



The Twenty-Eighth Amendment of the Constitution

Submission to the Joint
Committee on the Constitutional
Amendment on Children

January 2008



The Children's Rights Alliance is a coalition of over 80 non-governmental organisations (NGOs) working to secure the rights and needs of children in Ireland, by campaigning for the full implementation of the UN Convention on the Rights of the Child. It aims to improve the lives of all children under 18, through securing the necessary changes in Ireland's laws, policies and services.

Our Membership

The Alliance was formally established in March 1995. Our membership, from which Board Members are elected at the Alliance's AGM, consists of a diverse range of groups, including child welfare agencies and service providers; child protection groups; academics; youth organisations; family support groups; human rights organisations; disability organisations; parent representative organisations; community groups and others interested in children's rights. The Alliance's policies, projects and activities are developed through ongoing collaboration and consultation with our member organisations.

Our Aims

- Bringing about a shared vision that will realise and protect children's rights in Ireland
- Securing legislative and policy changes to give meaningful effect to the UN Convention on the Rights of the Child
- Securing the effective implementation of Government policies relating to children

Our Experience

- The Alliance is recognised for its participation in the international monitoring and reporting process of the UN Convention on the Rights of the Child, including the publication of two shadow reports critically evaluating progress made by the Irish State to implement the Convention's provisions into domestic law, policies and services
- In 2006, the Alliance was the sole Irish NGO commentator reporting to the UN Committee on the Rights of the Child
- The Alliance is a designated Social Partner within the Community and Voluntary Pillar
- The Alliance has played an important role in influencing the development of several key initiatives for children, including the publication of a National Children's Strategy; the establishment of the Office for the Ombudsman for Children; and the inclusion of children's rights in the EU Charter of Fundamental Rights

The Alliance gratefully acknowledges the contribution made to the preparation of this submission by the staff, Board, member organisations and friends of the Alliance, as well as the input of other non-governmental organisations.

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CONTENTS

I.	INTRODUCTION AND SUMMARY OF RECOMMENDATIONS	1
II.	DISCUSSION ON PROPOSED AMENDMENT WORDING.....	5
1.	General Statement on the Rights of the Child	5
	Provision 1. Natural and Imprescriptible Rights of All Children.....	5
2.	Duty of the State to Intervene to Support Children’s Rights	14
	Provision 2.1 Threshold for State Intervention in Family Life.....	14
	Provision 2.2 Adoption of Children in Long-Term Care.....	17
	Provision 3. All Children Eligible for Voluntary Adoption.....	20
	Provision 4. Best Interests of the Child	21
3.	Child Protection and Criminal Law	23
	Provision 5.1 Use of Soft Information	23
	Provisions 5.2 and 5.3 Offences of Absolute and Strict Liability.....	26
III.	APPENDIX I – List of Alliance Member Organisations.....	31

I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

Introduction

1. The Children's Rights Alliance, a coalition of over 80 NGOs working to secure the rights and needs of children in Ireland, welcomes the opportunity to submit its observations to the Joint Committee on the Constitutional Amendment on Children. As requested by the Committee, our submission follows the Orders of Reference of the Committee. The Alliance would also welcome an opportunity to present its views to the Committee at an oral hearing and to engage in ongoing interaction with the members of the Committee.
2. The Alliance welcomes the commitment to hold a referendum on strengthening children's rights made in the current Programme for Government and in the opposition parties' 2007 General Election manifestos.
3. 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 through a range of proactive and reactive measures is, indeed, critically important. However, it is only one of the rights that children hold and which should be addressed by a constitutional amendment.
4. The Orders of Reference of the Committee, under (a) and (b), focus the work of the Committee on the substance of the issues addressed in the Twenty-eighth Amendment of the Constitution Bill 2007. Under (c) the Committee is tasked with making recommendations and the Alliance calls on the Committee to utilise this remit to broaden its thinking on the concept of children's rights. 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.¹ In this regard, it should include a non-discrimination provision; the right of the child to be heard; the right to identity; and certain socio-economic rights. It should also ensure that the best interests of the child is the paramount consideration in all actions concerning the child. Furthermore, the amendment should place an onus on the State to intervene in a positive way to support children and families.
5. *Calls for constitutional reform:* The Alliance believes that there is a clear need to amend the Irish Constitution to strengthen the position of children's rights.² Acknowledgment of the need for change is not new: it was first discussed in the Oireachtas, over thirty years ago, during the 1976 debate on the powers of the Adoption Board which were addressed in the Sixth Amendment to the Constitution.³ On a number of occasions, over recent years, the public has made clear its concern about the present position of children in the Constitution and its desire that greater constitutional protection be afforded to them.
6. This public concern mirrors that which has been expressed over several years by the legal profession, academics and others working professionally with children, as well as by political parties and non-governmental organisations. Constitutional change has been repeatedly called for in a series of official reports: including, in 1980 by the Task Force on Child Care;⁴ in 1993 by the Kilkenny Incest Investigation report;⁵ in 1996 by the Constitution Review Group;⁶ in 1998 by the Commission on the Family;⁷ in January 2006 by the All-Party Oireachtas Committee on the

1 *United Nations Convention on the Rights of the Child* (1989) <http://www.ohchr.org/english/law/crc.htm>.

2 See also the Alliance Position Paper on a proposed referendum on children's rights, which was developed following a consultation process with NGOs. Children's Rights Alliance (2007) *The Constitution and Children: A Position Paper on the Proposed Referendum on Children's Rights* Dublin: Children's Rights Alliance. <http://www.childrensrights.ie/pubs/CRAConstitution.pdf>

3 See Parliamentary Debates Official Report, Seanad Éireann, Vol. 84, 7 July 1976; and Dáil Éireann, Vol. 308, 24 October, 1978.

4 Task Force on Child Care Services (1980) *Final Report to the Minister for Health/Task Force on Child Care Services*, Dublin: Stationery Office.

5 *Kilkenny Incest Investigation: Report presented to Mr. Brendan Howlin TD, Minister for Health by South Eastern Health Board* (1993) Dublin: Stationery Office.

6 *Report of the Constitution Review Group* (1996) Dublin: Stationery Office.

7 *Strengthening Families for Life, Final Report of the Commission on the Family* (1998) Dublin: Stationery Office.

Constitution;⁸ and in November 2006 by the Joint Committee on Child Protection.⁹ At an international level, the UN Committee on the Rights of the Child in 1998, and again in 2006, added its voice to these cumulative calls to strengthen the position of children's rights in the Constitution.¹⁰ Furthermore, there have been a large number of Supreme Court cases concerning child welfare, particularly over the past ten years, which serve to highlight the inadequacy of the current constitutional recognition afforded to the rights of children.

7. *Why we need constitutional reform?:* The current provisions in the Constitution relating to children 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'; corporal punishment in schools was the norm; the 'family' was a marital family headed by the father; and there was concern that, in the context of the rise of communism and fascism in Europe, the State could pose a threat to individual rights. Given the economic, social and cultural changes that have occurred over the past 70 years, the Constitution now needs to be amended to reflect more modern thinking about children. The Alliance believes that constitutional reform is necessary to affirm the child as a full citizen of the State in his or her own right, both within and, when necessary, separate from the context of the family unit.¹¹
8. Children already, of course, have rights under the Constitution: they enjoy, where appropriate¹², the same fundamental rights as are granted to all individuals living in the State.¹³ Children also have an express right to free primary education (Article 42.4). What is lacking, however, is a sufficiently clear constitutional recognition of the specific needs of children that are different from, and additional to, those of adults. Currently, children are almost invisible in the Constitution and this places significant restrictions on the legislation that may be enacted and on judicial decisions. Children have few autonomous rights under the Constitution. Their rights, in many instances, arise as a result of their membership of a family, defined in constitutional case law as the marital family.¹⁴
9. 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 amendment should be drafted so as to create a culture of respect for children and for their rights. It should strengthen the focus on the child within the courts and among practitioners working with children and families. It should begin to address the concerns raised in 1993 during the Kilkenny Incest Investigation by the Chair, Catherine McGuinness, that "... the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the right of parents than to the rights of children."¹⁵ In addition, the amendment has the potential to provide an important impetus to further progressing the implementation of the UN Convention on the Rights of the Child. It is essential that a Bill providing for the children's rights constitutional amendment be introduced into the Dáil at the earliest date possible and that a referendum be held within a defined period of time.

8 The All-Party Oireachtas Committee on the Constitution (2006) *Tenth Progress Report: The Family*, Dublin: Stationery Office.

9 Houses of the Oireachtas Joint Committee on Child Protection (2006) *Report on Child Protection*.

10 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Ireland*. U.N. Doc. CRC/C/IRL/CO/2, 29 September 2006. In addition, at European level, the Council of Europe has recommended that States guarantee children's rights through explicit recognition in constitutional texts (See Council of Europe, Parliamentary Assembly (1996), Recommendation 1268 on a European Strategy for Children). Children's rights are also recognised in the Charter of Fundamental Rights of the European Union (Article 24).

11 Children's Rights Alliance (2006) *From Rhetoric to Rights: Second Shadow Report to the United Nations Committee on the Rights of the Child*, Dublin: Children's Rights Alliance.

12 In *re Article 26 and the Adoption (No. 2) Bill 1987* [1989] IR 656 the court found that a child is entitled, where appropriate, to the rights contained in Articles 40 to 44.

13 Such as the entitlement to acquire citizenship (Articles 2 and 9), and the entitlement to a range of fundamental rights, such as the right to equal treatment before the law, freedom of expression, association and assembly (Article 40).

14 See *Murray v. Ireland* [1985] I.R. 532. The court's interpretation of the family as the family based on marriage derives in particular from Article 41.3.1, which states that "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

15 *Kilkenny Incest Investigation: Report presented to Mr. Brendan Howlin TD, Minister for Health by South Eastern Health Board* (1993) Dublin: Stationery Office.

