



# Children's Referendum

Saturday, 10th November

## Information Booklet

- **Protecting children**
- **Supporting families**
- **Removing inequalities in adoption**
- **Recognising children in their own right**



An Roinn Leanaí  
agus Gnóthaí Óige  
Department of  
Children and Youth Affairs

[www.childrensreferendum.ie](http://www.childrensreferendum.ie)



## What's this booklet about?

This booklet gives people information about the Children's Referendum.

It sets out:

- the new wording that would be put into the Constitution if a majority of people vote for it in the Referendum on **Saturday, 10th November**;
- the areas of our law that are covered by the Referendum; and
- the type of change that would follow on from the proposed new Article in the Constitution.

## Where can I find out more?

The Department of Children and Youth Affairs has published a special website containing detailed information on the Referendum ([www.childrensreferendum.ie](http://www.childrensreferendum.ie)).



You may also get more information:

- by e-mail: [referendum@dcya.gov.ie](mailto:referendum@dcya.gov.ie)
- by twitter: [@childref12](https://twitter.com/childref12)
- by telephone: Lo-call 1890 253380 or +353 (01) 647 3143
- by writing to the Department of Children and Youth Affairs, 43-49 Mespil Road, Dublin 4

## What is proposed in this Referendum?

In the Referendum, people will be asked to vote on inserting a new Article into the Constitution that deals directly with children. This new Article, Article 42A titled 'Children', would be placed in the part of the Constitution that sets out 'Fundamental Rights'. The stated purpose of the new Article is to place a focus on:

- **Protecting children**
- **Supporting families**
- **Removing inequalities in adoption**
- **Recognising children in their own right**

The objective of the proposal is to influence the legal framework for decision-making regarding children and add weight to existing provisions in statute law.

The following pages provide more detail, with the exact wording of the proposed amendment to the Constitution on pages 4 and 5. They also outline the type of change intended by the proposed new Article in the Constitution, as well as providing the Government policy framework within which this Referendum is being proposed.

## When can you vote?

The referendum will be held on **Saturday, 10th November 2012.**

Polling stations will be open from 9am to 10pm.



## Why do we need a Referendum?

Our Constitution (Bunreacht na hÉireann) cannot be changed without the approval of citizens through a Referendum. The purpose of the Children's Referendum, which, if passed, will be the Thirty-First Amendment of the Constitution, is to expressly acknowledge the position of children in the Constitution. If you want to change the Constitution to include a separate provision for children, then this has to be approved by the Irish people.

## Why this particular Referendum?

Our Constitution is the foundation for all the State's laws and policies. However, it does not provide a separate statement of rights for children.

The Government is bringing forward this Referendum to give the Irish people the opportunity to make a decision on this matter. The proposed amendment is intended to give recognition to the rights of children under the Constitution and to affirm the State's obligation, as far as practicable, to protect those rights.

The Referendum is intended to put children's needs at the centre of decision-making and to facilitate changes to adoption legislation.

### Is this a new idea?

Constitutional change of this nature was first suggested 19 years ago by former Supreme Court Judge Catherine McGuinness in the report on the Kilkenny Incest Case.

The Referendum was also recommended by the Constitution Review Group in 1996, which proposed a change to reflect the United Nations Convention on the Rights of the Child, ratified by Ireland in 1992.

A Joint Committee on the Constitutional Amendment on Children was established in 2007, under the chairmanship of Ms. Mary O'Rourke, T.D., to consider a proposed wording for a Children's Referendum. The Committee of 19 members met on over 60 occasions and received in excess of 170 submissions and produced three reports in total.

The Programme for Government 2011 commits to holding a Referendum on the rights of children in the Constitution and Minister for Children and Youth Affairs, Ms. Frances Fitzgerald, T.D., is now bringing this forward.



## Proposed amendment to the Constitution

The wording of the proposed new Article, as passed by the Dáil and Seanad, and now the subject of the Referendum on **Saturday, 10th November**, is as follows:

### ARTICLE 42A - Children

1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.
2. 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.  
  
