

Opening Statement to the Committee on Gender Equality

10 March 2022



Founded in 1995, the Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

Accompaniment Support Service for Children (A.S.S.C.)
Ag Eisteacht
Alcohol Action Ireland
Amnesty International Ireland
An Cosán
Aoibhneas
AsIam
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Barnardos
Barretstown Camp
Bedford Row Family Project
BeLonG To Youth Services
Blossom Ireland
Catholic Guides of Ireland
Child Law Project
Childhood Development Initiative
Childminding Ireland
Children in Hospital Ireland
Children's Books Ireland
Children's Grief Centre
Clarecare
COPE Galway
Cork Life Centre
Crann Centre
Crosscare
CyberSafeKids
Cycle Against Suicide
Dalkey School Project National School
Daughters of Charity Child and Family Service
Dental Health Foundation of Ireland
Department of Occupational Science and Occupational Therapy, UCC
Disability Federation of Ireland
Doras
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dyslexia Association of Ireland
Dyspraxia/DCD Ireland
Early Childhood Ireland
Educate Together
EPIC
Equality for Children
Extern Ireland
FamiliBase
Féach
Focus Ireland
Foróige
Gaelscoileanna Teo
Galway Traveller Movement
Good Shepherd Cork
Immigrant Council of Ireland
Inclusion Ireland
Institute of Guidance Counsellors
Irish Aftercare Network
Irish Association for Infant Mental Health
Irish Association of Social Workers
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Primary Principals' Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation

Jack and Jill Children's Foundation
Jigsaw
Katharine Howard Foundation
Kids' Own Publishing Partnership
Kinship Care
Leap Ireland
Let's Grow Together! Infant and Childhood Partnerships CLG.
LGBT Ireland
Mecpaths
Mental Health Reform
Mercy Law Resource Centre
Migrant Rights Centre Ireland
Mothers' Union
My Mind
My Project Minding You
Museum of Childhood Project
Music Generation
New Directions
National Childhood Network
National Council for the Blind of Ireland
National Forum of Family Resource Centres
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
Novas
One Family
One in Four
Parents Plus
Pavee Point
Peter McVerry Trust
Prevention and Early Intervention Network
Private Hospitals Association
Psychological Society of Ireland
Rainbow Club Cork
Rainbows Ireland
Rape Crisis Network Ireland (RCNI)
Realt Beag/Ballyfermot Star
Respond Housing
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
Scouting Ireland
School of Education UCD
Sexual Violence Centre Cork
SIPTU
Simon Communities of Ireland
Social Care Ireland
Society of St. Vincent de Paul
SPHE Network
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Teachers' Association
St. Patrick's Mental Health Services
TASC
Teachers' Union of Ireland
Terenure College Rugby Football Club
Transgender Equality Network Ireland
The Anne Sullivan Foundation
The Ark, A Cultural Centre for Children
The Irish Red Cross
The UNESCO Child and Family Research Centre, NUI Galway
Traveller Visibility Group Ltd
Treoir
UNICEF Ireland
Women's Aid
Youngballymun
Young Social Innovators
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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The Children’s Rights Alliance thanks the Committee for the opportunity to present on this important topic. We welcome the recommendations of the Citizens Assembly on Gender Equality.

The Alliance unites over 140 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children by making sure their rights are respected and protected in our laws, policies and services. We also provide legal information and advice to children, young people and their families through our legal information line and nationwide legal advice outreach clinics.

We understand the focus of today’s hearing is to concentrate on the recommendations related to potential constitutional amendments. We welcome the proposed inclusion of a reference to gender equality and non-discrimination in Article 40.1 of the Constitution given these are human rights recognised in international law and in particular, non-discrimination – including on the basis of gender – is a fundamental principle of the UN Convention on the Rights of the Child (UNCRC). The Convention on the Elimination on all forms of Discrimination against Women (CEDAW) also obliges the State to take ‘all appropriate measures’ to address and modify societal attitudes and behaviour that lead to gender stereotyping in terms of the roles experienced by women and the girl child.ⁱ We also recognise and welcome the proposal and discussions on replacing Article 41.2 with gender neutral language that will fully reflect the diverse nature of caregiving particularly in light of the fact that the 2016 Census identified 3,800 young carers in Ireland.ⁱⁱ

We intend to focus our presentation on the second recommendation of the Committee, namely amending Article 41 of the Constitution ‘so that it would protect private and family life, with the protection afforded to the family not limited to the marital family’.

The structure of Irish family life has changed significantly in recent decades and the Citizen’s Assembly proposal has the potential to ensure that the reality of diverse family types is recognised and granted constitutional protection. This change has the potential to impact positively on the lives of nearly half a million children who are growing up within non-marital families.