Principles to underlie the Amendment

10. The Alliance recommends that the following principles underlie the amendment:

- *Compliance with the UN Convention and the language of rights:* The amendment should use the language of rights and be fully compliant with the UN Convention on the Rights of the Child. It is vital that the amendment is drafted using the language of rights, language that states in explicit terms the rights to which children are entitled. The amendment must contain provisions that are justiciable. A rights-based approach is needed to provide a framework to ensure that effective remedies exist where children's rights are infringed. To ensure compatibility with the Convention and consistency with best practice elsewhere, it is important that the language of the amendment is harmonised with, and modelled on, the language of the Convention. The Convention, which is the most widely ratified of all human rights treaties, presents the minimum standards a State Party should meet in protecting the rights of children.
- *Direct constitutional principle:* Provisions, where appropriate, should 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. This will strengthen the provision by ensuring that it has the same constitutional status as other provisions, as opposed to legislation which would be subordinate to the Constitution.
- *Impose an obligation on the Oireachtas:* Where the amendment provides authority to the Oireachtas to legislate on a specific issue, the text should provide for the introduction of legislation as a constitutional requirement rather than as a permissive provision. This will strengthen the provision by ensuring that a provision inserted into the Constitution must be acted upon by the Oireachtas.
- *Unambiguous language:* The amendment should be expressed in language that will, as far as possible, be unambiguous within a legal context to ensure that the legislature and courts are given clear direction as to its meaning. This will, to some extent, reduce the likelihood of any unforeseen or unintended consequences of the amendment which may arise in the course of judicial interpretation. However, it is often the nature of constitutional reform that the impact of an amendment will only be fully determined by judicial interpretation, and therefore the Committee will be unable to predict all outcomes in advance. With this in mind, to ensure that the amendment has a positive effect on children, it is imperative that the likely impact of the proposed wording is considered within the context of the Constitution as it now stands and in light of how it has been interpreted by the courts. Consequently, the Alliance urges the Committee to show leadership when making recommendations around the amendment and aim to insert the highest possible standard of rights for children.
- *Necessity:* The amendment should aim to fill gaps that currently exist in the constitutional protections of children's rights, address issues which require constitutional change before any progress can be made and issues where existing or proposed legislation would be vulnerable to constitutional challenge.
- *Equivalence with Northern Ireland:* The amendment should reflect Ireland's obligations under the Good Friday Agreement that all those living on the island of Ireland shall enjoy the same rights and an equivalent level of rights protection.

Summary of Recommendations

11. In relation to the proposed wording for a constitutional amendment to strengthen children's rights:

- The Alliance recommends that the amendment should provide constitutional recognition of the child as an individual rights-holder. The Alliance recommends that the amendment include express rights for children which encapsulate the key principles of the UN Convention on the Rights of the Child. In this regard, it should include a non-discrimination provision; the right of the child to be heard; the right to identity; and certain socio-economic rights.
- The Alliance recommends that the amendment should include a constitutional provision to 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'; by creating an equitable standard of protection for all children; by including the best interests of the child principle and by redrafting the phrase 'for physical or moral reasons'.
- The Alliance recommends that the amendment should allow, by means of a constitutional requirement, 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 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.
- The Alliance recommends that the amendment allow, by means of a constitutional requirement, for the introduction of legislation to permit the voluntary placement for adoption of a child of marital parents. 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 the amendment should include a direct constitutional principle to provide that the best interests of the child will be the paramount consideration in all actions concerning children, whether by legislative, judicial or administrative authorities.
- The Alliance recommends that the amendment should allow for the introduction of legislation to permit the collection and exchange of soft information with the aim of creating a comprehensive child protection system. Safeguards must be put in place to govern such activity, which will respect the individual's right to fair procedures.
- 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. The Alliance believes that no child under 18 years of age should be prosecuted for an offence of strict or absolute liability strict or absolute liability. Furthermore, the Alliance believes that the proposed provision on strict or absolute liability should be examined closely to ensure that it is the most appropriate response to the prosecution of offences of sexual exploitation of children.

II. DISCUSSION ON PROPOSED AMENDMENT WORDING

12. The discussion of the wording of the proposed amendment follows the structure set out in (a) and (b) of the Orders of Reference for the Committee, which follow the provisions set out in the Twenty-eighth Amendment of the Constitution Bill 2007.

1. General Statement on the Rights of the Child

Provision 1. Natural and Imprescriptible Rights of All Children

Extract from Orders of Reference of the Committee

- (i) the acknowledgement and affirmation of the natural and imprescriptible rights of all children;

Article 42(A)1 of the Twenty-eighth Amendment of the Constitution Bill 2007

1. The State acknowledges and affirms the natural and imprescriptible rights of all children.

Comment on Article 42(A)1

13. The Alliance believes that the wording of Provision 1 will do little to strengthen children's rights in the Constitution, and should be revised. While the provision acknowledges the 'natural and imprescriptible' rights of the child, it does not require the State to defend and vindicate those rights. Furthermore, Provision 1 has been criticised as not adding any new children's rights dimensions to the existing constitutional text.¹⁶
14. *Natural and imprescriptible rights*: Provision 1 proposes to include that "The State acknowledges and affirms the natural and imprescriptible rights of all children". Article 42.5 already contains an acknowledgment of "the natural and imprescriptible rights of the child". While the reference is included in a provision which specifically enables the State to intervene in family life where married parents have failed in their duty towards their children, it has also been interpreted by the courts as a constitutional reference to children's rights, which are outside of the scope of Article 42.5. The terms 'natural and imprescriptible' have been criticised as their meaning is unclear.
15. The most notable decision in which the Supreme Court has addressed the scope of the 'natural and imprescriptible rights of the child' is *G v An Bord Uchtála*¹⁷, where Walsh J. stated:
"The child's natural rights spring primarily from the natural rights of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation."¹⁸

¹⁶ See Ursula Kilkelly and Conor O'Mahony, (2007) 'The Proposed Children's Rights Amendment: Running to Stand Still?' in *Irish Journal of Family Law*, vol. 10 no. 2, p. 22.

¹⁷ [1980] I.R. 32.

¹⁸ *Ibid.*, p. 69.

16. In the same decision, O’Higgins C.J. also expanded on these rights:
 “Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State.”¹⁹
17. It is evident, therefore, that even within the same judgment; different judges give different interpretations of this constitutional provision. Moreover, despite numerous opportunities for the courts to further specify and expand on the meaning of ‘natural and imprescriptible rights’, very few judgements have done so.²⁰ The Report of the Constitution Review Group has stated that no clear meaning of these terms has emerged from the judicial consideration of them and recommended that the terms ‘natural and imprescriptible’ should be removed from the Constitution.²¹
18. The Alliance calls for Provision 1 to be revised and strengthened, and proposes two options for consideration by the Committee.

Option 1: Insertion of Express Rights

19. The Alliance believes there is a clear need for the direct insertion into the Constitution of certain express rights for children, which would include a number of socio-economic rights. The inclusion of such express rights will supplement the existing fundamental rights provisions in the Constitution and will encourage the further development of children’s rights, including unenumerated rights.
20. *Individual rights-holders:* There is a need for constitutional recognition of the child as a ‘person’ with individual rights to which separate consideration must be given. Both historically and constitutionally, children’s rights have been viewed only within the context of ‘the marital family’, as the unit of society to receive special protection. As the rights of children (as individuals rather than members of a family) are not explicitly provided for in the Constitution, their rights are not often given sufficient consideration by the courts. The inclusion of express rights for children will allow for a balancing of a range of rights, (the rights of the child, the personal rights of parents, the rights of the family) but it will not create an automatic hierarchy of rights.
21. *Equality:* 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 contained in Article 40.3. The Alliance believes that the constitutional rights of all children should be protected irrespective of the form their family takes.
22. *Definition of the child:* The Constitution currently does not contain a definition of the child. Article 16 does, however, set 18 years as the age for entitlement to vote. Article 25 provides that in any interpretative conflict of its provisions between the two official languages, the Irish version will prevail. The correlative in the Irish version of the word ‘child’ is ‘leanbh’, which is generally assumed to refer to an infant or young child.²² To address the lack of clarity, the amendment should clearly define a child as a person under 18 years of age, in line with domestic legislation,²³ the *National Children’s Strategy*²⁴ and Article 1 of the UN Convention on the Rights of the Child.²⁵

19 *Ibid.*, at 55.

20 See Ursula Kilkelly and Conor O’Mahony, “The Proposed Children’s Rights Amendment: Running to Stand Still?,” in *Irish Journal of Family Law* 19 (2007).

21 *Report of the Constitution Review Group* (1996) Dublin: Stationery Office, p.330.

22 In the Sinnott case, Justice Hardiman referred to ‘leanbh’ as carrying the connotation of age rather than membership of a family, such as ‘offspring’ or ‘descendant’ – terms that may apply to a person of any age. The judgment ruled against use of the definition of a child based on membership of a family, but did not specify the age at which childhood ends. *Sinnott v. Minister for Education* [2001] IESC 63; [2001] 2 IR 545.

23 Such as the Child Care Act, 1991 and the Children Act, 2001.

24 Department of Health and Children (2000), *The National Children’s Strategy: Our Children – Their Lives*. Dublin: Stationery Office.

Why we need Express Rights

23. Fundamental rights provisions are found in Articles 40 to 44 of the Constitution. The courts have also guaranteed unenumerated rights, which are unspecified but which the judiciary have found to be implied by the Constitution. Unenumerated rights are not absolute: they can be limited or restricted through judicial interpretation or legislation.²⁶
24. Judicial interpretation of the Constitution has revealed certain unenumerated rights to which the child is entitled.²⁷ The Supreme Court is showing a growing reluctance to recognise and give effect to unenumerated rights (in particular, where the right is a socio-economic right), and to recognise any new unenumerated rights.
25. Recent decisions indicate a trend towards the erosion of the substantive constitutional rights of children. In *Sinnott v Minister for Education*, the doctrine of the separation of powers was held to constitutionally debar the courts from mandating the Government to take positive action where there had been a failure to enable a child to receive a minimum level of education, on the grounds that this would usurp the function of the Oireachtas and the Executive to distribute resources.²⁸ Primary education, a key constitutional right for children, was given a very conservative definition in the *Sinnott* case, undermining the more expansive interpretations of previous case law.
26. The separation of powers argument was again used by the Supreme Court in *T.D. v Minister for Education*.²⁹ The court held that it could not grant a mandatory order to children who claimed that an aspect of their unenumerated constitutional rights had been breached, since to do so would involve the court determining Executive policy in dealing with a particular social problem. On the question of the constitutional status of the rights claimed by the children, Keane C.J. professed to have the “gravest doubts” as to whether the courts, at any stage, should declare socio-economic rights to be unenumerated rights, guaranteed by Article 40 of the Constitution. Murphy J went further by questioning the existence of the constitutional rights claimed by the children concerned, stating:

“With the exception of Article 42 of the Constitution, under the heading “Education”, there are no express provisions therein cognisable by the courts which impose an express obligation on the State to provide accommodation, medical treatment, welfare or any other form of socio economic benefit for any of its citizens however needy or deserving.....The absence of any express reference to accommodation, medical treatment or social welfare of any description as a constitutional right in the Constitution as enacted is a matter of significance. The failure to correct that omission in any of the twenty-four referenda which have taken place since then would suggest a conscious decision to withhold from rights which are now widely conferred by appropriate legislation the status of constitutionality in the sense of being rights conferred or recognised by the Constitution.”³⁰
27. Clearly, the extent to which children possess constitutional rights, particularly unenumerated socio-economic rights, has been called into question by the judiciary, and the doctrine of the separation of powers continues to be used by the courts to imply that socio-economic rights are not justiciable. The Alliance believes there is a clear need for the insertion into the Constitution of certain express rights for children, which would include a number of socio-economic rights. Even

25 The insertion of the age of 18 into the Constitution should not preclude the enactment of legislation which, recognising children’s evolving capacities, provides them with increased rights, even before the age of eighteen years. Furthermore, the provision should not preclude the enactment of legislation to enable the State to provide support and protection for vulnerable adults based on their experience as a child, such as aftercare services for those who have left State care and services for persons with a disability who require either additional support in their transition to adulthood and independence, or ongoing support due to a developmental disability.