2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.
3. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4. 1° Provision shall be made by law that in the resolution of all proceedings -
- i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
  - ii concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

If this Referendum is passed, the new sub-article 2.1 shown will replace the existing Article 42.5 of the Constitution, which states the following:

***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.***

A detailed article-by-article guide is offered on pages 8 - 13.



## Purpose of the proposed amendment

### Protecting children

For children at risk, this Referendum seeks to promote their protection. It sets out when, and how, intervention should occur, with the focus on the child, and refers to the impact of parental failure on the child's safety and welfare.

Overall, Article 42A focuses on the protection afforded to children under the Constitution, while seeking to respect and preserve the rights of parents and the family.

### Supporting families

The amendment will require State intervention in the family to be proportionate.

This is in line with current Government policy, which is to continue the development of early intervention and family support services, which play a vital role in responding to child welfare concerns, thereby preventing more serious problems arising. Furthermore, the Government's objective is to protect children in the home and prevent children being taken into care at a later stage.

### Removing inequalities in adoption

If the Referendum is passed:

- Provision shall be made by law for the adoption of any child, irrespective of his/her parents' marital status. This will provide greater opportunity for children in foster care to be adopted where it is in the best interests of the child.
- Provision shall be made by law for the voluntary placement for adoption of any child (again, irrespective of his/her parents' marital status). At the moment, married parents cannot place their child for adoption voluntarily.



- Article 41 of the Constitution describes the rights and duties of the family. This is not being changed. Article 42A is explicit that the action of the State to intervene in families must be proportionate.
- There will be a revision of existing adoption law to more readily facilitate the adoption of children in certain well-defined circumstances. These are children who have been reared by foster parents for a considerable period by reason of the failure of their parents to look after or care for them. It will offer the option of adoption for some children, i.e. a permanent legal relationship with their foster family.

### Recognising children in their own right

This Referendum also proposes, for the first time, to give explicit Constitutional recognition to the best interests and views of the child in specified proceedings of central importance to the child's life.

This Referendum, if passed, will mean that provision shall be made by law to ensure that in the resolution of all proceedings taken by the State concerning the protection and welfare of children, or in adoption, guardianship, custody, and access proceedings in respect of any child that:

- the paramount consideration is the best interests of the child; and
- the views and wishes of the child should be taken into account, as long as the child is sufficiently mature to make this appropriate.



## Article-by-article guide to the proposed amendment

- 1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.**

The Constitution sets out rights for all citizens. The amendment seeks to add a provision dedicated to the rights and protections to be enjoyed by children as children. The sub-article above aims to provide a general statement of recognition for the rights of children and commits the State to protect those rights. It would make children fully visible as a group within the Constitution.

This proposed amendment is intended to strongly incorporate rights specific to children in the Constitution so that these rights may be taken into account alongside other important elements of the Constitution. This change would inform the making of laws and Court decisions regarding children and give added weight to existing child-friendly laws.

- 2. 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.**

As already stated, it is intended that this will replace the current Article 42.5 under 'Education' in the Constitution. It is under the power given by this Article of the Constitution that many of the actions of the Health Service Executive to secure the protection and welfare of children are taken under the Child Care Act 1991.

The change would not alter the fact that it is the primary duty of parents to care for and protect their children. As is currently the case, the State will step in to take a child into care only in exceptional circumstances.

**The presence of failure in parental duties towards the child remains a condition that must be met before the State removes a child from his or her family.**

The State cannot intervene where such failure has not taken place. In contrast to the current provision in the Constitution, the new wording focuses more on the effect of such failure on the child.

It will continue to be the case that the power given by the Constitution in this area can only be used by the State in very well-defined circumstances. Key requirements will be as follows:

- the State can only make use of the power *“in exceptional cases”*;
- a failure of parental duty towards the child must exist – *“where the parents, regardless of their marital status, fail in their duty towards their children”*;
- any failure must involve harm or risk to the child’s safety or welfare – *“to such extent that the safety or welfare of any of their children is likely to be prejudicially affected”*;
- the actions of the State must be in balance with the harm or risk to the child that needs to be addressed – *“by proportionate means”*; and
- the actions the State can take must be set out in law – *“as provided by law”*.



