



## The Case for Constitutional Change

Barnardos supports children whose well-being is under threat, by working with them, their families and communities and by campaigning for the rights of children. Barnardos was established in Ireland in 1962 and is Ireland's leading independent children's charity.

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## Foreword

Barnardos' vision is an Ireland where childhood is valued and all children and young people are cherished equally. As the Irish Constitution is the supreme source of law in Ireland, Barnardos believes that all children deserve to be fully protected by it in their own right rather than seen as a unit of a family. This move would show Ireland's commitment to valuing and respecting childhood.

Barnardos' mission is to challenge and support families, communities, society and government to make Ireland the best place in the world to be a child, focusing specifically on children and young people whose wellbeing is under threat. It is these children who would benefit most from an express commitment to their rights within the Irish Constitution as it could have a real and positive impact on their lives.

Giving a voice to children and ensuring their welfare and protection is crucial to enable children reach their full potential in all aspects of their lives as they progress into adulthood. The advancement of these principles, as enshrined in the UN Convention on the Rights of the Child, forms the cornerstone to the Barnardos' campaign calling for constitutional reform.

An amendment to the Constitution to strengthen the rights of children would have an impact on future legislation and policies, modernise family law and the provision of accessible and appropriate services. All of these combined will contribute to making Ireland the best place in the world to be a child.

*Fergus Finlay*

Fergus Finlay

Chief Executive, Barnardos

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## Part 1 - The Case for Constitutional Change

### Introduction

The Irish Constitution was adopted in 1937 and as the most important document in the Irish legal system is central to the administration of Government and the relationship between the State and its citizens. Fundamentally, the Constitution recognises the personal rights of the citizen and it sets limits on what the State can do and how it can do it.

Although it contains strong protection for the family, the Constitution is virtually silent on children's rights. This has made it difficult to protect and promote children's rights adequately in practice and while there is no consensus as to how this should be achieved, it is widely accepted by those working with children that some change is required to address this situation at a constitutional level. This document sets out the difficulty with current constitutional provision for children and explains why change is necessary to ensure better protection of children in Ireland.

### Children's Rights and the Irish Constitution

Articles 40 to 44 of the Irish Constitution set out the rights to which all citizens are entitled and can be summarised as follows:

- Article 40 recognises that every citizen has personal rights including equality before the law, the right to have one's life, property and good name protected and the right to liberty
- Article 41 concerns the rights of the family and recognises its status as the fundamental unit in society. The State guarantees to protect the family and guard the institution of marriage, on which the family is founded, from attack
- Article 42 deals with education and recognises that the family is the primary educator of the child. It also provides that the State shall endeavour to supply the place of parents in exceptional cases where the parents fail in their physical and moral duty towards their child
- Article 43 sets out the right to property, and
- Article 44 recognises freedom of conscience and the right to practise religion.

Although they make express reference to the rights of the family these provisions make little express provision for the rights of the child. Accordingly, it is clear the child's existing constitutional rights are inextricably linked to the rights of the family. Indeed, the Supreme Court has summarised the rights that children as family members enjoy under the Constitution as:

- The right to belong to a family and the right to have the family protected (Article 41)
- The right to be educated by the family (Article 42)
- The right to be provided by its parents with religious moral, intellectual, physical and social education (Article 42).<sup>1</sup>

Despite the value of this protection, the Constitution currently provides little protection for the independent rights of the child.

According to the Supreme Court Article 41, which sets out the rights of the family, recognises only the family based on marriage and only the marital family is thus entitled to the protection and guarantees of Articles 41 and 42.

1. In Re JH [1985] IR 375

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In contrast the rights of the non-marital family and its members are “personal rights” and flow instead from Article 40.3.<sup>2</sup> This may lead to differential treatment of children depending on their parents’ marital status.

### Few Express or Implied Constitutional Rights for Children

Article 40.3 of the Constitution recognises that it is the duty of the State to vindicate the personal rights of the citizen as far as practicable. This wording has allowed the Supreme Court to ‘enumerate’ or identify personal rights through case-law and in this way, for example, the right to physical integrity and the right to earn a living have been given constitutional protection. In the same way, this provision gives the courts scope to enumerate the individual rights of the child.<sup>3</sup> For example, in 1980, the Supreme Court recognised that under Article 40.3 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.”<sup>4</sup> Other case-law has highlighted the child’s right to be reared with due regard for his/her welfare,<sup>5</sup> and in 2006 the High Court held that the State must consider the rights of the child when deciding whether the child’s parents have a right to remain in the State.<sup>6</sup> Generally, however, there has been little development of children’s rights in case-law. Even if there had, the fact that these rights are part of judge-made law, rather than expressly protected in the Constitution, means that they can be diluted or removed in later judgment. This is an uncertain and weak level of constitutional protection to give children’s rights.

### The Superior Rights of the Family

Article 41 recognises that the family, defined as the family based on marriage, occupies a superior position in society, which requires that its integrity and its authority must be respected. In reality, this means that any rights which the child enjoys under the Constitution or in legislation must be interpreted in line with the rights of the family. Under Article 42.5, the State must endeavour to supply the place of parents who have failed in their physical and moral duty towards their child but only “in exceptional circumstances”. According to the Supreme Court, this operates as a presumption that the welfare of the child is to be found within the family (based on marriage) unless there are compelling reasons to the contrary.<sup>7</sup> This is a high threshold for state intervention in the family, which has made it difficult to ensure that children at risk are adequately protected. Together, these provisions mean that the constitutional emphasis on the family has led to the rights of children being ignored or underplayed in favour of the rights of parents. These problems are also apparent from the following two cases:

### The PKU case

The PKU case, decided by the Supreme Court in 2001, concerned a dispute between the Health Board and the parents of a new-born infant who refused to give their consent to have the PKU test carried out.<sup>8</sup> The PKU test involves taking a drop of blood from the baby’s heel to test for four medical conditions which, while serious, are fully treatable if detected on time. The Health Board believed the test was strongly in the child’s interests but the parents disagreed believing it caused harm to the child.