26 Express rights can also be qualified through judicial interpretation.

27 Unenumerated rights for children have been declared in judgements including *G. v. An Bord Uchtála* [1980] IR 32, at 56; *TD v Minister for Education* [2001] 4 IR at 259; and *TD v Minister for Education* [2001] 4 IR at 259.

28 [2001] 2 I.R. 545.

29 [2001] 4 I.R. 259.

30 *Ibid.*, pp. 3-5.

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.³¹

Key Express Rights

28. The following section will outline a number of key express rights: non-discrimination; right to be heard; right to identity and certain socio-economic rights.

Non-Discrimination

29. The amendment should prohibit direct or indirect discrimination of any kind in all actions concerning children, whether by legislative, executive, judicial or administrative authorities.
30. Such an amendment would give effect to the requirement of Article 2 of the UN Convention on the Rights of the Child that all children within the jurisdiction are entitled to rights without discrimination of any kind, “irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”³² In line with existing equality legislation, the provision should also cover the prohibition of discrimination based on membership of the Traveller Community.³³
31. *Family status:* Of particular importance is that the amendment should prohibit discrimination based on the marital status of the child's parents.³⁴ In 2006, the All-Party Oireachtas Committee on the Constitution noted that “Given that so many children are born outside marriage, it is necessary to ensure in express constitutional terms that they have exactly the same constitutional rights and entitlements as all other children.” The Committee recommended the insertion of a non-discrimination provision into a new section under Article 41 that would read “All children, irrespective of birth, gender, race or religion, are equal before the law.”³⁵ The Alliance believes the Committee's proposal on non-discrimination is inadequate, as it only includes prohibition of discrimination on four specified grounds. Article 2 of the Convention, in a non-exhaustive list, specifies 11 grounds. Furthermore, Irish equality legislation sets out a prohibition of discrimination on nine separate grounds.
32. *Interplay with Article 41:* 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 children of non-marital families would not be discriminated against. A non-discrimination provision would have equal constitutional status as to Article 41 and the court would thus have regard to both articles. While the precise interpretation of these articles and how they should be balanced will fall to the courts, such a provision will represent an important step forward towards ensuring that children are not the subject of discrimination.
33. *Legal status:* The amendment should prohibit discrimination based on the legal status within Ireland of the child or of his or her parents. The Alliance believes that the rights enshrined in the Constitution must be applicable to all children living within this jurisdiction. In this context, it should be noted that the child protection and child welfare provisions of Irish law do not make any exclusions on the basis of the citizenship of a child or his or her parents.

31 See Dr. Sinead Conneely, (2007) ‘Children's Rights in Irish Constitutional Law’ in *Irish Journal of Family Law*, vol. 6 no. 3, p. 5.

32 Article 2 (1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. (2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

33 The Equal Status Act, 2000 and the Employment Equality Act, 1998 prohibit discrimination on nine grounds: gender; marital status; family status; age; disability; race; sexual orientation; religious belief; and membership of the Traveller Community.

34 Family diversity is a reality in Ireland: one child in three is now born to parents who are not married to one another; there has been an increase in the number of children whose parents are separated or divorced; many children live in reconstituted families, with non-biological parents, step-siblings or same sex couples.

35 The All-Party Oireachtas Committee on the Constitution (2006) *Tenth Progress Report: Family*, Dublin: Stationery Office, p. 124.

34. *Promote equality*: In line with Article 2 of the Convention, the amendment should also place a positive obligation on the State to promote equality. The promotion of equality and the prohibition of discrimination are particularly important given that over the past decade Ireland has become a country of significant inward migration with a consequent increase in the number of EU national and non-EU national children living in this jurisdiction.

Right to be Heard

35. 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.³⁶ Article 12 is a procedural right with important substantive content and 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.
36. Hearing children's voices is particularly important within the legal and care systems, in school settings and in health and social services. This right is closely linked to the principle of the 'best interests' of the child, and the protection of children from abuse (given the importance of listening to children who have experienced abuse).
37. The need for significant change in this area is evidenced by the current gaps and inadequacies in relation to children being heard in legal and administrative proceedings that affect them.³⁷ For example, there has been a failure to develop and implement a comprehensive Guardian *ad Litem* service. The provision in the Children Act, 1997 to enable the appointment of a Guardian *ad Litem* in private family law proceedings has not yet been commenced, thereby denying children a voice in highly contentious custody and access cases affecting them.³⁸ Furthermore, whilst a Guardian *ad Litem* can be appointed in public law cases (that is, care proceedings and child protection cases), the appointment is not automatic, and there is a lack of statutory guidance as to the role and functions of a Guardian *ad Litem*.
38. Enshrining this principle in the Constitution would provide an impetus to the implementation of current legislative provisions for hearing the views of children and for the continued development of administrative practices to facilitate children's participation.³⁹

Right to Identity

39. In line with the UN Convention on the Rights of the Child and the recommendation of 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.⁴⁰ Children have the right to their identity and to know their origins, 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. Understanding their family and cultural identity is of huge significance to children, particularly in their teenage years, and can have a profound impact on their psychological development and stability. The right to identity also entitles a child to relevant genetic and health information.

36 Article 12 (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

37 Children may have their voice heard in legal proceedings affecting them by either direct input, independent legal representation or through the appointment of a Guardian *ad Litem*.

38 The Children Act, 1997 inserted a new section, section 28, into the Guardianship of Infants Act, 1964.

39 Valuable work has begun in this area, including the establishment of Comhairle na nÓg, Dáil na nÓg and Coiste na dTeachtaí. However, participation activities need to be integrated into public policy making.

40 The Constitution Review Group (1996) recommended the inclusion of a provision that: "the right of every child, as far as practicable, to know his or her parents, subject to the proviso that such right should be subject to regulation by law in the interests of the child."

40. The Supreme Court has held that a child's right to know his or her mother was an unenumerated constitutional right which flowed from the natural and special relationship between a mother and her child, but that the mother's right to privacy was also a constitutional right and took precedence over the child's right.⁴¹
41. It is recognised that in some instances, including adoption and assisted human reproduction cases, it may be desirable, in the child's interests, to regulate the time and manner in which a child should be entitled to information concerning their identity.⁴² While it is accepted that some children may not be entitled to access information regarding their identity until adulthood, the necessary collection and retention of information to enable a child to exercise their right to identity must be provided for during the period of that person's childhood.

Socio-Economic Rights

Inserting Socio-Economic Rights is Possible

42. The Alliance believes that inserting express socio-economic rights into the Constitution is possible and realistic. Such rights can be inserted using language which would strike a balance between the role of the Executive to formulate laws and policies and determine public expenditure, and the constitutional role of the courts to ensure that these rights are upheld. Furthermore, holding a referendum to insert these rights into the Constitution 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.
43. The language and norms of international human rights law could be very useful in drafting constitutional provisions on express rights for children, particularly in relation to socio-economic rights. The following principles of international human rights law should be considered:
44. *Progressive realisation*: The concept of 'progressive realisation' recognises the fact that many States will not be able to achieve full realisation of all economic, social and cultural rights within a short period of time. However, States are under an obligation to move as quickly and effectively as possible towards the full realisation of rights. Thus, a State cannot indefinitely postpone its efforts to ensure their full realisation. Furthermore, implementing socio-economic rights in a manner which does not discriminate amongst children remains an immediate obligation.⁴³
45. Inserting socio-economic rights for children into the Constitution subject to the principle of progressive realisation, will allow the judiciary to assess whether there has been effective use of available resources. Furthermore, the Oireachtas should subsequently introduce legislation to determine the significance of the particular right and the obligations and entitlements which ensue. Legislation should set out a framework as to how the particular constitutional right is to be implemented, it should define the elements of the right including its minimum core content. However, enshrining the right in the Constitution will ensure that legislation cannot erode the right in question.
46. *To the maximum extent of available resources*: The concept of 'to the maximum extent of their available resources' protects against fears of creating rights that place an unlimited, and thus unrealistic, claim on the State's resources.⁴⁴ However, this is not to be used as a justification for States not fulfilling their obligations contained in the Convention. Thus, even where the State claims that a lack of available resources has resulted in its inability to meet even its minimum

41 *IO'T v B* [1998] 2 IR 321. See also *Odievre v France*, 42326/98 [2003] ECHR 86.

42 The Report of the Commission on Assisted Human Reproduction recommended that on reaching maturity (i.e. at eighteen years) a person should acquire entitlement to access information as to the identity of the donor(s) involved in his or her conception, the identity of his or her surrogate mother or, where relevant, the genetic parents. Similarly, the Adoption Legislation Consultation Discussion Paper recommended that, from the age of eighteen years, a person should have the right to his or her birth certificate, personal information from files and relevant information about birth parents.

43 General Comment 3 of the Committee on Economic, Social and Cultural Rights. http://www.unhcr.ch/html/menu3/b/a_ceschr.htm

44 For example, Article 4 of the UN Convention on the Rights of the Child states that: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

obligations, it must at least be able to demonstrate that every effort has been made to use the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. They must still strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances, paying most attention to the most disadvantaged groups. Notwithstanding the principle of progressive realisation, States must demonstrate that they have genuinely implemented the right to the maximum of their available resources.

