



Presentation to the Joint Committee on the Constitutional Amendment on Children

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Good Afternoon Chair, Ministers, Deputies and Senators. I would like to begin by expressing, on behalf of the Children's Rights Alliance, our appreciation for the invitation to present again to the Committee.

Our organisation, the Children's Rights Alliance, campaigns for the rights and needs of all children under 18 years. We are a coalition of over 80 non-governmental organisations, all of which are committed to the full implementation of the UN Convention on the Rights of the Child in Ireland. Many of our member organisations are prominent in the children's sector – working directly with children on a daily basis across the country. A list of our members has been included in your packs, together with copies of the Convention and this presentation.

We have already submitted detailed, written positions, addressing the full remit of the Committee. With the precious time that you have kindly afforded us today, we would like to demonstrate why we believe there is a need for constitutional reform to strengthen children's rights in Ireland.

Since we last presented, the Committee has heard from a number of organisations. We have been struck that of the 11 public sessions, there has been little opportunity to discuss children's rights. The Committee's questions have almost entirely focused on the narrower proposals on child protection as outlined in Provision 5 (of the Twenty-eighth Amendment to the Constitution Bill 2007) rather than on the wider children's rights amendment. These are only one part of the wider constitutional question under discussion. After all, the remit of the Committee, as we understand it, is to examine text for a proposed amendment on children's rights, and not the narrower proposition of a child protection amendment.

Children's rights and child protection

It is important, at this point, to clarify our distinction between children's rights and child protection. To protect children, to keep them safe, we must, of course, establish a rigorous child protection system – a system that includes adequate vetting procedures and expedient and effective child focused criminal justice measures. However, this alone will never fully protect children. If we are to succeed in that aim, we must also give children a voice and ensure that they have a respected position in society. To be protected from abuse, neglect and exploitation is a child's right – a fundamental human right. However, it is not possible to vindicate this right without creating a society that fully respects children.

The commitments given by the current Government and main opposition parties, in their respective General Election manifestos, to place children's rights at the centre of our Constitution, will inevitably strengthen child protection in this country. Child protection is part and parcel of the broader issue of children's rights.

Why strengthening children's rights in Ireland requires constitutional reform

It has, therefore, been all the more disappointing that we now feel duty bound to address recent media coverage of key politicians stating that there are 'no compelling reasons' to hold a referendum on children's rights. We beg to differ.

There are a number of critical and compelling reasons as to why we need constitutional change. These fall into two broad categories:

1. constitutional blocks; and
2. bringing our Constitution into the 21st century.

Let us first deal with ‘**Constitutional Blocks**’. On ratifying the **UN Convention on the Rights of the Child** in 1992, Ireland made a formal commitment to the international community, and indeed to the people of Ireland, that it is dedicated to the Convention’s full implementation. However, with the Constitution as it stands, the State is unable to keep this commitment.

Where there has been no constitutional difficulty, Ireland has been successful in transferring some elements of the Convention’s provisions into our domestic law and policies. For example, the Children Act 2001 is underpinned by the principle that in youth justice matters, detention shall be a measure of last resort, thus reflecting Article 40 of the Convention.

However, where the Constitution takes a clear position on the family, the introduction of Convention-compliant legislation and judicial decisions is impeded. Let me make myself crystal clear here, any suggestion that you can strengthen children’s rights, here in Ireland, by legislation alone is erroneous.

Four of the Convention's 41 substantive articles have been given an elevated status by the UN Committee on the Rights of the Child; these ‘General Principles’ are critical to its implementation. Yet, of these four general principles, two are constitutionally blocked, namely:

- a. the best interests of the child; and
- b. non-discrimination.

These blocks were clearly identified in the now well-documented ‘Baby Ann’ case, where Justice McGuinness was compelled to comment that, bearing in mind the terms of the UN Convention on the Rights of the Child and Brussels II bis., the form of the proceedings by which the Supreme Court made its judgment “should at the very least give pause for thought”.

If we are to fully implement the Convention in Ireland and to uphold children’s rights, each of its four general principles must be integrated into our national law – and the only means of doing so is through a constitutional amendment.

We believe there are two options available to the Committee. The first is to directly incorporate the Convention into the Constitution, thereby binding the State to its principles and provisions: this would be similar to the constitutional amendments used for the Good Friday Agreement or the Maastricht Treaty. Such an amendment would need to incorporate the Convention as of a particular date, as it is a living document which can be amended by ratifying States.

The second option is to incorporate key principles from the Convention into the Constitution as **express rights**. In our eyes, the amendment should encapsulate the principles of the best interests of the child and non-discrimination and, in addition, the principles of:

- the right of the child to be heard;
- the right to identity; and
- certain socio-economic rights.

Furthermore, the existing constitutional provision contained in Article 42.5 should be amended to ensure that when the State intervenes in family life, the means used is both appropriate and proportionate, and that it provides an equitable standard of protection for all children.

Best Interests

Let us now examine in more detail the principle of the best interests of the child. This principle is only meaningful when children are recognised as individual rights holders and it is applied without discrimination of any kind.