The dispute ended up before the Supreme Court and, deciding in favour of the parents, the Court held that no matter how unreasonable or irrational their decision, it was one which they were entitled to make under the Constitution. The overwhelming benefits to the child of having the test done were thus a secondary consideration to the State’s duty to respect the integrity of the family in the circumstances of the case.

### The Baby Ann case

Baby Ann was placed for adoption by her then unmarried parents. They subsequently married and brought a constitutional action to have her returned to them. In September 2006, the High Court found there to be compelling reasons why Ann’s welfare was not best served by returning her to her natural parents - she had become highly attached to her prospective adoptive parents with whom she had lived for almost two years and other factors suggested that transfer of custody could not be undertaken successfully without causing her emotional and psychological harm. On 23 November 2006, the Supreme Court reversed this decision holding that the correct test was whether the married parents had failed in their duty to their child. As they had not - placing her for adoption did not constitute such failure - the Court found no basis for displacing the presumption that Ann was best raised in their care.<sup>9</sup> It was clear, overall, that the constitutional position of the family based on marriage made it virtually impossible for baby Ann to be adopted.

### Different Outcome?

It is not possible to say that the Supreme Court would have reached a different conclusion in either of these cases were children’s rights expressly protected under the Constitution. Although much depends on the wording adopted and the approach taken, provision for children’s rights in the Constitution would have facilitated if not required greater weight to be placed on the rights and interests of the child in these decisions and would have encouraged a more child-focussed perspective to be taken in the decision-making process. In this way, express constitutional protection for children’s rights might guide the Supreme Court to decide any future PKU or Baby Ann case not just from the perspective of the parents, but also from the perspective of what is in the child’s best interests. This might result in a substantially altered decision-making process, if not also a different conclusion in such cases.

### Express Consideration of Children’s Rights

The absence of children’s rights from the Constitution also has consequences for the way in which other decisions were made outside the family area. The CC case, decided on 23 May 2006, provides an illustration here.<sup>10</sup> In this case, the Supreme Court found that section 1.1 of the Criminal Law (Amendment) Act 1935, which criminalised sexual relations with girls under 15 years in absolute terms, was contrary to the Constitution because it did not allow the defence of reasonable mistake as to the girl’s age. A week after this judgment, another man, Mr A, who had been convicted under section 1.1 of unlawful sex with a young girl, sought to rely on the CC case to challenge the legality of his detention.

2. The State (Nicolau) v An Bord Uchtala [1966] IR 567

3. In Re Article 26 and the Adoption Bill (no 2) 1987 [1989] IR 656

4. G v An Bord Uchtála [1980] IR 32

5. DG v Eastern Health Board [1997] IESC 7, [1997] 3 IR 511, [1998] ILRM 241 (Supreme Court) and FN and EB v CO [2004] IEHC 60, [2004] IR 31 (High Court)

6. Bode and Others v Minister for Justice, Equality and Law Reform, unreported judgement of the High Court, 14 November 2006

7. In Re JH [1985] IR 375

8. North Western Health Board v HW and CW [2001] IESC 90, [2001] 3 IR 622

9. N and Others v Health Service Executive [2006] IESC 60

10. CC v Ireland, the Attorney General and the DPP [2006] IESC 33

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On 30 May 2006, the High Court found that as the relevant provision had been found to be unconstitutional Mr A's detention was indeed unlawful and it ordered his release. However, the Supreme Court overturned this decision on appeal on 10 July 2006. On the facts, the Supreme Court found that because Mr A had been convicted following a guilty plea, and had clearly known the age of his victim who was a friend of his 12-year-old daughter, the defence of reasonable mistake was not available to him in any event. More generally, the Court held that it was not in the interests of the common good for laws found to be unconstitutional to be held completely invalid in such cases. The Court concluded that in the circumstances the release of Mr A would be an affront to true social order and to the rights of the victim and her family. Accordingly, his return to prison was ordered.<sup>11</sup>

### Different Outcome?

Had children's rights been expressly recognised in the Constitution when these cases were decided, they might have been decided differently in terms of either substance or procedure. In CC, for example, strong express provision for children's rights might have required the Court to give express consideration to the rights of the child when considering the constitutionality of the relevant statute. This is by no means certain given the strength of the Court's judgment on the subject of due process rights. In the case of Mr A, express constitutional protection for the rights of the child might have allowed the Court to take full account of the rights of child victims as an important illustration

of the 'common good'; although the outcome might have been the same, the justification for the decision would have been more child-focussed with possible implications for further decisions also.

All the cases highlighted above demonstrate the impact that the lack of express protection for children's rights in the Constitution can have on the way in which judicial decisions are made. In particular, they illustrate the extent to which children may be of secondary importance in legal proceedings that concern them, and that they are not given serious consideration when conflict arises between their rights and those of others. Although much depends on the approach taken to the constitutional amendment and the strength of its wording, there is some scope for arguing that either process and/or outcome might be different in these kinds of cases were the Constitution to contain express provision for children's rights.