47. *Minimum threshold*: The concept of a 'minimum threshold' clarifies the meaning of a right by specifying the essential element of each right which cannot be violated. It creates a boundary, below which a State cannot fall, in order to comply with the human right in question. The minimum threshold represents the point at which a State can be considered to be in violation of its obligations concerning the realisation of the right.
48. *Socio-economic rights in practice*: The South African Constitution (1996) contains a Bill of Rights which expressly provides for a range of socio-economic rights.⁴⁵ Section 28 of the South African Constitution stands out as a model of international best practice in the constitutional recognition of children's rights. The South African model provides a useful example of how socio-economic rights can be enshrined in a Constitution, and gives a practical illustration of how the courts have interpreted these rights in a manner that does not infringe on the Executive (government). This model also illustrates how the international human rights concepts can be put into practice at a domestic level.
49. The approach of the South African Constitutional Court to these rights can be categorized into three main types.⁴⁶ Firstly, there are a range of basic rights which are unqualified by reference to resource constraint, such as children's socio-economic rights. Secondly, 'access rights', such as the right to have access to adequate housing and health care which are accompanied by a qualifying clause that the State must take reasonable measures to progressively realise these rights within available resources. The third category of rights prohibits the State from carrying out evictions without proper authorization and from refusing emergency medical treatment. The Constitution also contains a general limitation clause (Section 36) which states that the Bill of Rights can be limited through a law of general application where the limitation is reasonable and justified in an open and democratic society taking into account all relevant factors.⁴⁷
50. By applying a test of reasonableness, the case law of the South African Constitutional Court with regard to socio-economic rights focuses on whether the State policy can reasonably be expected to deliver the rights in question. For example, in *Soobramoney v. Minister for Health*, the court stated that it will be: "slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibilities it is to deal with such matters."⁴⁸ The issue of reasonableness was also central to the *Grootboom* decision where the court stated that: "The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are

45 The South African Constitution (1996), Chapter 2, Clause 28 states: "(1) Every child has the right to a name and a nationality from birth; to family care or parental care, or to appropriate alternative care when removed from the family environment; to basic nutrition, shelter, basic health care services and social services; to be protected from maltreatment, neglect, abuse or degradation; to be protected from exploitative labour practices; not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be kept separately from detained persons over the age of 18 years, and treated in a manner, and kept in conditions, that take account of the child's age; to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and not to be used directly in armed conflict, and to be protected in times of armed conflict. (2) A child's best interests are of paramount importance in every matter concerning the child. (3) In this section 'child' means a person under the age of 18 years." <http://www.info.gov.za/documents/constitution/index.htm>

46 See Dr Vinodh Jaichand 'The Implementation and Enforcement of Economic and Social Rights in South African' delivered at IHRC Conference December 2006.

47 These include the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation; and its purpose and the less restrictive means to achieve the purpose.

48 1997 (12) BCLR 1696 (CC). In this case the court examined the criteria which were applied to deny renal dialysis to a person who was terminally ill. The Court upheld the hospital's policy of limiting this scarce resource to patients who were not terminally ill and held that this did not fall within the ambit of the 'right to emergency treatment'.

reasonable.” Thus, the court recognised that resource allocation was a matter for Government but ordered it to devise and implement a comprehensive and coordinated programme to progressively realise the right of access to adequate housing.⁴⁹ These cases illustrate that courts can make decisions in relation to socio-economic rights without breaching the separation of powers doctrine.

Specific Socio-Economic Rights

51. *Survival rights:* Human rights which express conditions that are essential for physical survival are ‘Survival Rights’. In line with Article 6 of the UN Convention on the Rights of the Child, the Alliance recommends that the amendment should include a provision to protect the survival and development of the child to the maximum extent possible.⁵⁰
52. *Right to health:* The Alliance recommends the inclusion of a provision on the right to health, to reflect Article 24 of the UN Convention on the Rights of the Child which recognises the right of the child to enjoy “the highest attainable standard of health” and facilities for the treatment of illness and rehabilitation of health. This provision should place an obligation on the State to take legislative and other measures to achieve progressive realisation of this right in order to ensure that no child is deprived of his or her right of access to such health care services. Thus, while providing a constitutional right to health for children, the provision could be developed and interpreted by the courts, and the Oireachtas could also introduce legislation which would map out the various elements of this right. Such legislation should develop a framework for implementing this right having regard to factors such as access to health services, creation of conditions that further health, protection of children’s rights within the health care and social system and protection against actions harmful to children’s health.⁵¹ However, by giving the right constitutional status such legislation cannot undermine the essence of this right.
53. *Right to an adequate standard of living:* The Alliance recommends the inclusion of a provision, modelled on Article 27 of the UN Convention on the Rights of the Child, recognising the right of every child to an adequate standard of living – that is, ‘adequate’ in terms of facilitating the child’s physical, mental, spiritual, moral and social development. Such a provision would recognise that the primary responsibility to secure the conditions of living necessary for the child’s development lies with the parents or others responsible for the child, within their abilities and financial capacities. However, the provision should oblige the State to take legislative and other measures to achieve the progressive realisation of this right by assisting parents and by providing material assistance in cases of need, particularly in regard to nutrition, clothing and housing.
54. *Right of children with disabilities:* In light of the UN Convention on the Human Rights of Persons with Disabilities,⁵² and the UN Convention on the Rights of the Child consideration should be given to including express rights for children with disabilities. The provision could be modelled on the Northern Ireland Human Rights Commission proposals for the Bill of Rights: “Every child living with a disability has the right to the greatest extent possible to enjoy an independent and fulfilling life in conditions which ensure dignity, promote self-reliance and facilitate his or her active participation in the community. He or she has the right to special care and assistance, to assessment and appropriate services, and to effective education, which allows the child, to the greatest extent possible, to maximise his or her potential for personal development, independence and social inclusion.”⁵³

49 Government of Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC).

50 Article 6 (1) States Parties recognize that every child has the inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the child.

51 These four factors were identified by the UN Committee on the Rights of the Child as fundamental factors for developing the right to health of children.

52 Ireland signed the Convention on the 30 March 2006 <http://www.un.org/disabilities/>

53 Northern Ireland Human Rights Commission (2004) *Progressing a Bill of Rights for Northern Ireland, An Update*, p.62-63, www.nihrc.org

55. *Right to Education:* In line with the recommendation of the Constitution Review Group, the amendment should clarify the entitlement of all children to free primary education and also extend this right to second level education.⁵⁴

Option 2: Incorporation of the Convention

56. Consideration should be given to inserting a clause into the Constitution which would incorporate the UN Convention on the Rights of the Child. Such a change would strongly indicate the State's commitment to the principles of the Convention and would set the stage for the progressive realisation of the provisions of the Convention.⁵⁵ This would need to be followed by the introduction of a comprehensive children's rights act to enumerate the rights contained in the UN Convention.

Summary of Recommendations

57. The Alliance recommends that the amendment provide constitutional recognition of the child as an individual rights-holder. The Alliance recommends that the amendment include express rights for children which encapsulate the key principles of the UN Convention on the Rights of the Child. In this regard, it should include a non-discrimination provision; the right of the child to be heard; the right to identity; and certain socio-economic rights.

54 *Report of the Constitution Review Group* (1996) Dublin: Stationery Office, p. 353.

55 For further exploration on various methods of incorporation see Human Rights Commission (2006) *Irish Human Rights Commission Submission to the UN Committee on the Rights of the Child on Ireland's Second Periodic Report under the UN Convention on the Rights of the Child*, Dublin: Irish Human Rights Commission.

2. Duty of the State to Intervene to Support Children’s Rights

Provision 2.1 Threshold for State Intervention in Family Life

Extract from Orders of Reference of the Committee

(ii) the restatement and extension of the existing provision in relation to children and parents contained in Article 42.5 of the Constitution to include all children;

Article 42(A) 2.1 under the Twenty-eighth Amendment of the Constitution Bill 2007

2.1 In exceptional cases, where the parents of any child for physical or moral reasons fail in their duty towards such child, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

58. The UN Convention on the Rights of the Child places a positive duty on the State to protect and support children and their families. The Alliance believes that the best way for the State to protect children is by supporting and working in partnership with families, and through early intervention and prevention initiatives. The amendment should ensure that the State adequately support children and families and is empowered to put in place a robust child protection system.

State Power to Intervene

59. Most families are positive places for children to grow up. Unfortunately, in some cases, families can be unintentionally or, in rare instances, intentionally damaging places for children.⁵⁶ The State’s powers under the Constitution to intervene in family life depends on the marital status of the child’s parents:

Marital families

- Articles 41 and 42.1 grant rights to the marital family which are ‘inalienable’,⁵⁷ ‘absolute’,⁵⁸ and ‘imprescriptible’.⁵⁹ Article 42.5 empowers the State, in exceptional circumstances, to limit these rights where there has been a failure of duty on the part of parents for physical or moral reasons. When a court looks at the circumstances of a child of marital parents, it grants a rebuttable presumption that the child’s best interests are served within his or her own family.

Non-marital families

- 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. When a court looks at the circumstances of a child of unmarried parents, it does not consider a non-marital family to constitute a “family” and therefore focuses on what it deems to be in the welfare and best interests of the child.

⁵⁶ The majority of children (57%) who are in the care of the State are under a ‘Voluntary Care Order’ – their parents have consented to their care placement and continue to exercise parental authority (under Section 4 of the Child Care Act, 1991). A smaller number of children are in the care of the State under a ‘Statutory Care Order’ – their parents have been deemed to have failed in their duty of care to their child and the State has assumed parental authority over the child up to the age of 18 years (under Section 18 of the Child Care Act, 1991). See *Table 6.2: Legal Basis for Care of Children in Care: Percentage Breakdown*, Department of Health and Children (2004) *Preliminary Analysis of Child Care Interim Dataset 2004* Dublin: Department of Health and Children.

⁵⁷ i.e. absolute, not transferable to another power and incapable of repudiation.

⁵⁸ i.e. not transferable to another power and incapable of repudiation.

⁵⁹ i.e. cannot be lost by the passage of time; antecedent and superior to all positive law.

Recommendations

60. *Positive duty*: There is need to insert a constitutional provision which 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. This provision could be drafted along the lines of Article 19.2 of the Convention,⁶⁰ placing an onus on the State to put appropriate protective measures in place to provide necessary supports for children and their families, as well as other forms of prevention and protection and for the identification, reporting, referral, investigation, treatment and follow-up of instances of abuse and neglect. Support to families should not discriminate on the form of the family or their parent's marital status.
61. Statistics point to a correlation between the number of children taken into State care and the level of investment in local family support services.⁶¹ The provision should also place an onus on the State to take all possible actions to proactively support vulnerable families so as to enable them, where possible, to care for their children in the family home and avoid a child being taken into State care.
62. *Continuity of care*: The amendment should also aim to recognise and protect the principle of continuity of care. This principle is recognised in Article 20.3 of the Convention, and its importance derives from the child's need to experience stability and continuity in arrangements for his or her care, particularly during the early years.⁶²
63. *Proportionate*: The Alliance recommends the insertion of 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.⁶³ It contains the notion that any action undertaken must be proportionate to its objectives and must not infringe upon protected rights to a greater extent than is necessary. In the context of State intervention, it would require that any action taken constitutes the minimum intervention necessary to secure the child's welfare and is one that interferes least with the right to family life. As a general principle of law, proportionality involves establishing a balance between competing claims and considerations.⁶⁴
64. The inclusion of the term 'proportionate' would support best practice where proceedings to take a child into care should only be embarked upon as a measure of last resort, after a range of other family supports and interventions have been considered or undertaken. Furthermore, when a child is placed in care, an onus should be placed on the State to take all actions necessary to ensure that the child is able to return to his or her family at the earliest opportunity, with the proviso that this is in the child's best interest.⁶⁵
65. *Equitable standard of protection*: All children have a right to be protected from abuse, regardless of their parent's marital status. There is a need to provide an equitable standard of protection for all children.