**2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.**

The Constitution does not currently refer to the circumstances where adoption may be provided for in law. The normal way a child is adopted involves the agreement of his or her parent(s) or guardian, as required by law. This is to remain the position.

Since 1988, the adoption of a child from foster care has been possible if the High Court allowed, but this arises only in very limited circumstances. The Court must be satisfied (a) that there has been a failure of duty by the parents towards their child, (b) that this failure is likely to continue until the child is 18 years old, and (c) that the parental failure amounts to the parents giving up all parental rights towards the child. The applicants to the Court must prove that this failure is likely to continue until the child reaches 18 years of age. Therefore, while it is already the case that a child who is in care may be adopted by his or her foster parents, in practice, this happens to a very limited extent since the test set out in existing law is difficult to meet.

If this Referendum is passed, it is proposed to introduce legislation to amend the Adoption Act 2010. The new legislation would set out new requirements that must be met before the High Court will authorise the adoption of a child in foster care.

- The requirement to prove 'total abandonment' without interruption until the child is 18 years of age will be changed. The requirement will be that parents will have to have failed in their duty towards the child for 3 years.
- That the parents have no reasonable prospect of resuming the care of the child.
- The High Court must also be satisfied that this failure constitutes an abandonment of the parental rights.

- The child will have to be at least 18 months in the care of those who apply to adopt them.
- As is the case now, the Court must be satisfied that adoption is an appropriate way in which to provide for the parenting of the child. It must consider the Constitutional rights of all of the parties, including the child. It must consider the views of the child if the child is old enough to be able to express his or her views.

Ultimately, in the resolution of the proceedings, the best interests of the child must be the paramount consideration for the Court.

Many of the children who may be affected by this change have been in foster care under a Court order or voluntary agreement, and would have been in care for a long time.

The Scheme of the Adoption (Amendment) Bill 2012 has been published by the Government so that members of the public will be aware of it as they consider the changes proposed in the Referendum. It can be viewed on [www.childrensreferendum.ie](http://www.childrensreferendum.ie). **A note explaining the changes in detail is also available on the website.**

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

The aim of this part of the amendment is to make it possible for married parents to place their child for adoption and to consent to an adoption in the same way as a parent or parents who are not married.

Under present law, the only route to adoption for a child whose parents are married is for the parents to be found by the High Court to have failed in their duties towards the child. Currently, married parents who for good reasons, and with the best interests of their child at heart, decide on adoption as the most suitable way of providing for the future care of their child are not allowed to place their child for adoption.



This part of the amendment mandates the Oireachtas to introduce legislation to allow married parents who decide adoption is the best option for their child to place the child for adoption.

The placement of children for adoption will continue to be closely regulated under the Adoption Act 2010, which allows only the Health Service Executive and bodies accredited by the Adoption Authority of Ireland to make arrangements for adoptions. Existing law also ensures that parents who are seeking adoption for a child must be counselled and given information so that their decisions are fully informed.

The adoption of any child can only proceed if it is in the child's best interests.

- 4. 1° Provision shall be made by law that in the resolution of all proceedings -**
- i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or**
  - ii concerning the adoption, guardianship or custody of, or access to, any child,**
- the best interests of the child shall be the paramount consideration.**

The aim here is to give explicit backing at Constitutional level to the principle that in the resolution of family law proceedings (guardianship, custody, access) and proceedings relating to child protection and adoption, the best interests of the child should be the most important consideration. This principle can already be found in existing legislation concerning guardianship, child care and adoption. However, specific recognition of this principle in the Constitution will give this principle a greater weight when counter-balanced against other rights and interests, and ensure that laws in these areas make such provision. The requirement applies to proceedings in respect of "any" child, i.e. regardless of the marital status of the child's parents.

**2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.**

Similar to sub-article 1, the aim here is to give explicit recognition at Constitutional level to the rights of children to have their views heard and taken into account in Court proceedings in the areas of family law, child protection and adoption. As with sub-article 4.1, this provision will add weight to provisions of this kind that already exist in law and any new laws made in these areas would have to have such a provision.