### Children's Rights in Ireland

In addition to the legal issues, the case for constitutional change must be considered in the light of Ireland's record in the promotion and protection of children's rights. Improvements have been made in recent years to the situation of Irish children but many serious problems remain. They can be summarised as follows:

- One in ten children live in consistent poverty<sup>12</sup> and do not have adequate access to housing, healthcare and education

- Educational disadvantage creates a significant obstacle for many young people and can have a negative impact on them throughout their lives. Almost one in three children from disadvantaged areas have severe literacy difficulties<sup>13</sup>
- Children with disabilities and children from ethnic minorities suffer discrimination in accessing healthcare and education appropriate to their needs<sup>14</sup>
- Mental health services for young people are woefully inadequate, there are only 20 in-patient beds in the country for the assessment and treatment of children and adolescents under the age of 16 years<sup>15</sup>
- Children have no separate representation in divorce proceedings and have no right to be heard in judicial and administrative decisions that affect them<sup>16</sup>
- There is inadequate support for families in crisis and children at risk and an absence of preventive, early support and specialised therapeutic services<sup>17</sup>
- Separated children (children outside their country of origin separated from parents or other caregivers) suffer discrimination in their access to the care and protection of the State. Over 300 separated children have disappeared from care of the State in the past five years.<sup>18</sup>

### Lack of Political Priority

Many of these problems can be said to stem indirectly from the weak constitutional protection enjoyed by children. In particular, the current constitutional situation means that children's issues are not given political

priority, children's interests are not always given due weight in matters which affect them and their voices are not always heard when relevant decisions are made. The absence of children's rights from the Constitution also means that there is little guidance for those taking decisions in areas which directly concern children such as education, health care or family law. Nor is there guidance available in areas which indirectly affect children such as the criminal law, the planning process and environmental decisions. The weak constitutional provision thus has a knock-on effect on how and what decisions are made in matters of law, policy and how resources are allocated.

### Absence of an Effective Remedy

Combined with this, current weak constitutional provision for children's rights means that children and their families have access to few remedies to challenge inadequate access to children's services. This was highlighted in the TD case in 2001 which concerned the rights of a number of extremely vulnerable children who required care in a secure setting.<sup>19</sup> The Government had given a commitment to putting the accommodation in place, but consistently failed to do so despite orders of the High Court. The legal issue at stake was whether the courts could order the Government to provide the placements which were necessary to vindicate the children's rights to care and protection. The Supreme Court decided that even though the rights of children were at stake, it could not interfere with Government's exercise of its power, upholding what is known as the 'separation of powers' principle, which provides that the

11. A v the Governor of Arbour Hill Prison [2006] IESC 45

12. EU SILC study: Central Statistics Office (Cork, 2005)

13. National Assessment of English Reading in 2004, Report by the Education Research Centre, (Dublin: Department of Education and Science, 2006)

14. Make the Grade Report: Barnardos (Dublin, 2005)

15. A Better Future Now: A report by the Irish College of Psychiatrists, (Dublin, 2004),

16. Rights-based Child Law: The case for reform. A report by the Law Society's Law Reform Committee (Dublin: Law Society of Ireland, 2006) pp 64-103.

17. Kilkelly, Small Voices: Vital Rights Submission to the United Nations Committee on the Rights of the Child (Dublin: Children's Rights Alliance, 1997) pp 31-36 and Children's Rights Alliance, From Rhetoric to Rights: Second Shadow Report to the Committee on the Rights of the Child (Dublin: Children's Rights Alliance, 2006) pp 29-40

18. www.irishrefugeecouncil.ie

19. TD v Minister for Education, the Attorney General and the Eastern Health Board [2001] IESC 101, [2001] 4 IR 259

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three branches of the State – the judiciary, the government and the legislature - are separate and independent from each other. As a result, the children were unable to challenge further the Government's failure to make adequate provision for their needs.

### What effect will giving constitutional protection to children's rights have?

Putting children's rights into the Constitution will not transform children's and families' lives overnight. Nor is it a panacea for the many problems faced by children and young people in Ireland today. Much depends on the approach adopted, the wording chosen and on the political will to translate a constitutional amendment into real change in children's services and lives.

These caveats aside, putting children's rights into the Constitution has the potential to bring about positive change for children. For example, it can help to:

- require express consideration to be given to children's rights in all areas of decision-making including policy and law making, expenditure of resources and judicial and administrative decision-making
- provide a remedy in the courts to children, parents and their representatives who seek to challenge the failure to fulfil commitments to children's rights
- raise the profile of children's issues by putting them on the political agenda.

It may also have the following advantages:

**Symbolic Commitment to Children's Rights:** Giving constitutional protection to children's rights has a symbolic value as it highlights the value that the State and society place

on children and childhood. In light of Ireland's poor record in child protection, the amendment could represent a commitment to securing the rights of current and future generations of children.

#### Political Mandate:

Rights and principles which enjoy express constitutional provision must be protected from interference and no law or policy can be passed which interferes with them. Children's rights set out in express form in the Constitution will require protection by present and future governments and all state bodies will have a duty and a mandate to protect them through legislative, judicial and administrative decision-making and the appropriate allocation of resources.

#### Challenging Legislation and Decisions:

Depending on the form the provision takes, putting children's rights into the Constitution should give individuals the legal right to challenge legislation and administrative action which are inconsistent with that protection. In this way, it can provide the benchmark against which all government action can be measured. Legislation may also be referred to the Supreme Court by the President of Ireland to test its compatibility with the children's rights provision.

#### Will this cost money?

Putting children's rights into the Constitution in express form will establish children as one priority for the allocation of resources. A duty to vindicate the rights of the child will provide a clear focus for budgetary decisions and should ensure that resources are directed to the areas necessary to make children's rights a reality.

#### Will it impact on the family?

As the case-law above explains, current constitutional provision is imbalanced insofar as it favours the rights of parents over the rights of children. While this has undoubtedly curbed excessive state interference in the family by making it very difficult to permanently remove children from their parents, it has also led to under-investment in family support services and a reluctance on behalf of social services to get involved with families that need help. The high threshold for state intervention in the family has caused severe difficulties for some children. For example, children of married parents whose welfare demands that they be provided with alternative care cannot be adopted under current constitutional provision; they and their families are thus left in an uncertain and transient situation. Constitutional change is thus necessary to ensure that all children are fully protected from abuse and neglect and that children who cannot remain with their families receive appropriate long-term alternative care, including adoption. It is also required to ensure that all children enjoy their rights equally, regardless of the nature of their family arrangements.