60 Article 19(2): "Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

61 Carl O'Brien, "Rates of children in care linked to funding levels" in *The Irish Times*, 14 March 2006. O'Brien cites findings of an unpublished report commissioned by the Government, *Promoting the Well-Being of Families and Children: A Study of Family Support Services in the Health Sector in Ireland*. "It revealed that the eastern region had the highest rate of children in care (78 per 10,000 children) and the lowest rate of family support services. By contrast, the western region had the lowest level of children in care (25 per 10,000) and one of the highest rates of family support."

62 The Convention holds that the State should take account of a child's "ethnic, religious, cultural and linguistic background", when alternative care arrangements are being made. In Ireland, this has particular relevance for children in the Traveller Community, as well as for children from the migrant communities.

63 See also the Children's Rights Alliance *Note on the Legal Doctrine of Proportionality* (2007) available at <http://www.childrensrightrights.ie/pubs/Children'sRightsAllianceNoteonDoctrineofProportionality.doc>

64 For an exposition of the principle of proportionality in Irish law see Costello J. in *Heaney v. Ireland* [1994] 3 IR 593 (see also *Rock v. Ireland* [1997] 3 IR 484; *Cox v. Ireland* [1992] 2 IR 503). The concept is also central to the European Convention on Human Rights, see *Johansen v. Norway* [1996] 23 EHRR 23 and *K and T v. Finland* [2003] 36 EHRR, which make clear that the deprivation of parental rights and access should only occur in exceptional circumstances and where the range of alternatives is manifestly unsuitable.

65 *K. and T. v Finland*, judgment of 27 April 2000, (2001) ECHR 465.

66. *Impact of extending marital threshold to non-marital families:* The threshold for intervention by the State under Article 42.5 is deemed to be higher than that applied in respect of non-marital parents under Article 40.3. Provision 2.1 proposes to extend the threshold for marital families to cover non-marital families. Although we would need to await judicial interpretation to assess the practical impact of this provision, it may be viewed as raising the threshold for State intervention in non-marital families. Concerns about the implications of a change in the intervention threshold for non-marital families should be addressed by the inclusion of a reference to ‘best interests’ (see below).⁶⁶
67. *Best interests:* Within a recalibrated Article 42.5, the phrase ‘natural and imprescriptible’ should be deleted. 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.
68. This is not necessarily inconsistent with the rest of Article 42.5, and it would provide a necessary balance to the test of parental failure. While the best interests of children are the paramount consideration, there is a presumption within the UN Convention that the child’s best interests are served by being with their parents wherever possible, and that a child’s parents have ‘primary responsibility’ for their upbringing, a responsibility the parents must exercise within the framework of the child’s best interests, his or her rights under the Convention and his or her evolving capacity.
69. *‘For physical or moral reasons’:* Consideration should be given to redrafting the phrase ‘for physical or moral reasons’ in relation to parental failure. This phrase guards against State intervention (including the granting of an adoption order) solely on the grounds of the poverty of his or her parents. Whilst the Alliance wishes for the provision to guard against intervention solely on the grounds of poverty, we understand that the phrase ‘for physical or moral reasons’ has been problematic in court decisions.

Summary of Recommendations

70. The Alliance recommends that the amendment should include a constitutional provision to 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 should be recalibrated by including the term ‘proportionate’; by creating an equitable standard of protection for all children; by including the best interests of the child principle and by redrafting the phrase ‘for physical or moral reasons’.

66 There is concern that, by extending this provision to encompass non-marital families, the courts are being asked to apply a test which is inspired by Article 41 to parents who fall outside the scope of that article. See Eoin Carolan (2007) “The Constitutional Consequences of Reform: Best Interests after the Amendment”, in *Irish Journal of Family Law*, vol.10 no. 3.

Provision 2.2 Adoption of Children in Long-Term Care

Extract from Orders of Reference of the Committee

(iii) *the provision of legal authority for the adoption of children who have been in care for a substantial period of time if it is in the best interests of those children;*

Article 42(A)2.2 under the Twenty-eighth Amendment of the Constitution Bill 2007

2.2 *Provision may be made by law for the adoption of a 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.*

71. *Background:* At present, given the rights afforded to the marital family under Article 41 it is very difficult for a child born to married parents to be adopted in circumstances where the child has been abandoned by their birth parents.
72. Certain children, for whom a return to their birth marital families is not an option, are thereby denied the opportunity through adoption for a ‘second chance’ of a stable and secure family life. These children, although they no longer have regular access to their married parents, nevertheless ‘belong’ to them and are not ‘free’ for adoption under law. They can be ‘freed’ for adoption only if their parents are legally branded as ‘failing’ in their duties. This issue potentially affects several hundred children who have been in foster care for a significant number of years and who have grown up with little or no regular contact with their birth parents but who are not eligible for adoption by their foster families.
73. Until 1988, the view was taken that the irrevocable nature of an adoption order was incompatible with the inalienable nature of the marital family’s constitutional rights under Articles 41 and 42. Hence, only the children of unmarried parents could be legally adopted, as they fell outside of the scope of Articles 41 and 42.
74. The situation changed with the introduction of the Adoption Act, 1988, which made provision for the adoption of children of marital families. The constitutionality of this legislation was upheld by the Supreme Court which ruled that: “The guarantees afforded to the institution of the family by the Constitution, with their consequent benefit to the children of a family, should not be construed so that upon the failure of that benefit it cannot be replaced... by the incorporation of the child into an alternative family”.⁶⁷
75. The drafters of the Adoption Act, 1988 relied heavily, however, on the text of Article 42.5, which provides that the State can only intervene to supply the place of a child’s parents in exceptional circumstances where there has been a failure of parental duty. Thus adoption can only occur where the High Court is satisfied that:
- there has been a total failure, for physical or moral reasons, on the part of parents in their duty towards their child for the previous twelve months;
 - the failure is likely to continue without interruption until the child reaches 18 years; and
 - the failure constitutes an abandonment of all constitutional rights on the part of the parents.
76. The result is that, to date, the availability of adoption to children whose parents are married to one another has been severely limited.⁶⁸ Only a handful of adoptions have taken place.
77. *Why reform is needed?* Reform is needed 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 parents in relation to

⁶⁷ *Re Article 26 and the Adoption (No. 2) Bill 1987* [1989] IR 656.

⁶⁸ *Western Health Board v An Bord Uchtála*, unreported, Supreme Court, November 10, 1995.

their duty towards their child. This reform is required to uphold the children's right, under Article 20 of the UN Convention on the Rights of the Child, to alternative care if they are deprived of their family environment or if it is not in their best interests to remain with their family, and the requirement of the Convention that all the rights it provides should be available to all children without discrimination of any kind (Article 2).

78. Under the current constitutional provisions, such legislation is likely to be found unconstitutional, due to its incompatibility with the inalienable nature of the marital family's constitutional rights under Articles 41 and 42. An amendment to the Constitution is therefore necessary.

Recommendations

Constitutional Amendment

79. The Alliance recommends that the wording in the 2007 Bill – 'Provision *may* be made' – should be replaced by: 'Provision *shall* be made'. This would impose a constitutional requirement rather than merely provide permissive powers to the Oireachtas, thus ensuring that a provision inserted into the Constitution must be acted upon by the Oireachtas.

Legislative Reform

80. The Alliance recommends that in advance of the proposed referendum the heads of a Bill to address certain legislative issues that would follow from a constitutional amendment should be published. The heads of a Bill should provide 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.
81. Legislation arising from the constitutional amendment should recognise the fact that a child who is subject to a care order for a period of many years should not, in and of itself, be deemed to constitute a failure in parental duty: a failure to include such a provision would undermine the system of voluntary care. The legislation must provide that the key factor should be that the parent has failed to maintain contact with their child for a specified period of time. A legislative definition of the term 'abandonment' is also needed. In the absence of a definition in law of 'abandonment', situations arise where the State removes a child from his or her parents in the interests of the child's welfare but is unable to have the child adopted by another family.
82. Clarity is also needed on what criteria will be used to determine the best interests of the child in such a situation.
83. *Support for parents to maintain contact with their child:* This provision has the potential to frighten many vulnerable parents, who may feel inadequately supported to maintain a relationship with their child. Measure, underpinned by legislation, must be put in place to ensure that parents are adequately supported to maintain contact with their children who are in care and, where appropriate, to play an active role in their lives.⁶⁹
84. *Right of a parent to challenge an adoption:* Legislation should provide that all adoption orders under the new provision would require a court hearing, at which the judge would have to satisfy him or herself that the child has been abandoned by his or her parents for a period of time specified in law. The legislation should also provide that the parents of a child being proposed for adoption should have the right to object, at this court hearing, to the adoption and to dispute the allegation that he or she has abandoned their child. A Guardian *ad Litem* should be appointed to represent the views and best interests of the child in all such proceedings.

⁶⁹ It should be noted that Irish case law suggests that access is the right of the child rather than the right of the parent, the welfare of the child is the paramount consideration. (See for example *M.D. v G.D.*, unreported, High Court, July 30, 1992). Similarly, the European Court for Human Rights has indicated that access is an automatic right of the child and must not be denied unless there is clear evidence that it is contrary to his or her welfare. The Court has held that the natural family relationship is not terminated by reason of the fact that a child is taken into public care. (*Eriksson v Sweden* (1989) 12 E.H.R.R. 200).

85. *Threshold for State intervention:* Any change, under Provision 2.1, to the threshold for State intervention in family life will have a knock on impact on Provision 2.2. This provision should recalibrate the test for parental failure in relation to the placement for adoption of a child who is already in State care, by impacting on the criteria under which a child may be adopted. The focus should be on what happens to children when they are in long-term State care. In summary, Provision 2.1 may impact on the number of children entering State care, whereas Provision 2.2 may impact on the number of children who are currently in long-term care being adopted.
86. *Open or semi-open adoptions:* There is no legal basis for open or semi-open adoptions in Ireland at present.⁷⁰ The Alliance believes that there is a need to introduce legislation to allow for such adoptions. Where appropriate, this would enable some level of contact between the child and his or her birth parents to be set out in law. Legislative provisions for 'open or semi-open' adoptions should be published in advance of the referendum.

Summary of Recommendations

87. The Alliance recommends that the amendment allow, by means of a constitutional requirement, 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 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.

