

Submission to the  
All-Party Oireachtas Committee on the Constitution  
**January 2005**



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# Foreword

The Ombudsman for Children's Office is less than one year old. The Office is one of a growing number of international offices dedicated to the promotion and safeguarding of children's rights.

The Ombudsman for Children has two main functions; to investigate complaints made against public bodies, schools and voluntary hospitals and to promote the rights and welfare of children.

Dealing with individual complaints is of great importance to the complainants but it is also recognised that complaints can provoke sufficient analysis to recommend strategic policy and practice change to ensure that children's rights are fulfilled. We suggest that strategic actions should have wider impact on child rights than solving individual complaints.

In trying to influence or effect change at a strategic level, there could be no opportunity as great as that presented by a review of the Irish Constitution. We have taken this opportunity to make a submission which we hope will be heard and accepted by the All-Party Oireachtas Committee on the Constitution in its deliberations. We have considered the pertinent Articles of the Constitution and have proffered suggestions which we see as advancing the rights of the child in Ireland. In drawing up these recommendations, the Office has been greatly aided by the legal expertise of Mr Geoffrey Shannon and we owe him a great debt of thanks.

Children are human beings and rights holders. Children's rights are human rights. International and European human rights instruments guarantee rights for everyone, for all members of the human family. In this submission, we seek express rights for children in the Irish Constitution.

We look forward to seeing changes in the Irish Constitution which recognise that children too are holders of rights, not possessions of parents or of the State.

# Introduction

The Ombudsman for Children is the first of its kind in this State. The Office was established under the Ombudsman for Children Act, 2002. The Ombudsman for Children's Office is an independent, statutory body which came into force by Statutory Instrument on 25 April 2004.

The Office investigates complaints made against public bodies, schools and voluntary hospitals. The Office also has the responsibility for the promotion of the rights and welfare of children and young people under the age of eighteen in all aspects of public policy, practices, procedures and law. The Ombudsman for Children is one of a growing number of international offices dedicated to the promotion and safeguarding of children's rights.

This paper acknowledges the existence of three previous reports that recommended constitutional change to include an express statement of children's rights.

In 1993, the Kilkenny Incest Investigation Committee recommended to the Government that an amendment be made to Articles 41 and 42 of the Constitution. The Committee recommended:

*"...that consideration be given by the Government to the amendment of Articles 41 and 42 of the Constitution so as to include a statement of the constitutional rights of children."*

In 1996, the Report of the Constitutional Review Group highlighted the need for a review of Articles 41 and 42 of the Constitution. The Review Group indicated the need to:

*"...put into the Constitution an express obligation to treat the best interests of the child as a paramount consideration in any actions relating to children."*

In 1998, the United Nations Committee on the Rights of the Child, in its Concluding Observations, emphasised that the recommendations of the Report of the Constitution Review Group would reinforce "the status of the child as a full subject of rights".

Ireland has ratified two international human rights instruments that have a bearing on children's rights. Ireland ratified the 1989 United Nations Convention on the Rights of the Child (CRC), without reservation on September 21, 1992. However the provisions of the CRC do not form part of our domestic law.

Ireland has also ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR). Unlike the CRC, the ECHR has been incorporated into Irish Law by way of statute. The incorporation of the ECHR at sub-constitutional level will ensure that child rights remain subordinate to parental rights. Without an express statement on children's rights in the Constitution child rights will remain subordinate to parental rights.

# The Constitution of Ireland

The principal source of fundamental rights in Irish family law has been the Constitution. Articles 41 and 42 of the Constitution have had a major impact on the manner in which family legislation has been enacted and family law judgments delivered in Ireland. Article 41 of the Irish Constitution of 1937 relates to the family and “recognises the family as the natural and primary unit group of society” and also guarantees “to protect the family in its constitution and authority”.

The rights guaranteed by Article 41 are recognised as belonging not to individual members of the family but rather to the family unit as a whole. An individual on behalf of the family may invoke them but, as Costello J. notes in *Murray v Ireland*<sup>1</sup> they “belong to the institution in itself as distinct from the personal rights which each individual member might enjoy by virtue of membership of the family”.