#### Will it mean less rights for parents?

It is sometimes said that giving rights to children takes rights away from parents and that the family is weakened as a result. However, this ignores the fact that many of the rights of children and parents are mutual. For example, children have a right to grow up in their natural families and parents have a right to educate and rear their children; recognising the child's right thus does not necessarily take away rights from parents. In fact, giving constitutional

protection to children's rights should mean that the State must support all families more effectively in order to vindicate the rights of children and parents together. The fact that the rights of young children are exercised by their parents on their behalf should mean that constitutional protection for children's rights will strengthen rather than undermine the family, in all its forms.

It is clear that currently the scales of constitutional protection are tipped in favour of parents, especially married parents, rather than children and that this has had negative consequences for some children. Children may also be subject to differential treatment depending on their parents' marital status. While much depends on the wording of any amendment, the existing recognition in Article 41 that the family has superior rights should ensure that any realignment of the relationship between parents and children in the Constitution will be subtle rather than radical. What is vital is that all children who need protection from abuse and harm receive it, while at the same time all families are supported to make this a reality. Any state involvement in the family must always be limited by what is required to protect the rights of the children involved as well as governed by constitutional guarantees of fair procedures.

#### What is the international experience?

The United Nations (UN) Convention on the Rights of the Child illustrates how legal recognition of children's rights can raise the profile of children's issues and bring about real change in children's lives. Adopted by Ireland in 1992, the Convention enjoys enormous international support and its detailed and comprehensive standards

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operate as important benchmarks against which progress towards implementing children's rights can be measured. However, as it does not have the force of Irish law, it cannot be relied upon before the courts and children have nowhere to seek a remedy when their Convention rights have been violated. The UN Committee on the Rights of the Child, which monitors implementation of the Convention, has recommended that this situation be addressed, although how this is done is a matter for the Irish Government.

Reviewing the experience of other countries, it is apparent that there is no single approach to providing constitutional protection for children's rights. Every country has adopted the approach most appropriate to its needs and circumstances meaning that the level of detail and protection given to children's rights in constitutional documents varies dramatically from one country to another. The South African Constitution, for example, contains a very detailed provision on the rights of the child, while many other countries, particularly Central and Eastern European countries, limit their provision for children's rights to specific areas such as the right to education and health care, the right to a family and the right to care and protection. More innovative approaches include that of Spain, whose Constitution makes express reference to international obligations on children's rights, and Poland, whose Constitution places a duty on the State to give priority to the views of the child when vindicating the child's rights. The Constitutions of Switzerland and Finland recognise in different ways that children's ability to exercise their rights increases with their maturity. Also Portugal has special provisions in its Constitution for both children and young people to ensure their development and enjoyment is protected.

### Recommendations for constitutional change

A wide range of bodies and groups have highlighted the problems described above over the last few decades. They have also gone on to make recommendations for constitutional change to give express constitutional protection to children's rights.

#### The Kilkenny Incest Investigation 1993

Calls for constitutional reform were first made by the Task Force on Child Care Services in 1980<sup>20</sup> and then by the Report of the Kilkenny Incest Investigation chaired by Ms Justice Catherine McGuinness in 1993.<sup>21</sup> In the context of investigating the State's failure to adequately investigate claims of child abuse, the report noted in particular 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 rights of parents than to the rights of children." It recommended that an explicit statement on the constitutional rights of all children be included in Articles 41 and 42 of the Constitution to address this imbalance.

#### The Constitution Review Group 1996

In 1996, the Constitution Review Group (CRG), which undertook a comprehensive review of the Constitution, highlighted the inadequacy of constitutional protection for children and accepted the need for a review of Articles 41 and 42.<sup>22</sup> In particular, it recommended change to Article 41 in order to guarantee to all individuals the right to respect for their family life, whatever form it takes, and it also proposed that the provision be amended to include an express

guarantee of certain rights of the child including, for example, the right to be registered and to have a name, the right to know and be cared for by his/her parents, the right to be reared with due regard to his/her welfare and an express requirement that in all actions concerning children, the best interests of the child shall be the paramount consideration. The Commission on the Family endorsed this recommendation in its final report in 1998.<sup>23</sup>

#### All Party Oireachtas Committee on the Constitution 2006

In January 2006, the need for constitutional expression of children's rights was recognised by the All Party Oireachtas Committee on the Constitution. Having received extensive submissions from a wide variety of groups concerned with children and the family, it recommended that a new section be inserted into Article 41 as follows:

“All children, irrespective of birth, gender, race or religion, are equal before the law. In all cases where the welfare of the child so requires, regard shall be had to the best interests of that child<sup>24</sup>”

#### The UN Committee on the Rights of the Child 1998 and 2006

In 1998, the UN Committee on the Rights of the Child recommended that the Irish Government take all measures necessary to accelerate the implementation of the advice of the Constitutional Review Group on the need for constitutional change. It also urged the Government to:

“take further steps to ensure that the Convention is fully incorporated as part of the domestic law, taking due account of its general principles as defined in Article 2 (non-discrimination), Article 3 (best interests of the child), Article 6 (right to life, survival and development) and Article 12 (respect for the views of the child)”

20. Task Force on Child Care Services, Final Report (Dublin: The Stationery Office, 1980)

21. Eastern Health Board, Kilkenny Incest Investigation: Report presented to Mr Brendan Howlin, TD, Minister for Health (Dublin: Stationery Office, 1993) p 96

22. Report of the Constitution Review Group (Dublin: Stationery Office, 1996)

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

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

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In 2006, the UN Committee reiterated this recommendation. It also advised the Government to take measures to ensure that the best interests principle is “applied in all political, judicial and administrative decisions” that have an impact on children and recommended that it

“strengthen its efforts to ensure, including through Constitutional provisions, that children have the right to express their views in all matters affecting them and to have those views given due weight in particular in families, schools and other educational institutions, the health sector and in communities”<sup>25</sup>”

### Review by the Office of the Minister for Children

On 26 September 2006, before the UN Committee on the Rights of the Child, the Minister for Children, Brian Lenihan, TD, announced that the Office of the Minister for Children would undertake a further review of the Constitution line-by-line with a view to bringing forward further proposals for constitutional change.<sup>26</sup> The outcome of this review is awaited.

