actions concerning the

child. Finally, the amendment should place an onus on the State to intervene in a positive way to support vulnerable children and families.

The need for a wide-ranging constitutional amendment on children was discussed as long ago as 1976, in an Oireachtas debate. Over the past few years, we have seen a real momentum building up around the need for constitutional change to strengthen children's rights which culminated in the publication of the 2007 Bill and the establishment of this Committee.

Whilst acknowledging that the task assigned to the Committee is complex and onerous, this complexity should not be used as an excuse to paralyze the work of the Committee. The Alliance firmly believes that devising an amendment with cross party support is achievable and, indeed, necessary. The establishment of this Committee offers us a golden opportunity to work together; an opportunity which must be seized.

Our written submission contains a number of principles that we feel should underlie the amendment. Key amongst these is full compliance with the UN Convention on the Rights of the Child.

The need for constitutional reform is clear. The current provisions in the Constitution reflect the historical period in which it was written. The Ireland of 1937 was a time when it was commonly held that children should be 'seen and not heard'. Children growing up in Ireland in the twenty-first century deserve a Constitution that respects and recognises them as individuals; and puts their best interests at the centre of decisions.

I'll now explore each provision in turn.

The Alliance believes that the wording of Provision 1 will do little to strengthen children's rights in the Constitution and should be revised. The extent to which children possess constitutional rights, particularly unenumerated rights, has been called into question by the judiciary. We believe, therefore, that there is a need to directly insert into the Constitution express rights for children.

The amendment should prohibit direct or indirect discrimination of any kind in all actions concerning children, whether by legislative, executive, judicial or administrative authorities and should give effect to Article 2 of the UN Convention on the Rights of the Child. In line with existing equality legislation, the provision should also cover the prohibition of discrimination based on membership of the Traveller Community.

Of particular importance is that the amendment should prohibit discrimination based on the marital status of a child's parents. As you will be aware, 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 contained in Article 40.3.

In line with Article 12 of the UN Convention on the Rights of the Child, 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. The right to be heard is critical to the development of a societal approach to respecting the rights of the child. In particular, the child should have the opportunity to be heard in any judicial and administrative proceedings affecting him or her, either directly, or through a representative.

In line with the UN Convention and the Constitution Review Group, 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. All children should enjoy the right to identity regardless of the marital status of their parents, the manner in which they were conceived or whether they were placed in State care or adopted.

The Alliance believes that inserting express socio-economic rights into the Constitution is possible and realistic. Such rights can be inserted using the language and norms of international human rights law which would strike a balance between the role of the Executive to formulate laws, policies and public expenditure and the constitutional role of the courts to ensure that these rights are upheld. Inserting socio-economic rights for children into the Constitution, subject to the principles of 'progressive realisation' and 'the maximum extent of available resources', will allow the judiciary to assess whether there has been effective use of available resources. Furthermore, this would address an issue often raised by the judiciary in the context of the separation of powers, namely that the judiciary do not have democratic legitimacy to adjudicate on the implementation of these rights. Even if no other group can claim socio-economic rights that are enforceable, the special and dependent position of children in society justifies this particular treatment.

The Alliance believes that a number of specific socio-economic rights should be included in an amendment, such as the survival and development rights, right to health, right an adequate standard of living, rights for children with disabilities and the right to education.

I'll move now to examine briefly Provision 2 and Provision 3.

In relation to Provision 2.1 which covers the threshold for State intervention, the Alliance recommends that a new constitutional provision be included. This provision would place a positive duty on the State to support vulnerable children and their families, and to take measures to adequately and comprehensively protect children who have been abused or who are at risk of abuse.

Furthermore, the Alliance recommends that the existing threshold for State intervention in family life be recalibrated by including the term 'proportionate' to ensure that, when the State intervenes in family life, the means used by the State would be both appropriate and proportionate. This would also support best practice where proceedings to take a child into care should only be embarked upon as a measure of last resort.