⁷⁰ Open adoption usually refers to the adoption of an infant where the birth parent is actively involved in choosing from a pool of prospective adoptive parents. In some cases, the Adoption Agency arranges for the birth parent to meet the prospective adoptive parents prior to the adoption taking place. Some models of open adoption allow for an agreed level of contact between the child and his or her natural parents. However, this does not change the legal effects of adoption which gives full parental rights to the adoptive parents. Thus, open adoptions generally rely on the willingness of the adoptive parents to maintain such contact. To facilitate open adoptions, mechanisms would need to be put in place whereby boundaries for contact and access arrangements are agreed prior to the adoption order being made. The level of contact would depend on the wishes of the parties concerned and could range from receipt of photographs and birthday cards, to phone-calls or periodic visits. The agreed arrangements and boundaries would then form part of a legally binding contract. Provision could be made for renegotiation of the contract or possible variation by a court. In a semi-open adoption, the adoption agency provides full, but non-identifying information to the birth parents and prospective adoptive parents about each other, but does not arrange face-to-face meetings. Thus, the birth parents will have a role in choosing the couple to bring up the child, but will not meet them in person.

Provision 3. All Children Eligible for Voluntary Adoption

Extract from Orders of Reference of the Committee

(iv) the provision of legal authority so that all children may be eligible for voluntary adoption;

Article 42(A)3 under the Twenty-eighth Amendment of the Constitution Bill 2007

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

88. At present, only children born to non-marital parents are eligible to be voluntarily placed for adoption by their parents. Certain children are thereby discriminated against on the basis of the marital status of their parents and hence, in particular circumstances, actions cannot be taken that are in their best interests. The Alliance is not aware of any public information on the numbers of children who are currently affected by this issue, but examples may include the adoption of a child by the new spouse of a widowed parent or the adoption of a child at the request of the parents due to their acknowledged inability to care for their child on a long-term basis as a result of serious disability or terminal illness.
89. *Why reform is needed?:* Reform is needed to ensure that all children, those born in marital as well as non-marital families, can be considered eligible to be voluntarily placed for adoption, and to ensure that all children are provided with a 'second chance' of family life. Moreover, this reform is required to uphold the right of the child under Article 20 of the UN Convention on the Rights of the Child to alternative care if they are deprived of their family environment, and the requirement of the Convention that all the rights it provides should be available to all children without discrimination of any kind (Article 2).
90. Under the current constitutional provisions, legislation to allow for the voluntary placement for adoption of a child born to a marital family is likely to be found unconstitutional, due to its incompatibility with the inalienable nature of the marital family's constitutional rights under Articles 41 and 42. An amendment to the Constitution is therefore necessary.

Recommendations

Constitutional Reform

91. The Alliance recommends that the wording in the 2007 Bill – 'Provision *may* be made' – should be replaced with: 'Provision *shall* be made'. This would impose a constitutional requirement rather than merely provide permissive powers to the Oireachtas, thus ensuring that a provision inserted into the Constitution must be acted upon by the Oireachtas.

Legislative Change

92. The Alliance recommends the publication, in advance of the proposed referendum, of the heads of a Bill to address certain legislative issues that would follow from a constitutional amendment. For example, the heads of the Bill should specify 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.

Summary of Recommendations

93. The Alliance recommends that the amendment should allow, by means of a constitutional requirement, for the introduction of legislation to permit the voluntary placement for adoption of a child of marital parents. 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.

Provision 4. Best Interests of the Child

Extract from Orders of Reference of the Committee

- (v) the provision of legal authority so that the courts shall be enabled to secure the best interests of a child in any court proceedings relating to adoption, guardianship, custody or access of that child and to ensure that such interests are taken into account in all other court proceedings in relation to that child;

Article 42(A)4 under the Twenty-eighth Amendment of the Constitution Bill 2007

4. Provision may be made by law that in proceedings before any court concerning the adoption, guardianship or custody of, or access to, any child, the court shall endeavour to secure the best interests of the child.

94. The 'best interests' principle is one of four overarching principles of the UN Convention on the Rights of the Child (Article 3)⁷¹. This principle is more far-reaching and in keeping with the requirements of the Convention than the more narrow and limited concept of the child's 'welfare'.
95. While the best interests of children are the paramount consideration, there is a presumption within the UN Convention that a child's best interests are served by being with their parents wherever possible, and that a child's parents have 'primary responsibility' for their upbringing, a responsibility the parents must exercise within the framework of the child's best interests, his or her rights under the Convention and his or her evolving capacity.

'Best Practice' under Law

96. The best interests principle has operated as part of child and family law since the 1960s. Under Section 3 of the Guardianship of Infants Act, 1964, a court is obliged to regard the welfare of the child as the first and paramount consideration in any proceedings before it, including the custody, guardianship and upbringing of an infant.⁷² Section 3 of the Child Care Act, 1991 (as amended) provides that, in the performance of its functions, the Health Service Executive "having regard to the rights and duties of parents, whether under the Constitution or otherwise shall regard the welfare of the child as the first and paramount consideration". In addition, Section 24 provides that in any court proceedings under this Act in relation to the care and protection of a child, the court shall regard the 'welfare' of the child as the first and paramount consideration.⁷³

Interplay with Articles 41 and 42

97. However, when applying this test the courts have found themselves bound by Article 41 and Article 42 of the Constitution which place the interests of the constitutional (i.e. marital) family above those of the child.⁷⁴ The Supreme Court has interpreted Articles 41 and 42 to mean that there is a constitutional presumption that the child's interests are best served within the marital family.⁷⁵ Hence, in any conflict between the interests of the marital family and the interests of

71 Article 3 (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. (3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. Several other articles in the Convention refer to the best interests of the child including Article 21 on adoption. The 'best interest' principle is also the accepted criterion for any assessment of State intervention in family life under Article 8 of the European Convention on Human Rights.

72 An existing authority, which predates the 1964 Act, indicates that this section is vulnerable to constitutional challenge. See *Re Tilson, Infants* [1953] IR 1 SC; and Geoffrey Shannon (2005) *Child Law*, Dublin: Thomson Round Hall.

73 See also the Children's Rights Alliance (2007) *Note on the Best Interests Principle in Private Law Proceedings* <http://www.childrensrights.ie/pubs/NoteBestInterestPrincipleaPrivateLaw0207.pdf>

74 *G. v. An Bord Uchtála* [1980] IR 32, at 56.

75 *J.H.* [1985] 375; *H.W v. North Western Health Board* [2001] 3 IR 622; Judgment of Hardiman, J. in the Supreme Court in *N. & anor. -v- Health Service Executive & ors* [2006] IESC 60.

the child, the rights of the family will take precedence. In such cases, the provisions of Articles 41 and 42 thereby preclude the courts from adopting the principle of the best interests of the child as the key principle guiding their decisions.

Recommendations

98. The Alliance supports the 1996 Constitution Review Group recommendation that the best interests of the child should be the paramount consideration in all actions concerning children, whether by legislative, judicial or administrative authorities.⁷⁶
99. The child's best interests are normally best protected by the parents of that child, but where a court is faced with a decision regarding a child's welfare it must have the power to put the child's best interests at the centre of the case. 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.
100. 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.
101. *Direct constitutional principle*: 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.⁷⁷ This will strengthen the provision by ensuring that it has the same constitutional status as other provisions, as opposed to legislation which can be seen to be subject to the other constitutional provisions.
102. *Interplay with Article 41*: 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.
103. *Right to be heard*: The principle of best interests of the child represents a holistic view of what is best for children and, depending on the age and maturity of the child, should incorporate provision for taking into account the child's own views.

Summary of Recommendations

104. The Alliance recommends that the amendment should include a direct constitutional principle to provide that the best interests of the child will be the paramount consideration in all actions concerning children, whether by legislative, judicial or administrative authorities.

⁷⁶ *Report of the Constitution Review Group* (1996) Dublin: Stationery Office, p. 337.

⁷⁷ For a discussions on the concept of the best interest in the context of the proposed amendment see Eoin Carolan (2007) "The Constitutional Consequences of Reform: Best Interests after the Amendment", in *Irish Journal of Family Law*, vol.10 no. 3.

3. Child Protection and Criminal Law

Provision 5.1 Use of Soft Information

Extract from Orders of Reference of the Committee

(vi) the provision of legal authority for the collection and exchange of information relating to the risk or actual occurrence of child sexual abuse;

Article 42(A)5.1 Proposed wording under Twenty-eighth Amendment of the Constitution Bill 2007

5.1 Provision may be made by law for the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law.

Why Constitutional Reform is Needed

105. There is no system in Ireland for the collection and exchange by relevant authorities of soft information relating to employees and volunteers whose work entails substantial unsupervised access to children or vulnerable adults.⁷⁸ There have been numerous calls for the expansion of our vetting system to include soft information so as to create a comprehensive vetting system.⁷⁹ The Alliance supports the introduction of a comprehensive child protection system that incorporates the use of ‘soft information’ within its vetting process.

106. *Legislative or constitutional change?* Legal opinion differs as to whether there is need for a constitutional amendment to empower the Oireachtas to enact laws that will qualify the right to protection of a person’s good name⁸⁰ in the interests of putting in place a comprehensive vetting system in relation to those who work with children.⁸¹ The only known judicial decision on the issue is the 1998 case of *MQ v Gleeson* which indicated that legislation to allow for the exchange of soft information between agencies (other than the HSE) could be vulnerable to a constitutional challenge.⁸² The Committee should examine whether constitutional reform is necessary to allow for enactment of legislation to provide for the collection and exchange of soft information relating to the endangerment, sexual exploitation or sexual abuse of children.

Recommendations⁸³

107. *Fair procedures:* This text of the constitutional provision should also respect the individual’s right to fair procedures, which is an important constitutional doctrine.

78 ‘Soft information’ is information that has come to the attention of the State authorities, which falls short of a criminal conviction of a relevant offence, but indicates a concern over the suitability of an individual to have unsupervised access to children. Example could include being identified as a suspect in a reported incident of child abuse, being investigated for child abuse, being charged and going to court but not being found guilty, or being dismissed from work due to misconduct or inappropriate behaviour towards a child. At present, the Garda Central Vetting Unit can only release details of criminal convictions.

79 See Francis D. Murphy, Helen Buckley, and Larain Joyce (2005) *The Ferns Report, presented to the Minister for Health and Children*, The Stationery Office: Dublin and Houses of the Oireachtas Joint Committee on Child Protection (2006) *Report on Child Protection*, recommendation no. 56.

80 Article 40.3.2 guarantees that the State will protect “from unjust attack ...[the] good name of every citizen”.

81 The issue of legal opinion on the need for constitutional reform in this area was referred to during a Dáil debate (see response of An Taoiseach to a question from Mr. Enda Kenny, TD in *Parliamentary Debates Official Report, Dáil Éireann*, Vol. 628, No. 1, Wednesday, 22 November 2006, p. 5 –available at: <http://debates.oireachtas.ie/Xml/29/DAL20061122.PDF>).

82 *M.Q. v Gleeson*, unreported, High Court, Barr J., February 13, 1997 [1998] 1 Irish Journal of Family Law 30.