- In 2020, 38.4 per cent of births were registered as being outside of marriage.ⁱⁱⁱ
- In 2016 the census recorded 215,817 one parent households and^{iv} 75,587 unmarried cohabiting couples with children.^v

The Irish Constitution places great importance on the family and defines it as ‘the natural, primary and fundamental unit group of society’ (Art. 41). However, in the past the Irish Courts have narrowly interpreted the constitutional family as only including marital families and this provision has been relied upon to uphold unequal treatment.^{vi} The benefits of updating the definition of the family in the constitution to extend it beyond the marital family include legal clarity, promoting legal stability, greater relational stability and security, and reduced stigma.^{vii}

International Human Rights Standards

It is clear that under international human rights standards, the State has an obligation to afford children living in all family types the same rights and protections.

Parents and families are central to a child’s life and the rights of parents and children are inextricably linked. The UN Convention on the Rights of the Child clearly highlights the important relationship between children’s rights and those of their family and focuses on the substance of family relationships rather than the form. The UNCRC:

- Recognises the family as the ‘fundamental group of society and the natural environment for the growth and wellbeing of...children’ (Preamble).
- Acknowledges that parents have the ‘primary responsibility’ for their child’s upbringing and development (Article 18).
- Affirms that the family itself requires protection and assistance to fulfil its responsibilities and places a duty on States to support parents in rearing their children (Article 18).

Under the UNCRC the term ‘parent’ is interpreted to mean genetic, birth and psychological parent, the latter referring to a person who is not biologically related to the child but cares for the child for significant periods of their childhood.^{viii}

Children have a right to be protected from discrimination irrespective of the child’s parents/guardians’ marital status or sexual orientation under Article 2 of the UNCRC. The Committee on the Rights of the Child has recognised that ‘young children may suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values’.^{ix} The Committee has set out that States ‘have a responsibility to monitor and combat discrimination in whatever forms it takes and wherever it occurs - within families, communities, schools or other institutions’.^x

In addition to the principles outlined in the UN Convention on the Rights of the Child, Article 8 of the European Convention on Human Rights (ECHR) provides that ‘Everyone has the right to respect for his private and family life, his home and his correspondence’.

The European Court of Human Rights has recognised the right to family life in cases where there are close personal ties between the parties rather than looking at the format of the non-married family unit or whether or not the parents of the child live together.^{xi} The Court has also determined that Article 8 further extends its protection of family life^{xii} to relationships between children and grandparents,^{xiii} siblings,^{xiv} and also aunts and uncles.^{xv} Interestingly our domestic legislation – the Children and Family Relationships Act 2015 – reflects the importance of these relationships and allows for all of those named categories to apply for custody of the child.^{xvi}

Article 14 of the ECHR also prohibits discrimination, for example on grounds of birth, when ECHR rights are engaged. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) also prohibits discrimination on any ground including birth or other status.

It is clear that under international human rights obligations all family types should be afforded the same rights and protections. The Constitution should be updated to reflect this

So what would the change mean for children and young people living in Ireland?

Historically, children from non-traditional families have often been treated differently to those in the married family. For example, consider the recent reports on mother and baby homes and the lack of respect afforded to unmarried mothers and their children.^{xvii}

The Irish Constitution, as interpreted by the courts, only affords married families constitutional recognition. According to relevant case law, the elevated status of this family form does not simply mean that the State cannot discriminate against marital families; it also sanctions unequal treatment of other family groups. On numerous occasions Irish courts have interpreted the constitutional priority afforded to marriage in a manner that has adverse concrete effects for other families and individuals.

Article 41 has been used to uphold discrimination against children born outside marriage in areas such as succession rights,^{xviii} and non-recognition of an unmarried mother and her child as being a family entitled to constitutional protections.^{xix}

Under the UNCRC the best interest of children should be a primary consideration in all actions concerning a child.^{xx} The Committee states that the principle should be determined on a case-by-case basis and 'should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs'.^{xxi} The best interests principle has a three-fold meaning: a substantive right, a fundamental, interpretative legal principle and a rule of procedure.^{xxii}

One of the most infamous Irish legal cases where the rights of the marital family overruled the best interests principle (which at the time was not incorporated into the Constitution) was the so-called 'Baby Ann' case.^{xxiii} In that case unmarried parents who put their child up for adoption and who then subsequently married were found to have, upon their marriage, become a constitutional family protected under Article 41. This resulted in the child, who had spent two years with her prospective adoptive parents and formed a bond with them, being removed from their care at an important formative time for that child. Judge Catherine McGuinness – dissenting noted that the best interests of the child were not represented in the case.