Within a recalibrated Article 42.5, the phrase 'natural and imprescriptible' should be deleted so that the wording simply refers to the rights of the child. In addition, the phrase 'with the best interests of the child as the paramount consideration' should be inserted to ensure that this is a central component in considering whether there has been a failure on the part of the parents. This would also ensure that the amendment, in creating an equitable standard of protection for all children, does not lower the intervention threshold for non-marital families.

Finally, consideration should be given to redrafting the phrase 'for physical or moral reasons' in relation to parental failure, although the provision should continue to guard against intervention solely on the grounds of poverty.

In relation to Provision 2.2, the Alliance supports this provision to allow for the introduction of legislation to permit the adoption of any child, from either a marital or non-marital family, where there has been a failure on the part of the parents in relation to their duty towards their child. The heads of a Bill should be published in advance providing for criteria as to what constitutes a failure of duty on the part of the parents in respect of their child, including a minimum period of time and a provision that an adoption can only occur where it is in the best interests of the child.

In relation to Provision 3, the Alliance also supports this provision which allows for the introduction of legislation to permit the voluntary placement for adoption of a child of marital parents. Again, we recommend that the heads of a Bill should be published in advance specifying that such adoptions would be subject to the consent of both parents and made only where the adoption is considered to be in the best interests of the child.

The Alliance recommends that in relation to Provision 2.2 and Provision 3, the words 'provision *may* be made' should be replaced by 'provision *shall* be made' to ensure that there is a constitutional requirement for this legislation to be introduced.

I'll turn now to Provision 4, which relates to the best interests of the child. The Alliance recommends that the amendment provides that the best interests of the child will be the paramount consideration in all actions concerning children, whether by legislative, judicial or administrative authorities. This provision must be inserted in the form of a direct constitutional principle or right, as opposed to merely providing the Oireachtas with the authority to enact legislation on the issue under discussion.

The Alliance believes that in a conflict between the interests of the family or the State and the interests of the child, the courts should be able to balance the interests of all parties, but should give paramount consideration to the child's best interests. This requirement should not be restricted by the marital status of the child's parents. The insertion of a best interests principle, coupled with the inclusion of express rights for children

and a non-discrimination guarantee, would act as a guide to the court in how to balance competing rights in any conflict between the interests of the family or the State, and the interests of the child. However, consideration needs to be given to the issue of whether the existing Article 41, with its focus on the family based on marriage, would continue to present an obstacle to ensuring that courts can give paramount consideration to the best interests of the child, including those from marital families.

In relation to Provision 5.1 on the use of soft information, the Alliance welcomes the introduction of legislation to permit the collection and exchange of soft information with the aim of creating a comprehensive child protection system. If this requires a constitutional amendment, the text of the constitutional provision should also respect the individual's right to fair procedures and the heads of a Bill should be published in advance providing for balanced and proportionate legislation for the collection and exchange of soft information.

Finally, I'll say a few words on Provisions 5.2 and 5.3. The Alliance strongly endorses the need to put in place as robust a child protection system as possible to protect children against all abusive or exploitative sexual activity. We believe that no child under 18 years of age should be prosecuted for an offence of strict or absolute liability. Furthermore, the Alliance believes that the proposed provision on strict or absolute liability should be examined closely to ensure it the most appropriate response to the prosecution of offences of sexual exploitation of children. In particular, the Alliance calls for the recommendations made in November 2006 by the Joint Committee on Child Protection in relation to the criminal trial process to be fully implemented as a matter of priority.

The Alliance is keen to develop and build a cross-party approach to the work of the Committee. Our engagement with the Joint Committee will be no different. We are mindful of the enormous task that looms before you; both in terms of the amount of reading and thinking expected of you, and the very difficult decisions that you will be required to make. As a result, we would like to take this opportunity of putting the Alliance forward as a resource to you and each member of the Joint Committee. We are quite happy to meet up with Committee members informally or provide background reading or research should you require so.

Finally, we would like to thank you for your time and attention this evening and I look forward to participating in the questions and answers session.