### Announcement of An Taoiseach, 2006

In the interim, on 3 November 2006, An Taoiseach announced the Government’s intention to hold a constitutional referendum to insert children’s rights into the Constitution.<sup>27</sup> According to An Taoiseach:

“It appears increasingly clear that the inadequate recognition in our constitutional law of the rights of children as individuals has to be addressed. That is an essential first step in creating a new culture of respect for the rights of the child”

An Taoiseach went on to note that:

“Our objective should be to have, in our fundamental law, provisions which are as strong and as effective as that possessed by any other country in the world. We should be second to none in giving effect to our commitment to truly value childhood. That is why I believe we should have a constitutional referendum to put the rights of children in a central place in our Constitution”

He added that this should include provision “for children to be protected from maltreatment, neglect or abuse” and also a recognition that the “welfare of the child should be the paramount consideration.”

### Joint Committee on Child Protection, 2006

On 30 November 2006, the Joint Committee on Child Protection made a wide number of recommendations in the context of its review of child protection laws including the age of sexual consent. Of particular relevance here is its recommendation to amend the Constitution to permit the Oireachtas to enact laws providing for absolute criminal liability in respect of sexual activity with children under 16 years, or 18 years where the alleged abuser is a person in authority.<sup>28</sup> This seeks to return the law to the position that existed prior to the decision of the Supreme Court in the CC case, highlighted above.

### Conclusion

Those working with, and for children, agree that constitutional change is required to ensure that children are fully protected in society and that their rights are taken into account in decisions made about them. In this way, a constitutional amendment has the potential to bring about significant and positive change in children’s services and child protection. While the political will appears to exist, the approach taken and wording chosen will be crucial as to whether this potential is realised.

Written by Dr Ursula Kilkelly,  
Senior Lecturer, Faculty of Law,  
University College Cork

25. Committee on the Rights of the Child, Summary Record of the 1182nd Meeting (Chamber B) ; Press Release 29 September 2006

26. Minister for Children welcomes UN Committee’s report on progress made in the position of children in Ireland’ available at [www.omc.gov.ie](http://www.omc.gov.ie) (1 December 2006)

27. The Examiner Breaking News, 3 November 2006; The Independent, 4 November 2006 and The Irish Times, 4 November 2006

28. Houses of the Oireachtas Joint Committee on Child Protection, Report on Child Protection November 2006 (Dublin: Stationery Office, 2006) p 81

## Part 2 - Children's Rights in the Constitution - Barnardos' Campaign

### Introduction

Barnardos launched a national campaign for the insertion of an express commitment to children's rights into the Irish Constitution in November 2006. This campaign comprises the following components:

- Drafting of proposed wording
- Conducting a national poll
- Hosting a national conference on children's rights
- Public awareness advertising campaign
- Political lobbying

While preparation for this campaign was ongoing, the external political environment was changing rapidly culminating in the announcement by An Taoiseach on November 3rd 2006 of the intention to hold a referendum on children's rights. This announcement was very welcome just ahead of our national conference and provided an extra backdrop for Barnardos to launch its public awareness campaign.

Barnardos' proposed wording, devised in consultation with legal experts, is discussed later in this chapter. A brief overview of the key findings of the national poll is presented below, followed by a summary of the consultations with children.

### Conducting Public Research

#### Methodology

Barnardos commissioned Behaviour and Attitudes, an independent market research company, in August 2006 to undertake qualitative and quantitative research to

measure public attitudes to children's rights. The qualitative component comprised a limited number of small focus groups being conducted throughout the country with respondents from different geographic and socio-economic backgrounds participating in the research.

The quantitative research was conducted in September 2006 when Barnardos added a series of questions on children's rights to the Behaviour and Attitudes' Barometer study. This study interviewed over 1,200 adults in 60 sampling locations across the country. The sample is representative as quotas on respondents are set according to gender, age, social class and region. These face to face interviews were conducted in accordance with ICC/ESOMAR guidelines by fully trained and supervised interviewers.

The results were collated and have been segregated according to age, gender, social class, region and political affiliation.

### Key Findings

#### Focus Groups

The focus group respondents discussed the experiences of childhood nowadays versus their own experience of childhood and noted many societal changes that have occurred. These include more parents working outside the home, children having access to more money, increased perceived levels of confidence among children and increased influences of media, peers and the wider community. Parents expressed concerns that their children appear to be more grown up, demonstrating worldliness beyond their actual years yet they do not have the emotional capacity behind their appearance or demeanour.

During the discussion on children's rights, it became apparent that the respondents had a strong belief that children's rights including the right to education, health and protection were already contained in the Constitution. When explained that children's rights are virtually silent in the Constitution the respondents expressed dismay and appeared eager to rectify this situation in the best interests of all children.

#### National Poll

In the Barometer study, respondents were asked questions covering areas on children's rights in Ireland in general and more explicitly the extent of express children's rights in the Irish Constitution.

When asked to spontaneously outline what rights children in Ireland have the respondents gave the following answers:

|   |     |
|---|-----|
| A right to education                    | 58% |
| A right to healthcare                   | 35% |
| A right to childhood                    | 16% |
| A voice in all matters that affect them | 10% |
| Other                                   | 8%  |
| No rights                               | 6%  |
| Don't Know                              | 24% |