While there has subsequently been reform and constitutional amendments regarding the best interests of children, it remains that the marital family is the only family type recognised in the Irish Constitution. To date, no significant jurisprudence has emerged, to our knowledge, where these two articles interact. In the absence of any constitutional amendment to Article 41.2, it is open to courts and legislators into the future to decide cases and introduce legislation that favours the marital family over other family types. To ensure that this cannot happen constitutional reform is needed. Article 41 of the Constitution should be amended so that it would protect private and family life, with the protection afforded to the family not limited to the marital family.

The symbolism that this change could bring about cannot be underestimated for those families and children who fall outside the current constitutional definition of family. It will send a clear message to them and to society as a whole that their families matter and are considered equal.

Endnotes

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- ⁱ Article 5, Convention on the Elimination of All Forms of Discrimination against Women.
- ⁱⁱ Central Statistics Office, 'Census of Population 2016 - Profile 4 Households and Families' <<https://bit.ly/3sNg2BP>> accessed 7 March 2022.
- ⁱⁱⁱ Central Statistics Office, 'Vital Statistics Yearly Summary 2020' <<https://bit.ly/3CjPprm>> accessed 7 March 2022.
- ^{iv} Central Statistics Office, 'Census of Population 2016 - Profile 4 Households and Families' <<https://bit.ly/3sNg2BP>> accessed 7 March 2022.
- ^v Central Statistics Office, 'Census of Population 2016 - Profile 4 Households and Families' <<https://bit.ly/3sNg2BP>> accessed 7 March 2022.
- ^{vi} *The State (Nicolaou) v An Bord Uchtala & The Attorney General* [1966] IR 567; *N & Anor v HSE & Others* [2006] 4 IR 374
- ^{vii} American Psychological Association (28 Mar., 2008), Proof Brief of the American Psychological Association as Amicus Curiae in support of Plaintiff-Appellees, Supreme Court Case No. 07-1499 *Katherine Varnum et al. v. Timothy J. Brien*
- ^{viii} UNICEF (2007) Implementation handbook for the *UN Convention on the Rights of the Child, Fully Revised third Edition*, Geneva: United Nations Children's Fund, pp.104-5.
- ^{ix} UN Committee on the Rights of the Child, *General Comment No. 7 on implementing child rights in early childhood* CRC/C/GC/7/Rev.1 20 September 2006.
- ^x UN Committee on the Rights of the Child, *General Comment No. 7 on implementing child rights in early childhood* CRC/C/GC/7/Rev.1 20 September 2006.
- ^{xi} *Johnston v Ireland* (1986) 8 E.H.R.R. 214 and *Keegan v Ireland* (1994) 18 E.H.R.R. 342. Article 8 of the ECHR guarantees respect for private and family life, home and correspondence. The general principle applied by the European Court of Human Rights in deciding if family life exists for the purpose of art.8 is whether there are close personal ties between the parties. The family based on marriage comes within art.8, and the court has also recognised family life in the context of a cohabiting heterosexual couple with children in *Johnston*. Cohabitation is not necessary though and in *Keegan* family life was found where the couple were not living together.
- ^{xii} As noted by Kilkelly, "Child Law and the ECHR: Issues of Family Life, Adoption and Contact" in Kilkelly, *ECHR and Irish Law*, 2nd edn (Bristol: Jordans, 2009) at 135.
- ^{xiii} *Marckx v Belgium* (1979-1980) 2 E.H.R.R. 330.
- ^{xiv} *Boughanemi v France* (1996) 22 E.H.R.R. 228.
- ^{xv} *Boyle v United Kingdom* Comm. Rep. 9 February 1993.
- ^{xvi} Children and Family Relationships Act 2015, s.57.
- ^{xvii} Mother and Baby Homes Commission of Investigation, *Final Report*, (DCEDIY 2021); MerrionStreet.ie 'Statement of An Taoiseach: Report of Commission of Investigation into Mother and Baby Homes and certain related matters, 13 January 2021, <https://merrionstreet.ie/en/news-room/releases/statement_of_an_taoiseach_.html> accessed 8 March 2022.
- ^{xviii} *O'B v S* [1966] IR 567 (Sup. Ct.).
- ^{xix} *G. v An Bord Uchtála* [1980] IR 32.
- ^{xx} UN Convention on the Rights of the Child, A/RES/44/25 (20 November 1989), Article 3.
- ^{xxi} UN Committee on the Rights of the Child (2013) *General Comment No. 14: The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14
- ^{xxii} *Ibid.*
- ^{xxiii} *N. & anor. -v- Health Service Executive & ors* [2006] IESC 60.