Article 41 lacks child focus. It fails to recognise the child as a person with individual rights. This derives from the principle of parental autonomy created by Article 41 of the Constitution. This Article establishes a level of privacy within family life, which the State can enter only in the exceptional circumstances detailed in Article 42.5 of the Constitution. Article 42 provides as follows:

*“(1) The State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for religious and moral, intellectual, physical and social education of their children...”*

*“(5) In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, 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.”*

This Article clearly provides that only in exceptional cases, where parents, for physical or moral reasons, fail in their duty towards their children, can the State as guardian of the common good attempt to supply the place of the parents.

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<sup>1</sup> [1985] I.L.R.M. 542 at 547.

## The Constitution and the family

The Irish Constitution is unique in that the family unit in Ireland takes precedence over and above that of the individual members of the family. In fact, the individual rights of the members of the family are both directed and determined by the family as an entity in itself. Thus, membership of the constitutional family subordinates the rights of the individual members in Ireland. This is specifically true in relation to the rights of children and Supreme Court judgments on the issue have proven to support this interpretation.

When examining Article 42 of the Constitution, it is true to say that this in fact has more to do with the family than it does with the substantive right to education and is an accompaniment and subordinate to Article 41. It deals with education in a broader sense than scholastic education. In referring to education, it alludes to the upbringing of the child, which it holds not only to be a right but a duty of parents. This Article reinforces the decision-making autonomy of the family. This can be observed by examining the structure of Article 42, which assigns a strong sense of priority to parental autonomy.

Article 42.5 of the Constitution is of particular importance in that it addresses the complete inability of some parents to provide for their children's education. It has been interpreted as not being confined to a failure by the parents of a child to provide education for him/her, but extends in exceptional circumstances, to failure in other duties necessary to satisfy the personal rights of the child. This interpretation supports the assertion previously made that the right to education in Article 42 is a mere extension of the concept of "the family" in Article 41.

Looking at Articles 41 and 42 of the Constitution together, it is clear that they render the rights of married parents in relation to their children "inalienable". Article 41 of the Constitution alludes to the inalienable and imprescriptible rights of the family and Article 42 refers to the rights and duties of married parents. Only if the circumstances allow the constitutional restriction on inalienability, contained in Article 42.5 of the Constitution, is there then scope for the legal overruling of the rights of married parents. The threshold for State intervention is set at a very high level. As a result children can be placed at risk.



## The statutory position

In spite of the precedence afforded to the welfare best interests of the child in Section 3 of the Guardianship of Infants Act, 1964, the Constitution prevails. Section 3 of the Guardianship of Infants Act, 1964 makes it clear that in considering an application relating to the guardianship, custody or upbringing of a child, the Court must have regard to the welfare of the child. This, the Section states, is “the first and paramount consideration”. The Supreme Court, however, has determined that the welfare of a child must, unless there are exceptional circumstances or other overriding factors, be considered to be best served by its remaining as part of its marital family. The Court considered in a number of cases that this was dictated, by the constitutional preference for the marital family exhibited in Article 41.3 of the Constitution and the requirement therein that it be protected from attack<sup>2</sup>. There is, therefore, an uneasy tension between, on one hand, the provisions of Articles 41 and 42 of the Constitution and, on the other, the welfare principle outlined in section 3 of the Guardianship of Infants Act, 1964.

The apparent contradiction between Articles 41 and 42 of the Constitution and the principle of the welfare of the child in Section 3 of the Guardianship of Infants Act, 1964 has been correctly reconciled by the judiciary by holding that the welfare of the child is to be found within the confines of the Constitution<sup>3</sup>. This is a negative definition of welfare insofar as it impacts on the child. The focus is not on actively promoting the welfare interests of the child, but merely with ensuring that these are not seriously impaired. This approach derives from the wording of Articles 41 and 42 of the Constitution. It could therefore be argued that the current constitutional position in Ireland embodies a seen but not heard approach to the concept of children’s rights.