83 Many of the recommendations in the following section are drawn from Geoffrey Shannon (2007) *Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas*, http://www.omc.gov.ie/documents/child_welfare_protection/Report_of_Special_Rapporteur_on_Child_Protection_Geoffrey_Shannon.PDF

108. The Alliance recommends that, in advance of a referendum, the heads of a Bill should be published, outlining the changes proposed on foot of a constitutional change, and providing for balanced and proportionate legislation for the collection and exchange of soft information.
109. *Safeguards:* The collection and exchange of soft information should be governed by balanced and proportionate legislation which sets down strict safeguards to respect the individual's right to a good name, as guaranteed by Article 40 of the Constitution and the rights guaranteed by the European Convention on Human Rights Act 2003.⁸⁴ These safeguards should include that the individual concerned should be notified of the exchange of information and provided with an opportunity to present a challenge. This is necessary not only to protect the individual's right to a good name but to ensure that the soft information used is accurate. Safeguards will be required to avoid mistakes; to protect the innocent from unfounded allegations; to ensure respect of privacy; to promote the rehabilitation of offenders and to protect minor misdemeanours from blighting an individual's later life. Measures must be put in place to guard against malicious, unmerited or speculative allegations that might result in inappropriate or unmerited barring.
110. *Independent body:* To ensure public confidence in the vetting system, it will be important to ensure that the body that governs the collection and exchange of soft information is independent. There must be stringent controls within this body on the dissemination and review of information to ensure confidentiality and prevent against victimisation. The categories of persons who will have access to recorded soft information should be defined. The body should be required to notify a person where there is an allegation against him or her which forms the subject of the 'soft information' and that person should be given an opportunity to respond. The person should also be given an opportunity to appeal their entry onto a 'soft information' register to an independent third party, such as a judge. These proceedings should be held in camera.
111. Furthermore, clear and coherent explanations must be made available to explain barring decisions, and the release and use of information. The operations and powers of this body will need to be mapped out in law. Clarity will be needed on the responsibilities of employers who were made aware of information relating to a potential employee. Clarity is needed as to whether soft information, no matter how limited or weak, could become an automatic bar to a person's application for employment. There is a need for a form of risk assessment.
112. There is a potential for a North/South dimension to this issue to ensure that there is equivalent protection for children in both jurisdictions.
113. *Public information:* The Alliance would not support the adoption in Ireland of a model that allowed details of soft information or convictions to be distributed to members of the public, on the lines of 'Sarah's Law' in the UK and 'Megan's Law' in the US.
114. *Categories of 'soft information':* A definition of the conduct (nature of the offences/activities) covered by this provision should be clearly defined in law in advance of the referendum. For example, Provision 5.1 of the 2007 Bill allows for the use of soft information relating to "the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children." Clarity is needed as to what actions will be categorised as 'endangerment'.⁸⁵ Would 'endangerment' cover non-sexual activities? Different weight may need to be attached to different incidents. Furthermore, the primary focus of a vetting system should be on any investigations into alleged crimes or abuses conducted by the Gardaí and the HSE. The circumstances of the offence should also be taken into account.

84 The relevant Articles of the European Convention on Human Rights include Article 6 (determination of civil rights), Article 8 (right to respect for private and family life) and Article 1 of Protocol 1 (protection of property – in this case, it may be relevant in terms of the individual's capacity to continue to work in a certain profession).

85 For example, will it be similar to the definition of reckless endangerment of children under the Criminal Justice Act, 2006?

Summary of Recommendations

115. The Alliance recommends that the amendment allow for the introduction of legislation to permit the collection and exchange of soft information with the aim of creating a comprehensive child protection system. Safeguards must be put in place to govern such activity, which will respect the individual's right to fair procedures.

Provisions 5.2 and 5.3 Offences of Absolute and Strict Liability

Extract from Orders of Reference of the Committee:

(vii) that no provision in the Constitution should invalidate any law providing for absolute or strict liability in respect of sexual offences against or in connection with children;

Article 42(A)5.2 & 5.3 under the Twenty-eighth Amendment of the Constitution Bill 2007:

5.2 No provision in this Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.

5.3 The provisions of this section of this Article do not, in any way, limit the powers of the Oireachtas to provide by law for other offences of absolute or strict liability.

The Offences of Unlawful Carnal Knowledge

116. The Criminal Law Amendment Act, 1935 created two separate offences in respect of sexual intercourse with a girl under 17 years. Section 1 of the Act made it an offence for a male to have sexual intercourse with a girl under the age of 15, and Section 2, which carried a lower sentence, made it an offence to have sexual intercourse with a girl under the age of 17. Both offences described sexual intercourse as unlawful carnal knowledge, and together were commonly known as statutory rape. The policy underlying the offence of statutory rape was “to protect young girls, not alone against lustful men, but against themselves”.⁸⁶ Consent was no defence to a charge under the 1935 Act.

117. The offence of unlawful carnal knowledge (referred to as statutory rape) should be distinguished from the offence of rape. The offence of rape applies irrespective of the age of the victim, and thus also applies to children.⁸⁷ In relation to an offence of rape, the prosecution must establish that there was no consent, and it would be possible for the defence to cross-examine the victim, with certain limits, on the issue of consent.

The CC Case and the 2006 Act

118. The Supreme Court, in the *CC* case, found Section 1.1 of the Criminal Law (Amendment) Act, 1935 to be unconstitutional, as it failed to allow for a defence of ‘mistake as to age’ in a case of unlawful carnal knowledge of a girl under 15 years.⁸⁸ In response, the Oireachtas passed the Criminal Law (Sexual Offences) Act 2006. The Act replaces the offences of unlawful carnal knowledge under the 1935 Act with two new offences - defilement of a child under 15 years (Section 2(1)) and defilement of a child under 17 years (Section 3). The Act provides for a defence of mistake of fact as to the victim’s age in respect of both sections. It allows for the defendant to prove that he or she honestly believed that, at the time of the alleged offence, the child victim had attained the relevant age (15 in respect of section 2, and 17 in respect of Section 3).⁸⁹

119. It was perceived by the public that the outcome of the *CC* case and the enactment of the 2006 Act were unsatisfactory from a child protection perspective. The 2006 Act was criticised as a retrograde step as it allows a child victim to be cross-examined by the prosecution with a view to creating a case that the defendant made a ‘mistake as to age’. It allowed for the defence to question the child as to how they looked and acted and whether they pretended or lied about being over the age of consent. Since the public debate on the *CC* and *A* cases⁹⁰ and the

⁸⁶ AG (*Shaughnessy v. Ryan* [1960] IR 181)

⁸⁷ The offence of rape is defined under Section 2 of the Criminal Law (Rape) Act, 1981 and at common law.

⁸⁸ *C.C. v Ireland & ors* [2006] IESC 33 (23 May 2006). The *CC* case involved a 19 year old male and a 13 year old girl. The accused admitted to thinking the victim was 16 (and was therefore guilty of statutory rape) because he thought that 16 was the legal age of consent.

⁸⁹ The 2006 Act provides that if anyone convicted under this offence is not more than 24 months older than the child under 17 years of age, they shall not be subject to the Sex Offenders Act 2001 (i.e. peer sex will not result in someone being registered as a sex offender).

⁹⁰ The *A* case involved a 41 year old man serving three years for the statutory rape of a 12 year old, who sought release from prison on the basis that the law under which he was charged no longer existed.

enactment of the 2006 legislation, there has been a reduction in the numbers of complaints concerning offences of unlawful carnal knowledge.⁹¹ It is unclear if there is correlation between the change in law and the number of reported complaints to the Gardaí.

Use of the Criminal Law

120. The Alliance strongly endorses the need to put in place as robust a child protection system as possible. A mechanism is needed to protect children against all abusive or exploitative sexual activity. However, the Alliance believes it is not appropriate for society to use criminal justice legislation to deter, through criminal prosecution, young people from engaging in consensual sexual activity. A more appropriate means of encouraging young people to be responsible in relation to sexual behaviour is through investing in education and youth programmes, including sexual health education and programmes that empower young people to make responsible decisions about their own behaviour.
121. The Alliance thereby believes that the proposed provision should be examined closely to ensure that it is the most appropriate response to the prosecution of offences of sexual exploitation of children.
122. The Alliance believes that no child under 18 years of age should be prosecuted for an offence of strict or absolute liability. Any person under 18 who is prosecuted for an offence of 'statutory rape' should have open to them the possibility of putting forward a defence of 'mistake as to age'.⁹² This should be distinguished from offences which are committed by a child offender (against another child) where there is an abusive element or a question as to whether the child consented or had capacity to consent. In such situations, a prosecution should be brought under legislation dealing with rape or sexual assault. This is also relevant to the issue of whether sexual abuse and sexual offences against children are dealt with comprehensively by our existing legislation or whether they need to be reviewed and strengthened.
123. There are a number of areas which need to be addressed to ensure that the criminal justice system can adequately respond to the needs and rights of children who have been sexually exploited; they include legislative change and practice reform, some of which require resource-based measures.

Recommendations on the 'Statutory Rape' Offence

124. In this regard, consideration should be given to strengthening the provisions of the Criminal Law (Sexual Offences) Act 2006.
125. *Honest belief*: Under the 2006 Act, there is not clarity as to whether the defence of 'honest belief' is to be judged objectively or subjectively.⁹³ This should be strengthened to ensure that the standard is an objective one which would require the court to ensure that the defendant honestly believed that the child had reached the relevant age and that this belief was reasonably based. The Act should also explicitly state that the defence will not succeed where the defendant was reckless as to whether or not the complainant had reached the relevant age. The Act should also state that it is not a defence to the charge to show that the defendant believed that the complainant had reached the relevant age unless the defendant took all reasonable steps to ascertain the age of the complainant.

91 The Central Statistics Office statistics show that the incidence recorded by an Gardaí Síochána in relation to the crime of "unlawful carnal knowledge" has dropped since 2006. The incidence was 52 in 2007; 48 cases in 2006, which is a drop from 94 cases in 2005 and 106 cases in 2004. CSO, *Headline Crime Statistics, Quarter 4 2008*, 28 January 2008. Incidents reported or which become known to members of An Garda Síochána are recorded when, on the balance of probability, a Garda determines that a criminal offence defined by law has taken place and there is no credible evidence to the contrary.

92 Such a defence is unlikely to succeed in relation to an offence against a much younger child. See also sections 124-131 which recommend a strengthening of the 2006 Act.

93 The question of whether the defendant honestly believed his victim had attained the relevant age is to be judged subjectively, although the Act provides, in respect of both sections, that 'the court shall have regard to the presence or absence of reasonable grounds' for the defendant's belief as well as 'all other relevant circumstances'. While this introduces an objective element, it does not require that the honest belief *must* be reasonably held. Thus, this could mean that once the court has regard to the presence or absence of reasonable grounds, the court could accept an honest belief defence which was based on unreasonable grounds.