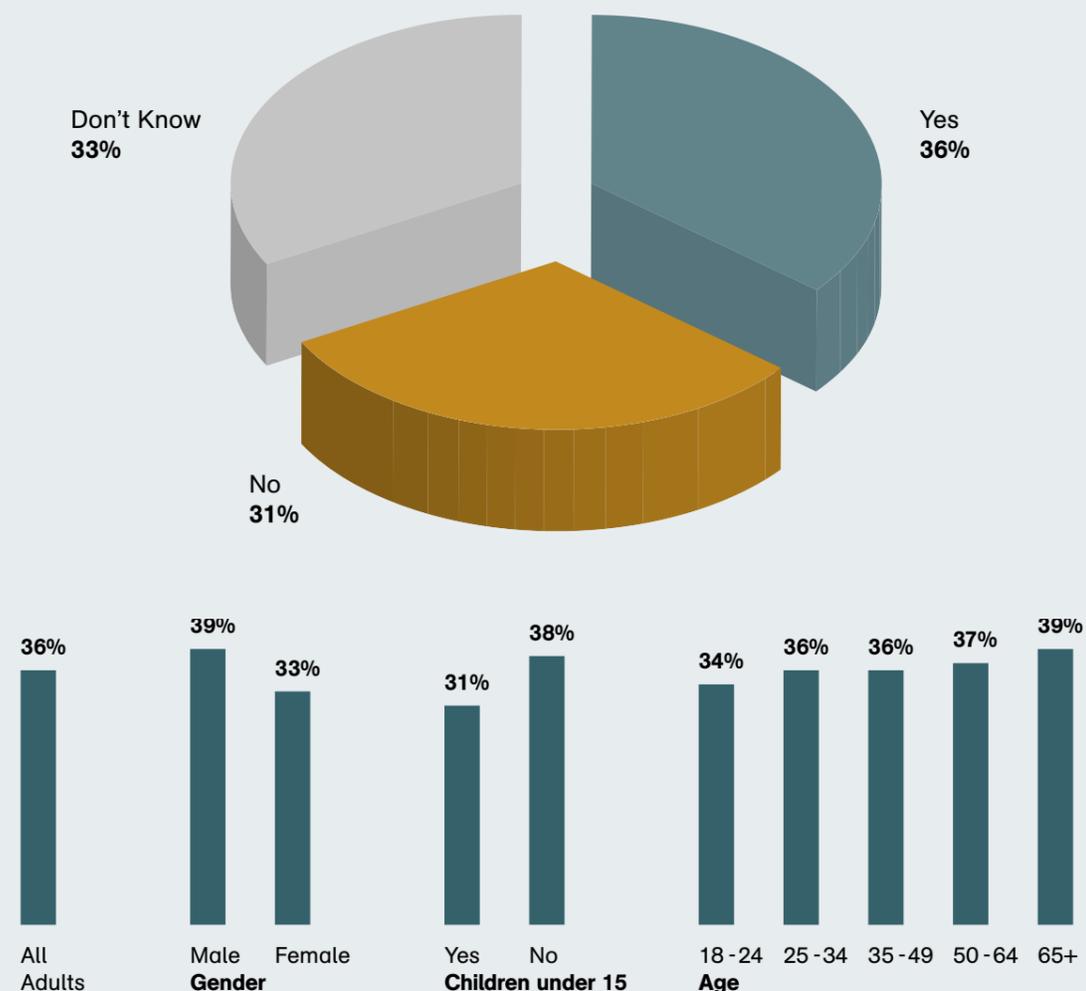
In response to the question 'Do children in Ireland have the full protection of the law under the Constitution?' the answers indicated a high level of presumption and also uncertainty towards the extent of children's rights within the Constitution.

Table 1 shows that 36% of adults felt that children do have full protection of the law under the Constitution while 33% reported 'don't know' and the remaining 31% said children do not have full protection of the Constitution. A breakdown of the 36% of adults who responded positively shows very little difference by gender, age and whether they had children of their own who were less than 15 years or not.

## Children's Rights in the Constitution Barnardos' Campaign

**Table 1**

Do children in Ireland have the full protection of the law under the constitution?  
Gender, Parent, Age (Base: Adults 18+)