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<sup>2</sup> See, for example, *Re J.H. (An Infant)* [1985] I.R. 375 and *North Western Health Board v H.W. and C.W.* [2001] 3 I.R. 635.

<sup>3</sup> *North Western Health Board v H.W. and C.W.* [2001] 3 I.R. 622. See, however, *Southern Health Board v C.H.* [1996] 1 I.R. 231, where O’Flaherty J. observed, in a case concerning the admissibility of a video-taped interview containing allegations of parental abuse, that: “it is easy to comprehend that the child’s welfare must always be of far graver concern to the court. We must, as judges, always harken to the constitutional command which mandates, as prime consideration, the interests of the child in any legal proceedings”.

## Current State obligations

The United Nations Committee on the Rights of the Child in its Concluding Observations on Ireland's implementation of the CRC 1989 was critical of this approach to children's rights. The Committee held that the implementation of the recommendations of the Report of the Constitution Review Group<sup>4</sup> be accelerated which, it stated, would reinforce "the status of the child as a full subject of rights". The report of the Constitution Review Group recommended, inter alia, in 1996 that an express statement of identified rights of children be incorporated into the Constitution. Further, the Kilkenny Incest Investigation Committee<sup>5</sup> stated:

*"We feel 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 the parents than to the rights of children."*

In light of this, the Committee therefore recommended:

*"...that consideration be given by the Government to the amendment of Articles 41 and 42 of the Constitution so as to include a statement of the constitutional rights of children."*

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<sup>4</sup> Constitution Review Group, Report of the Constitution Review Group (Stationary Office, 1996).

<sup>5</sup> Kilkenny Incest Investigation Report presented to Mr Brendan Howlin TD, Minister for Health by South Eastern Health Board (Stationary Office, May 1993).

## The Constitution and the child

The Courts have, in the past, accepted that children have certain personal, unenumerated rights under Articles 40 and 42 of the Constitution. In the case of *G. v An Bord Úchtála*, Finlay P. held that the child “has a constitutional right to bodily integrity and has an unenumerated right to an opportunity to be reared with due regard to his or her religious, moral, intellectual, physical and social welfare.”<sup>6</sup> O’Higgins C.J. in the Supreme Court expanded upon Finlay P.’s statement when he stated:

*“The child also has natural rights... [T]he 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. The rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State. In exceptional cases the State, under the provisions of Article 42.5 of the Constitution, is given the duty, as guardian of the common good, to provide for a child born into a family where the parents fail in their duty towards their child for physical or moral reasons. In the same way, in special circumstances the State may have an equal obligation in relation to a child born outside the family, to protect that child, even against its mother, if her natural rights are used in such a way as to endanger the health or life of the child or to deprive him of his rights.”<sup>7</sup>*

In this same case, Walsh J. stated that: “[T]here is nothing in the Constitution to indicate that in cases of conflict the rights of the parent are always to be given primacy.”<sup>8</sup> He went further by analysing the rights of children in the following terms:

*“Not only has the child born out of lawful wedlock the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock, but a fortiori it has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth. The child’s natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to practice of religion, and to follow his or her conscience... It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child’s*

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<sup>6</sup> [1980] I.R. 32 at 44.

<sup>7</sup> Ibid at 69.

<sup>8</sup> Ibid at 78.

*natural right to life and all that flows from that right are independent of any right of the parent as such.”<sup>9</sup>*

In the case of *D.G. v Eastern Health Board*, Denham J., in a laudable judgement held that the child had “the right to be reared with due regard to his religious, moral, intellectual, physical and social welfare; to be fed accommodated and educated; to suitable care and treatment; to have the opportunity of working and of realising his personality and dignity as a human being.”<sup>10</sup>

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<sup>9</sup> Ibid at 69.

<sup>10</sup> [1998] 1 I.L.R.M 241 at 262.

## Recent developments

Recently, however, the Supreme Court has veered away from enumerating children's rights by holding that the Government was responsible for articulating the rights of children. This approach can be seen in four landmark judgments of the Supreme Court in the past four years on children's rights:

- *North Western Health Board v H.W. and C.W.*<sup>11</sup>;
- *Sinnott v Minister for Education and Others*<sup>12</sup>;
- *T.D. v Minister for Education and Others*<sup>13</sup>;
- *Lobe and Osayande v Minister for Justice, Equality and Law Reform*<sup>14</sup>.