## How is the proposed wording designed to help with policy objectives?

Overall, the wording of the proposed new Article in the Constitution is aimed to help achieve the following objectives:

### **(1) Dedicated Constitutional provisions for children**

New standalone provisions are proposed for 'Children'. They affirm each individual child's inherent rights and give recognition to the protection of the rights of all children under the Constitution, while continuing to respect and preserve the rights of the family as already set out in Article 41.

### **(2) Protecting children and supporting families**

The proposed new Article puts the safety and welfare of children at the centre of decision-making in relation to child protection. It provides that any intervention must be proportionate to the risk facing the child, which ensures that a child is only removed from his or her parents where no other appropriate action can be taken, which will protect the child's safety and welfare in the home.

### **(3) Removing inequalities**

The proposed rights are for the benefit of all children, irrespective of the marital status of their parents. The intention is that children of marital and non-marital families will be treated equally when it comes to protecting their safety or welfare, their access to adoption and consideration of their best interests and views in key proceedings.



### (4) Adoption: A second chance for children

The Referendum proposal, together with the associated draft law which has been published, will provide greater possibility than is currently the case for a second chance for children by means of adoption, under defined conditions. These cases would always be brought before the Adoption Authority of Ireland and in some cases the High Court.

### (5) Recognising children in their own right

The wording of the proposed new Article provides that the best interests of the child should be the paramount consideration in key proceedings and that the views of the child be given due weight, having regard to the age and maturity of the child, during such proceedings. These proceedings include cases brought by the State to protect any child or proceedings concerning adoption, guardianship, custody of or access to any child.



## Background to the Referendum

### Facts and figures about care in Ireland

The vast majority of children live in loving, caring families and never require the assistance of the State's child protection and welfare services.

However, there are some families where concerns about the safety and welfare of the children within those families arise.

In 2011, there were over 31,000 child welfare and protection referrals to the HSE. (A number of referrals can relate to the same child.)

At present, there are over 6,250 children in care placements. Over 91% of these children are in placement with a foster family, with nearly a third of these living with a relative.

Over 2,000 children have been living with the same foster family for over 5 years.

Of the 6,155 children in care in 2011, 45% were in care with the voluntary consent of the child's parents. Over 85% of non-voluntary admissions (Court ordered) to care in 2011 were due to abuse (physical and sexual), neglect and serious family problems.

## Other Reforms in Children's Services

The Government has started a Programme for Change for Children and a number of developments are underway, which provide the wider context for the proposed changes to the Constitution. These include:

### ● Child Protection services

- Establishment of the Department of Children and Youth Affairs.
- Establishment of a new dedicated Child and Family Support Agency on a statutory basis in order to fundamentally reform the delivery of child protection services and remove responsibility for these from the Health Service Executive (HSE).
- Publication and implementation of the Health Information and Quality Standards in respect of Child Protection, by which services provided by the HSE (and the new Agency) will be inspected.

### ● Child Protection laws

- Withholding of Information Act 2012.
- Legislation is being drafted so that all people who are working with children will have a statutory duty to comply with *Children First: National Guidance for the Protection and Welfare of Children*.
- National Vetting Bureau (Children and Vulnerable Persons) Bill 2012.

### ● Adoption law

- Specific legislation to give effect to the adoption provisions of the amendment if it is passed in the Referendum.



## The Department of Children and Youth Affairs

The Department of Children and Youth Affairs (DCYA) was established on 2nd June 2011 following a Government decision to consolidate a range of functions which were previously responsibilities of the Minister for Health, the Minister for Education and Skills, the Minister for Justice and Law Reform, and the Minister for Community, Rural and Gaeltacht Affairs.

The Department's mission is to lead the effort to improve outcomes for children and young people in Ireland.

### Where can I find out more?

The Department of Children and Youth Affairs has published a special website containing detailed information on the Referendum ([www.childrensreferendum.ie](http://www.childrensreferendum.ie)).



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