126. *Burden of proof*: The 2006 Act states that it is a defence for the defendant ‘to prove’ his honest belief. It is not clear if the effect of this provision is to shift the burden of proof onto the defendant or whether it merely places an evidential, and not a legal, burden on the defendant.⁹⁴ Shifting the legal burden of proof onto the defendant would require him or her to prove the defence. The Act should explicitly place the burden of proving the defence on the defendant.⁹⁵
127. Amending the provision in relation to ‘honest belief’ and ‘burden of proof’ under the 2006 Act would make the defence more difficult to assert and therefore less favourable to the defendant. It should be noted that for this defence to be successful, all of these concepts would need to be explained to the jury in full detail by the prosecution counsel and the judge. The jury must be convinced that the defendant had proved that he or she had an honest belief that was reasonably held. In general, juries scrutinise defences raised in criminal trials very carefully.
128. *Use of appropriate legislation*: A child is deemed incapable in law of consenting to sexual assault or indecent assault. There have been reports of cases in which a prosecution for statutory rape was brought in circumstances where a prosecution for rape or sexual assault should have been sought. In such cases a question may have arisen as to whether the child had the capacity to consent to the sexual activity and whether the defendant either knew or was reckless to the fact that the child did not have capacity to consent. This highlights the need to examine the area of capacity of the child to consent to sexual activity. This could be considered in the context of a broader examination of the law in relation to existing sexual offences that apply to children.⁹⁶
129. *Scope of offence*: The 2006 Act replaces the offences of unlawful carnal knowledge under the 1935 Act with two new offences of defilement of a child under 15 and defilement of a child under 17. These new offences are broader in scope in that they include buggery, aggravated sexual assault and *Section 4 Rape*. Consideration should be given to whether it is appropriate to reclassify these offences as defilement of a child or whether these offences should continue to be prosecuted and punished as separate offences against children which involve issues of abuse in addition to the fact of the child’s age.
130. *New offence*: Consideration should also be given to the introduction of a new offence of child sexual abuse, as recommended by the Special Rapporteur for Child Protection, Geoffrey Shannon.⁹⁷
131. *Underage sexual experimentation*: The Director of Public Prosecutions considers the public interest when making a decision on whether to prosecute cases of children who engage in consensual sexual experiment. There is little public interest in prosecuting peer sex (which apart from the underage aspect does not involve any other aspects of abuse) and there has historically been a reluctance to prosecute in these cases.⁹⁸ Reliance on the prosecutorial discretion of the DPP is not sufficient. Likewise, the application of the ‘two-year rule’ is also insufficient in this regard. The Alliance believes that any change to the law must not allow for the prosecution of children under 18 years for consensual sexual activity with another child where there is an equal match in relation to maturity and understanding of their behaviour.⁹⁹ This would also address the gender inequality in Section 5 of the 2006 Act.¹⁰⁰

94 An evidential burden means that he does not have to prove anything, but he must produce some evidence which is believable and could be accepted as true by the jury. The legal burden of proof requires the prosecution to prove the guilt of the defendant and in a criminal case, the standard of proof requires that the prosecution prove their case ‘beyond a reasonable doubt’.

95 However, to protect against constitutional challenge, the standard of proving the defence should be the ‘balance of probabilities’ rather than ‘beyond reasonable doubt’.

96 It is noted that the Law Reform Commission is planning to carry out a codification of sexual offence as part of its new programme of work.

97 Geoffrey Shannon (2007) *Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas* http://www.omc.gov.ie/documents/child_welfare_protection/Report_of_Special_Rapporteur_on_Child_Protection_Geoffrey_Shannon.PDF

98 Some prosecutions have been brought in circumstances where a previous consensual sexual relationship existed but subsequently broke down. Personal communication from a senior legal practitioner.

99 A similar recommendation was made by F. McAuley (2007) *Report of the Criminal Law Rapporteur for the Legal Protection of Children*.

100 This section provides that girls under 17 years who engage in consensual sex are exempt from criminal prosecution (to avoid stigmatising teenage mothers). However, boys under 17 are not.

Recommendations on Protecting the Child in the Criminal Process

132. *Criminal trial process*: 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.¹⁰¹
133. The Alliance calls for all legal proceedings involving children, where the child is participating in the proceedings, to take place in an age appropriate and child friendly manner. A court is an unfamiliar place to a child. The experience of giving evidence in court, with the accused present, can be stressful, intimidating and potentially traumatising; it may result in the 'revictimising' of the child. Any aggressive cross-examination of a child witness, using adult terminology, particularly in sexual abuse cases, is inappropriate.
134. Part III of the Criminal Evidence Act, 1992 contains special provisions which apply to children in relation to the admission of evidence in the case of a prosecution for a sexual offence, an offence involving violence or the threat of violence to the person, and related offences.¹⁰² The implementation of these special provisions should be addressed as a matter of urgency. While the Committee has recommended that at least some of the special protective measures for witnesses are automatically applied to all child complainants, the Alliance recommends that all such protective measures are made compulsory.¹⁰³
135. *Video-link evidence*: The Joint Committee on Child Protection called for the necessary arrangements to be put in place to give practical effect to the statutory provisions for use of video-link evidence and to consider providing this service as widely as possible, ideally nationwide. The Alliance recommends that the Criminal Evidence Act, 1992 is amended to ensure that such facilities be provided for in relation to any witness under the age of 18. Furthermore, the Alliance supports the Committee's recommendation to amend the 1992 Act to ensure that all protective measures apply a single age limit of 18 years for all child witnesses and complainants.¹⁰⁴
136. *Statutory rape trials*: The Alliance supports the Joint Committee on Child Protection recommendation for the prohibition of personal cross-examination of child complainants, and of child witnesses to the offence, by the accused in the case of a sexual offence against a child, and the creation of an alternative means of examining the complainant in line with international best practice.
137. *Cross-examination*: The Alliance also supports the Joint Committee on Child Protection recommendation that further study or appropriate ways of ensuring that cross-examination of child witnesses and complainants is properly and fairly conducted. While the Committee's report refers to the vigilant approach of trial judges in relation to the cross-examination of child witnesses and child complainants in cases of alleged sexual offences, the Alliance recommends that consideration is given to amending the Criminal Evidence Act, 1992 to provide legislative safeguards in relation to the type of evidence that may be introduced at trial, as well as the depth of questioning allowed during cross-examination. The provisions of the Criminal Law (Sexual Offences) Act 2006 could be similarly amended to provide such safeguards in relation to the child complainant.¹⁰⁵

101 Houses of the Oireachtas Joint Committee on Child Protection (2006) *Report on Child Protection*. Recommendations 31-50 in the Table of Recommendations, p.95-97.

102 The Joint Committee found that "the implementation [of these provisions] on a practical level has lagged far behind the legislative reforms." (p.69).

103 Unless the child prefers otherwise, or the court, in the interests of justice, decides otherwise.

104 Currently, the age limit applied is 17 years and is reduced to 14 years in relation to the admission of a video-recorded statement.

105 The Report of the Joint Committee includes an extract from the submission of the Irish Centre for Human Rights, NUIG as follows: "Children, like defendants, have a right to privacy under human rights legal norms. In the use of children as witnesses in sex offence trials, states should recognise limits to the types of evidence that may be introduced at trial, as well as the depth of questioning allowed during cross-examination, e.g. history of sexual activity, clothing, etc. As a central pillar of international human rights law, these fundamental principles should play a role in any consideration of statutory rape laws."

138. *Training:* The Committee also recommended that all lawyers involved in the prosecution or defence of cases of child sexual abuse or sexual offences against children, and all judges hearing such cases, should be required to undergo a specialist programme of training to enable them to perform their respective functions in the manner least traumatic for child complainants and witnesses.
139. *Delay:* The Committee recommends that the arrangements for the listing and hearing of cases involving allegations of child sexual abuse, whether criminal trials or judicial review applications, be reviewed so as to ensure that such cases receive as prompt a hearing as possible, consistent with the rights of the accused.

Provision 5.3

140. The Alliance recommends that provision 5.3 is unnecessary and should be deleted.

Summary of Recommendations

141. 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. The Alliance believes that no child under 18 years of age should be prosecuted for an offence of strict or absolute liability strict or absolute liability. Furthermore, the Alliance believes that the proposed provision on strict or absolute liability should be examined closely to ensure that it is the most appropriate response to the prosecution of offences of sexual exploitation of children.

III. APPENDIX I – List of Alliance Member Organisations

Amnesty International
Ana Liffey Children's Project
The Ark, a cultural centre for children
Association for Criminal Justice Research & Development Ltd
Association of Secondary Teachers Ireland
ATD Fourth World
Barnardos
Barretstown
Border Counties Childcare Network
CARI
Catholic Guides of Ireland
Catholic Youth Care
Childminding Ireland
Children in Hospital Ireland
City of Dublin YMCA
CityArts
Crosscare Aftercare Unit
Crosscare Drug Awareness Programme
DIT –School of Social Sciences & Legal Studies
Dublin Rape Crisis Centre
Dun Laoghaire Refugee Project
Educate Together
Education Department UCD
Enable Ireland
Focus Ireland
Forbairt Naíonraí Teo
Foróige
Home Start National Office Ireland
Hope Voluntary Housing Association
IAYPIC
Inclusion Ireland
Integrating Ireland
IPPA, the Early Childhood Organisation
Irish Autism Action
Irish Association of Hospital Play Staff
Irish Association of Social Workers
Irish Association of Suicidology
Irish Centre for Human Rights, Galway
Irish Congress of Trade Unions
Irish Council for Civil Liberties
Irish Foster Care Association
Irish National Organisation of the Unemployed
Irish National Teachers Organisation
Irish Penal Reform Trust
Irish Traveller Movement
Irish Youth Foundation
ISPCC
Jack & Jill Children's Foundation
Jesuit Centre for Faith & Justice
Junglebox FDYS
Kids' Own Publishing Partnership
Kilbarrack Youth Project
La Leche League of Ireland
Lifestart National Office
Mary Immaculate College
Matt Talbot Community Trust
Miss Carr's Children's Home
Mothers Union
Mounttown Neighbourhood Youth Project
National Association for Parent Support
National Children's Nurseries Association
National Parents Council (Post-Primary)
National Parents Council (Primary)
National Youth Council of Ireland
O.P.E.N.
One Family
One in Four
Parentline
Pavee Point
Peter McVerry Trust
PLANET
Resident Managers Association
SAOL Project – SAOL Beag Children's Centre
Society of St. Vincent de Paul
South West Wexford Community Development
SPARK (Support Project for Adolescent Refugee Kids)
St. Nicholas Montessori College
St. Nicholas Montessori Society
Step by Step Child & Family Project
Sugradh
Tallaght Partnership
Teen Counselling
The Irish Girl Guides
The Irish Refugee Council
The Psychological Society of Ireland
Treoir
UNICEF Ireland
Youth Initiative in Partnership
Youth Work Ireland