They concern the children in society who are most in need; children who are dependent on the State for their education, health, welfare and citizenship. Such children now inhabit a legal limbo.

In summary, the foregoing judgments signpost a shift to conservatism by the Supreme Court both legally and in terms of social policy<sup>15</sup>. That said, the judgments could also indicate a desire on the part of the Supreme Court to respect the principle of the doctrine of the separation of powers. Whatever interpretation one affords to the recent approach of the Supreme Court regarding children's rights, there is a lacuna in the current legislative framework where children's rights are concerned. The Supreme Court has, as previously outlined, recognised that the Constitution protects children's rights. That said, if the State fails to protect the rights of individual children, and the Supreme Court refuses to step in as guardians of the Constitution (save in exceptional circumstances), to uphold such rights, on whom does this duty now fall?

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<sup>11</sup> [2001] 3 I.R. 622.

<sup>12</sup> [2001] 2 I.R. 598.

<sup>13</sup> [2001] 4 I.R. 259.

<sup>14</sup> [2003] 1 I.R. 1.

<sup>15</sup> See, however, the recent judgement of Finlay-Geoghegan J. in *F.N. and E.B. v C.D., H.O. and E.H.*, unreported, High Court, Finlay-Geoghegan J., March 26, 2004.

## International law

Internationally the traditional view of the family is changing. The designation of the family in Article 41 of the Irish Constitution is virtually impenetrable. The restrictive interpretation of the family has meant that Irish litigants have sought redress under international law through international human rights treaties. Our dualist approach to international law generally makes international human rights treaties binding on the State, though not on the Courts, as such treaties have traditionally not been incorporated into Irish Law.<sup>16</sup>

This has changed more recently with the inclusion of the European Convention on Human Rights and Fundamental Freedoms (ECHR) into domestic law. The European Convention on Human Rights Act, 2003 came into force on 31 December, 2003 and Section 1 of the Act provides that Articles 2 to 14 of the ECHR and Protocols 1, 4, 6 and 7 be incorporated into Irish Law.

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<sup>16</sup> Most of the other Member States of the Council of Europe adopt a monist approach to international law, where international law is automatically applicable in domestic law without the need for any implementing legislation.

# United Nations Convention on the Rights of the Child 1989

Ireland ratified the CRC without reservation on 21 September 1992. Again, by virtue of Ireland's dualist nature, the provisions do not form part of the domestic law. The Convention gives recognition to children's rights in its widest sense. Article 3 states, *inter alia*:

*"(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 interest of the child shall be a primary consideration.*

*(2) State 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."*

While this Article requires only that the children's interests be a primary consideration, not the primary consideration, it must also be read alongside the series of explicit rights which the Convention protects.

These include:

## General Principles

- *"the inherent right to life"* (Article 6)
- *"the right of the child who has the capacity to form his or her own views 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"* (Article 12)

## Civil Rights and Freedoms

- *"the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents"* (Article 7)
- *"the right of the child to preserve his or her identity, including nationality"* (Article 8)
- *"the right to freedom of expression"* (Article 13)
- *"the right of the child to freedom of thought, conscience and religion"* (Article 14(1))
- *"the right of the child to freedom of association and to freedom of peaceful assembly"* (Article 15)

- *“the right to the protection of the law against arbitrary or unlawful interference with the child’s privacy, family home or correspondence and unlawful attacks on the child’s honour and reputation” (Article 16)*

#### *Family Environment and Alternative Care*

- *“the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it contrary to the child’s best interest” (Article 9 (3))*

#### *Basic Health and Welfare*

- *“the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” (Article 27)*

#### *Education, Leisure and Cultural Activities*

- *“the right of the child to education” (Article 28)*

#### *Special Protection Measures*

- *“the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth” (Article 40)*

#### *Representation of Children*

- Article 12 of the CRC, 1989 provides for the separate representation of children:

*“(1) State 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.”*



Article 9 of the CRC provides for participation by children in separation and divorce processes:

*“(1) State parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case as such as one involving abuse or neglect of the child by the parents, or one where parents are living separately and a decision must be made as to the child’s place of residence.”*

Taking cognisance of the foregoing rights, and in particular Article 12, it is clear that the CRC 1989 is soundly based on a defensible concept of children’s rights. The law in Ireland, however, falls far short of such a concept.