The courts interpret the legal status of individuals on the basis of the weight given to their rights under the Constitution. Since children (as individuals rather than members of a family) are not expressly stated in the Constitution, it is often not possible for their rights to be taken into account by the courts. The inclusion of an explicit statement that children have rights and their best interests should be paramount would 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).

Under the current constitutional provisions of Articles 41 and 42, there is an automatic presumption that the best interests of the child lies within the marital family. Although we have provided for the best interests principle in both our private and public child care law, the Constitution takes precedence in judicial decisions concerning children of marital families and therefore blocks the application of the principle. Basically, we have a situation where children are not equal before the law; they are treated differently depending on the marital status of their parents.

Let's take a look at how this operates at a judicial level. The 2004 *FN v CO* decision is an interesting case, Justice Finlay Geoghegan in the High Court decided that it was in the best interests of two teenage sisters, aged 13 and 14 years, that their maternal grandparents be awarded sole custody. If the marital father had challenged in the Supreme Court, this decision would likely have been overturned. The Supreme Court must make its decisions based solely on the Constitution; it would not have been able to take into account the factors that influenced the High Court – namely, the best interests of the children and their wishes. The girls had been living with their maternal grandparents since the death of their mother in 1995 (some nine years in all). The girls stated that they loved their father (who had separated from their mother prior to her death and was remarried and living in the UK) and wished to maintain access with him. However, they regarded their grandparents as their de facto parents and Ireland as their home. They were doing well in Ireland and the High Court found that a move now, against their wishes, would cause significant damage to their educational and social development.

At the legislative level, the application of the best interests principle has also been impeded by constitutional provisions. In the area of adoption, for example, children are treated differently depending on the marital status of their parents in two specific instances:

- Firstly, it is virtually impossible for a child of a marital family to be adopted in circumstances where the child has been abandoned by their birth parents.
- Secondly, children of marital parents cannot be voluntarily placed for adoption.

The Alliance believes that these children, approximately 500–700 children, should be afforded the opportunity of a 'second chance' to grow up as part of a family, where normal family events, such as a holiday abroad, will no longer require a social worker's sign off, where the child's future is known and their succession rights are clear.

Bringing our Constitution into the 21st Century

The Constitution is not only our primary legal document but a declaration from which we can gauge the values of our society. It is a statement of our cultural identity and aspirations as a people. The Alliance's vision for modern Ireland is a society where childhood and children's participation is valued and respected.

Inserting children's rights into the Constitution would have enormous symbolic value that would subsequently translate into a shift in mindsets. And why do we need attitudinal change? We need it because we continue to build housing estates without play and recreation space. We need it because the HSE earlier this week announced that the two shelters for homeless boys in Dublin's city centre are to be relocated 15 miles outside the city in the grounds of St Ita's Psychiatric Hospital in Portrane.

A change in mindsets should not be feared. **Children's rights are not about driving a wedge between parents and their children.** Parents and children are inextricably linked: you can't be a parent without having a child. And we forget too often that it is the parent who champions their child's rights. Inevitably, when children's rights are not acknowledged it places parents, particularly those who have a child with special needs or those who are struggling in their parenting role, under enormous pressure and stress.

During your recent hearing with the National Youth Council of Ireland, Deputy Olwyn Enright asked about two viewpoints – Parents First and Children First. The vindication of children's rights does not require that they supersede the rights of parents or the State. Respecting children's rights is about seeing them as individuals in their own right – not making children more equal than others. It's about reminding society that children are humans too, that they have human rights that need to be acknowledged. Essentially, we're not calling for Children First but **Children Too**. We want them included.

For the vast majority of families, the enhancement of children's rights and consequent improvement in services for children will support parenting and strengthen parents' rights; it will keep families together rather than tear them apart. In the small number of cases where a child is failed by their parent or a conflict arises between the wishes of parents and the best interests of the child, the State needs to play a role to protect their best interests. Neglect and abuse cases, custody battles, parental child abduction and adoption cases may be rare and played out in the media as real life dramas, but at their centre are vulnerable children who depend on the State to safeguard their rights and ultimately their futures.

Conclusion

Constitutional change is necessary — and the only possible route — to secure children's rights. Placing express rights in the Constitution is a powerful symbol that Ireland wants the best for its one million children and their families. Without constitutional reform we cannot fully value children in our judicial decisions, in our laws, and in society as a whole.

With ever-increasing globalism, we must also seize this opportunity to become an exemplar to other countries. This will signal to the UN Committee on the Rights of the Child — which called for constitutional reform in 1998 and again in 2006 — that the Irish State is listening and values its children.

Whilst the Alliance is acutely aware that the drafting and passage of an amendment on children's rights is a complex and politically thorny issue, we strongly believe that the over one million children in Ireland represent over one million reasons to hold a children's rights referendum.

How many more generations of children will grow up before politicians vindicate their rights? This is not a theoretical exercise; rather it has the potential to have a real and positive impact on the lives of all children and their families, now and in the future, and it is non-negotiable.

We would like to end by reiterating our willingness to work with all parties and offer the Alliance as a resource to the Committee in whatever way we can to assist its work. Maria and I look forward to participating in the questions and answers session and thank the Committee members for their time and attention.