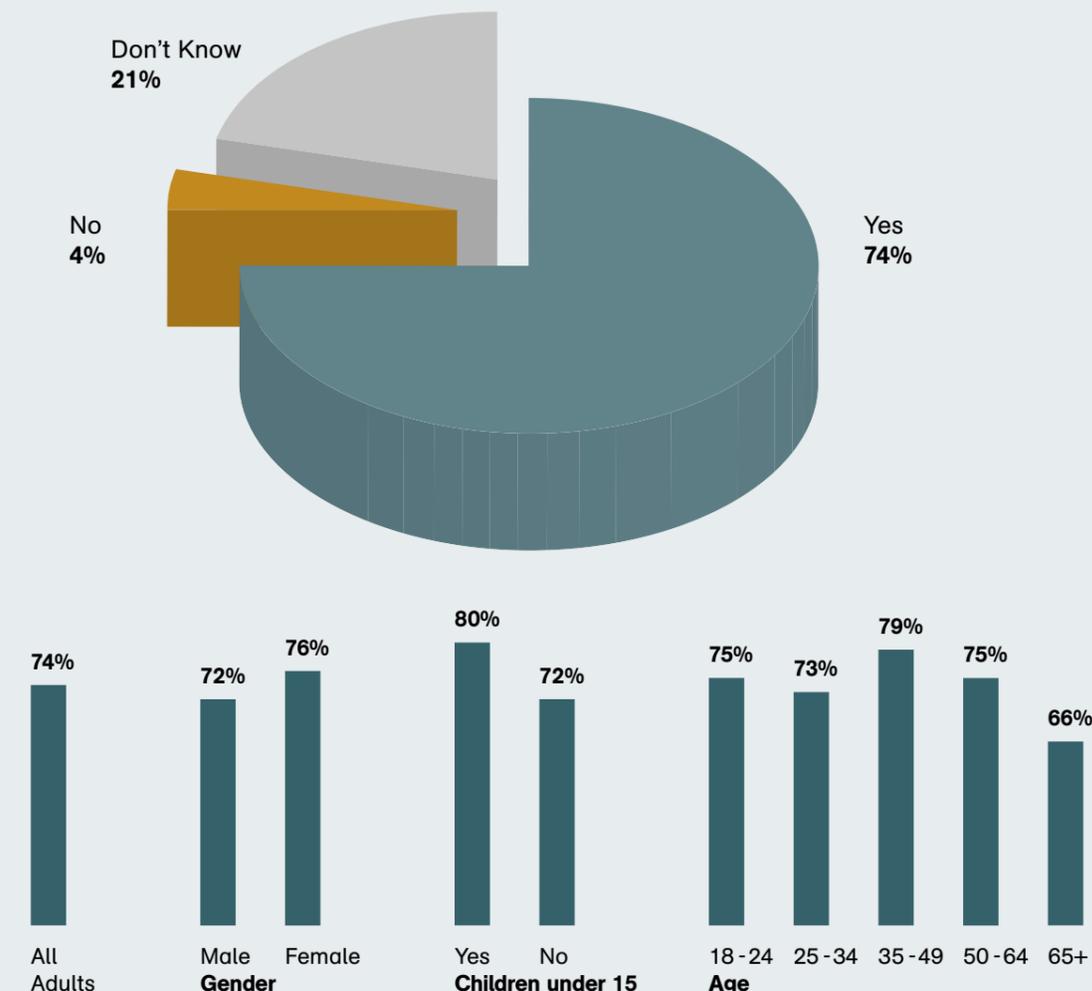


When asked 'Should the Constitution contain an explicit commitment to children's rights?' the responses were more definite. Table 2 shows that 74% of adults, almost 3 out of 4 voters, felt that there should be an explicit commitment to children's rights in the Constitution, only 4% were in disagreement with the question and 21% were unsure.

Of the 74% of adults who were in agreement that the Constitution should contain an explicit commitment to children's rights, there was little variance between the respondents when responses were segregated by age, gender, location and social class (see Table 2). Those adults who had children under 15 were slightly more (80%) in favour of the Constitution containing children's rights than those adults who did not have children of their own who were less than 15 years of age (72%).

**Table 2**

Should the Constitution contain an explicit commitment to children's rights?  
Gender, Parent, Age (Base: Adults 18+)



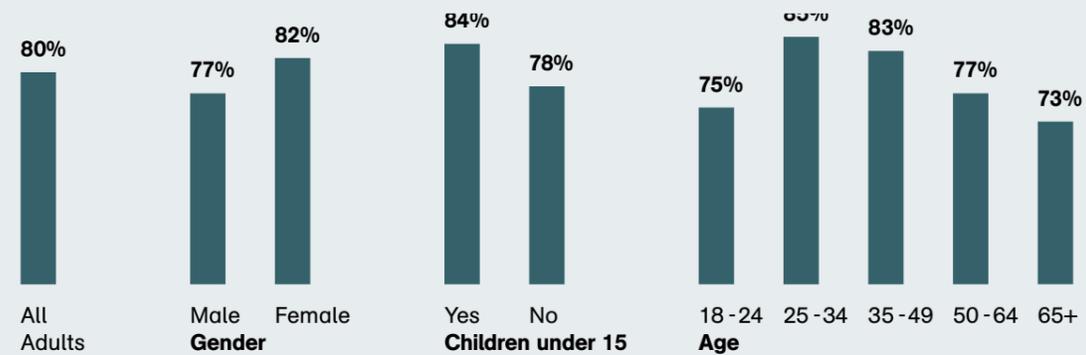
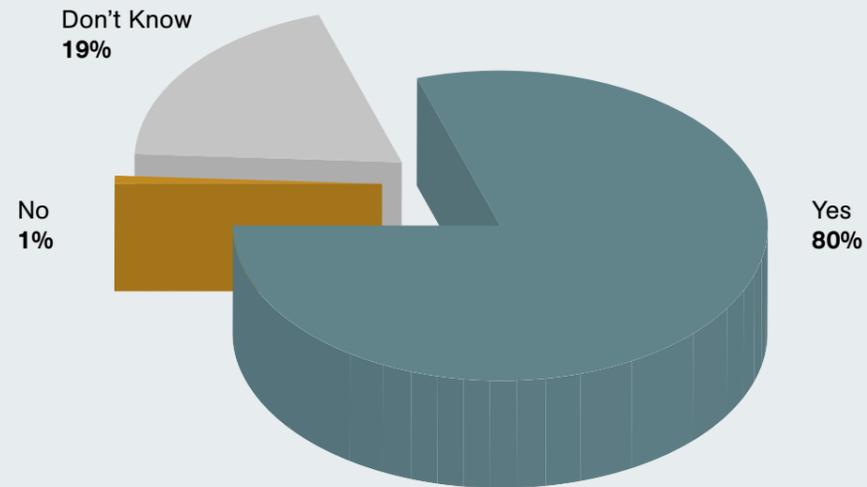
A sample wording was shown to respondents to elicit their views and voting intentions should they be asked to vote on children's rights in a referendum. The sample wording emphasised the welfare and protection of children by placing a responsibility on the State to safeguard children and that the interests of children would be a priority consideration in all matters affecting them.

Table 3 shows that the likelihood of voting in favour of the sample wording is 80%, only 1% would be against such a move and 19% were unsure. Again, the breakdown of the 80% positive response rate shows a strong consensus across gender, age and whether their children were less than 15 years of age. Those respondents aged over 65 years were slightly less likely to vote in favour (73%) in comparison to those aged 25-34 years (85%). This strong consensus continued to be apparent when the results were segregated by geographic, social class and political preference (see Table 4).