# European Convention on the Exercise of Children's Rights 1996

Ireland has signed but not ratified the European Convention on the Exercise of Children's Rights 1996<sup>17</sup>. Article 1(1) of the Convention provides that the object of the Convention is to:

*"Promote [children's] rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority."*

In some respects, the 1996 Convention is of more limited application than its 1989 counterpart. It focuses predominantly on procedural rather than substantive rights, the emphasis being on such matters as the right of children to participate in, and access information about, cases that concern their welfare. For example, Article 5 of the 1996 Convention states:

*"Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority offering them, in particular:*

- (a) the right to apply to be assisted by an appropriate person of their choice in order to help them express their views;*
- (b) the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer;*
- (c) the right to appoint their own representative; and*
- (d) the right to exercise some or all of the rights of parties to such proceedings."*

Clearly these provisions are aimed primarily at children of sufficient age and maturity to understand the matters under scrutiny. In appropriate cases, a child should have a person to help the expression of his or her views. Articles 4 and 9 of the European Convention on the Exercise of Children's Rights provide for the appointment of such a special representative. The absence of a facility for children in Ireland to support and articulate their views, particularly where a case is settled in advance of a hearing, is a serious problem.

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<sup>17</sup> European Treaty Series No 160. The European Convention on the Exercise of Children's Rights was opened for signature at Strasbourg on January 25, 1996, and Ireland was one of the seven signatories to the Convention on that date. It came into force on July 1, 2000, following ratification by Greece (September 11, 1997), Poland (November 28, 1997) and Slovenia (March 28, 2000) in accordance with Article 21(3) of the 1996 Convention.

## European Convention on Human Rights and Fundamental Freedoms

In discussing our obligations towards children, the relevant provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR) should be noted. The civil and political rights enshrined in the ECHR emphasise individual and familial freedom and autonomy and protection from excessive state interference. The ECHR is not child focused as such in the same way as the CRC, 1989. It does not recognise children as a special group requiring particular protection, because of their inherent vulnerability in a world of adults. The rights contained in the ECHR are as available to children as to adults; however, there is increasing awareness that the ECHR has potential as an important resource in the promotion of child rights. Whilst only a small body of ECHR case law deals with cases from the perspective of the child, it has been utilised very effectively to protect children within their family life with their parents.

The incorporation of the ECHR into Irish law has been by way of statute. As a result it is now possible to take proceedings in the Irish courts alleging a breach of the ECHR. Previously to assert any rights under the ECHR, an injured party had first to exhaust all domestic remedies before bringing the case to the European Court of Human Rights (ECtHR) in Strasbourg with the costs and delays associated with that process.

There is little doubt that inconsistencies will arise between Irish child law and practice and the standards required by the ECHR. The indirect or interpretative mode of incorporation preserves the domestic primacy of the Constitution.<sup>18</sup> Consequently, Article 41 of the Constitution will continue to act as an impediment to the effective implementation of the legal entitlements of children under the ECHR. More specifically, incorporation of the ECHR at sub-constitutional level will ensure that child rights remain subordinate to parental rights.

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<sup>18</sup> See s.2 of the European Convention on Human Rights, Act 2003.

## Recommendations

The current position of children in the Irish Constitution is a matter of concern. The Ombudsman for Children recommends an amendment to the Constitution to grant express rights to children. In defining these express rights the Ombudsman for Children recommends that the Committee should consider the rights enumerated in the 1989 CRC. In particular, the Ombudsman recommends the Constitution should be amended to ensure that the right of children to have their welfare protected is given the paramountcy it deserves.