## Children's Rights in the Constitution Barnardos' Campaign

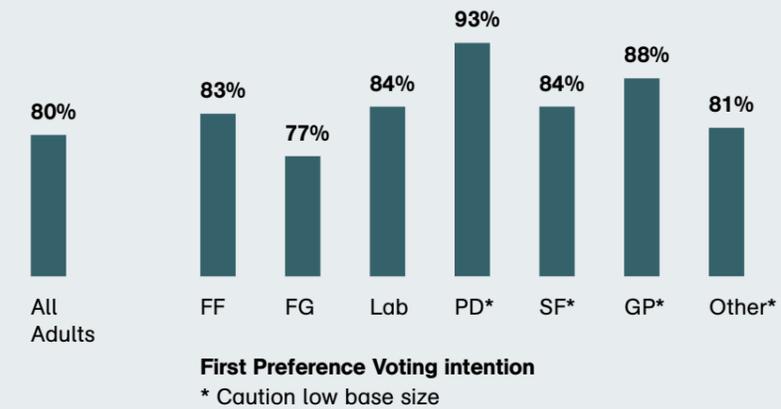
**Table 3**

Claimed voting intention when sample wording put to respondents:  
Gender, Parent, Age (Base: Adults 18+)



**Table 4**

Claimed voting intention when sample wording put to respondents:  
Voting intention (Base: Adults 18+)



### Conclusion

At present there appears to be much public confusion regarding the extent of children's rights in the Irish Constitution. There is also a strong need for public information on the current extent to which children are protected by Constitution. However, as Barnardos' national poll indicates there is widespread public appetite for a referendum on this matter in the interests of protecting the welfare of children and ensuring that their best interests are protected.

Interestingly this widespread public support was also found in a TNS/MRBI<sup>29</sup> opinion poll of 1,000 adults held following An Taoiseach's announcement to hold a referendum. Over 68% said they were in favour of the proposal to change the Constitution to improve the rights of children, 16% had no opinion and the remaining 16% were against the proposal. Again, there was strong support for the proposal across all age groups, social classes and political parties. Women were marginally more in favour of the proposal than men.

## Children's Rights in the Constitution Barnardos' Campaign

### Consultation with Children

Some consultation was undertaken in Barnardos projects to engage children in this debate about children's rights and in effect to discover what was important to them. While recognising that the concept of rights can be vague, ambiguous and difficult to grasp, the following quotes are some extracts from those workshops.

“The Government, the courts, the Health Board and the family all have responsibility to ensure our rights are protected.”

(Girl aged 12)

“I wish adults would listen to me more.”

(Boy aged 10)

“Children have the right to food, a house and to have fun as children.”

(Girl aged 11)

“For example, if a child's mother and father decide to get a divorce or separate, it should be the child that decides who they want to live with, not the courts who decide what is in the best interests of the child.”

(Girl aged 13)

“Children have a right to safe places to play and have fun; there are not enough activities in my area.”

(Boy aged 11)

“People could pay more attention to listening to children and we would be heard more then.”

(Boy aged 9)

“Children should have a right to proper healthcare, you should be able to go to the doctor when you need to and not have to pay for it. Some people cannot pay the bills for doctors and there are lots of children on waiting lists.”

(Girl aged 14)

## Children's Rights in the Constitution Barnardos' Campaign

### Barnardos' Proposed Draft Wording

This proposed wording was developed after months of consultation with legal experts and practitioners in the field of children's rights, child protection and welfare. After much discussion on the pros and cons of different approaches and bearing in mind the current political climate the following wording was agreed.

#### Article 40.3.4

The State recognises the unique and vulnerable nature of children and promises to guard with special care their welfare. It shall by its laws and its actions protect and vindicate the welfare of children and such welfare shall be the paramount consideration in any decision made by the State, or its authorities, in relation to children.

#### Article 42.5

In exceptional cases, where parents fail to protect the welfare of their children, the State shall take such action as is necessary to ensure such protection.

#### Airteagal 40.3.4

Aithníonn an stát, nádúr uathúil agus soghonta na bpáistí agus geallann sé a leas a ghardáil le cúram speisialta.

Cosnóidh sé agus déanfaidh sé leas na bpáistí a shuíomh lena dhlíthe agus lena ghníomhaíochtaí agus beidh an leas sin mar an mheas ardchumhachtach in aon socrú déanta ag an stát, nó a údaráis, i dtaca le páistí.

#### Airteagal 42.5

I gcásanna neamhchoitianta, ina dteipeann ar thuistí leas a gclainne a chosaint, déanfaidh an stát a leithéad de bheart ata riachtanach chun a leithéad de chosaint a dheimhniú.

### Rationale for this wording

Barnardos' proposal is to insert one amendment under Article 40 (which covers personal rights) to cover child protection and welfare. It would complement current articles as it is not unusual for the State to acknowledge specific situations where people are unique and vulnerable, (for example, the unborn). It would cover all children living in Ireland not just citizens and would likewise apply to children of both married and unmarried parents. The proposal is not altering the current definition of the family.

The second amendment would be a revised Article 42.5 to ensure that the State can intervene in exceptional cases where the welfare of the child is under threat and will limit such intervention to as 'is necessary'.

This proposal will strengthen families by providing parents with a basis from which to defend their children's rights if they think these rights are not being honoured. It will also still recognise, as our Constitution always has, that the welfare of children is best realised in a nurturing family environment, and that the State should only intervene in exceptional cases.

Overall, the inclusion of express rights into the Constitution will place the welfare of children at the heart of our laws. Although the Barnardos' proposal does not enumerate a series of specific rights, its inclusion in the Constitution would place an obligation on the State to make children's welfare its paramount consideration in all matters of public policy concerning children. It would also enable and oblige the State to intervene in those rare cases where the welfare of children is not protected in the family context, while still recognising that the welfare of children is best realised in a nurturing family environment.

It will further enhance our commitment to the principles and rights enshrined in the UN Convention on the Rights of the Child to which Ireland is a signatory.

Barnardos has put forward this proposal as one contribution to the debate now starting, and in the recognition that the Government is carrying out a detailed analysis of the Constitution as it affects children. Barnardos will be more than happy to participate in any discussion of the issue, and looks forward to the development of a consensus that will protect and enhance the rights of children into the future.



**BARNARDOS NATIONAL OFFICE**

Christchurch Square  
Dublin 8

Tel: +353 (01) 453 0355  
Fax: +353 (01) 453 0300  
Callsave: 1850 222 300

E-mail: [info@barnardos.ie](mailto:info@barnardos.ie)  
[www.barnardos.ie](http://www.barnardos.ie)

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