



Provided by the author(s) and NUI Galway in accordance with publisher policies. Please cite the published version when available.

Title	Children's Rights and the Family: a Commentary on the Proposed Constitutional Referendum on Children s Rights in Ireland
Author(s)	Kennan, Danielle; Keenaghan, Celia
Publication Date	2012-02
Publication Information	Kennan, D. and Keenaghan, C. (2012) Children's Rights and the Family: a Commentary on the Proposed Constitutional Referendum on Children s Rights in Ireland. Children and Youth Programme, .
Publisher	Children and Youth Programme
Link to publisher's version	http://www.childandfamilyresearch.ie/sites/www.childandfamilyresearch.ie/files/2012_03_21_commentary-cyp.pdf
Item record	http://hdl.handle.net/10379/3391

Downloaded 2019-11-19T04:45:31Z

Some rights reserved. For more information, please see the item record link above.





the children
and youth
programme



United Nations
Educational, Scientific and
Cultural Organization



UNESCO Chair in Education for Pluralism,
Human Rights and Democracy

UNESCO Chair in Children, Youth and
Civic Engagement



children's rights and the family.

A Commentary on the Proposed
Constitutional Referendum on
Children's Rights in Ireland.



NUI Galway
OÉ Gaillimh



University of
ULSTER

the children and youth programme.

The Children and Youth Programme (CYP) is an independent, academic collaboration between the two UNESCO Chairs in Ireland at the University of Ulster and National University of Ireland, Galway. Using a multidisciplinary framework the Programme will draw upon the knowledge and expertise of researchers from a wide range of disciplines on issues affecting children and youth.

This Commentary is part of a series of outputs and reports addressing the well-being of children and youth in Ireland and Northern Ireland. It corresponds with three key UNESCO aims: to strengthen awareness of human rights; to act as a catalyst for regional and national action in human rights; and to foster co-operation with a range of stakeholders and networks working with, or on behalf of, children and youth.

The term 'children and young people', as used in this Commentary, includes all those under the age of 18.¹

The Children and Youth Programme takes a rights-based approach towards policy development and implementation, working according to the other principles of the Programme: to have an all-island focus; to

retain academic independence; and to ensure the voice of children and youth is present. The objectives of the Programme are:

1. to focus on a topical issue considered to affect the well-being of children and youth;
2. to examine the impact of selected policy and practice interventions on human rights and well-being;
3. to gain an understanding of the processes of implementation;
4. to share learning that will enable duty holders to better meet their commitments to children's rights and improved well-being;
5. to share learning that will enable rights holders to claim their rights.

The Children and Youth Programme will work with key stakeholders to ensure that this knowledge enhances efforts in Ireland and Northern Ireland to realise children's rights and promote children's well-being.

The authors are responsible for the choice and presentation of views contained in this report and for opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organisation.

¹ The term for the most part excludes youth, a population group central to the CYP and defined by the United Nations as persons between the ages of 15 and 24. The focus on children and young people in the Commentary reflects the age range corresponding to the definition of a child in the United Nations Convention on the Rights of the Child (UNCRC) and the age range covered by the two national children's strategies in Ireland and Northern Ireland.

Authors:
Danielle Kennan and
Celia Keenaghan

Peer Reviewers:
Paddy Kelly, Children's Law
Centre and Anne Egan, School
of Law, NUI Galway.

February 2012



preface.

Professor Pat Dolan and Professor Alan Smith

As the two UNESCO Chairs on the island of Ireland we welcome the commitment by the Minister for Children and Youth Affairs, Frances Fitzgerald TD, to hold a referendum on the Rights of the Child in Ireland in 2012 and we look forward to engaging positively in the debate to come over the next number of months. We believe that this commentary will act as a helpful stimulus to that debate and, in particular, on the issue of children's rights and their interplay with the family. The referendum is an important opportunity to strengthen children's rights in Ireland and we hope that all parties approach the campaign in an open and honest way, making arguments based on evidence, and always with the best interests of children as the primary motivating concern. This is the basis on which we hope to proceed.

As members of the UNESCO International education network, UNESCO Chair holders are encouraged to act as 'bridge builders' by establishing and sustaining dynamic links between the academic world, civil society, local communities and policy makers. That is why we have come together to launch The Children and Youth Programme, a new academic, independent collaboration which aims to engage with policy makers and stakeholders on both sides of the border on a number of key issues relating to children and youth. We strongly believe that incorporating a stronger commitment to children's rights in the constitution would build a stronger culture of children's rights in Irish society and is in keeping with international obligations. We are also clear that it poses no threat to the rights of others in society. We hope to show that it is an approach underpinned by clear and consistent obligations that will cherish all children equally.

We want to be clear from the outset that the rights and well-being of children, parents and society are inextricably linked. Our perspective is simple, what is good for children is good for their parents and ultimately to the benefit of civic society. 2012 can be a defining year for children and young people in Ireland. And it needs to be – the best legacy that we can leave the next generation is a commitment that their rights are protected and enhanced, that they have some certainty in an increasingly uncertain world.

Professor Pat Dolan is the UNESCO Chair in Children, Youth and Civic Engagement at the National University of Ireland, Galway.

Professor Alan Smith is the UNESCO Chair in Education for Pluralism, Human Rights and Democracy at the University of Ulster.



United Nations
Educational, Scientific and
Cultural Organization



UNESCO Chair in Education for Pluralism,
Human Rights and Democracy
UNESCO Chair in Children, Youth and
Civic Engagement

1. Introduction

The close of 2011 marked another year without a referendum being put to the people to decide on whether to strengthen the protection of children's rights in the Irish Constitution. A commitment has been made by the Minister for Children and Youth Affairs, Frances Fitzgerald TD, to hold the referendum in 2012 (Joint Committee on Health and Children, 2012), although the final wording of the proposed Constitutional amendment has not yet been published. Nevertheless, previous developments provide a good indication of the direction that this proposed amendment will take (see Joint Committee on the Constitutional Amendment on Children, 2010). UNESCO has a constitutional mandate to contribute to the promotion of all human rights² and an identified output of the Children and Youth Programme (CYP), a collaboration between the two UNESCO Chairs on the island of Ireland, is to provide responsive commentaries on issues that arise in each jurisdiction related to the rights and well-being of children and youth.³ In the lead up to the proposed referendum this commentary aims to contribute to a more informed debate, focusing on the topic of children's rights and the family. The commentary will examine the inter-play between the rights of the child and the family, in the context of the current Constitutional provisions, distilling key messages regarding the potential change to the present status quo and consider its implications for children's and parental rights.

2. The Irish Constitution and Children's Rights

The Irish Constitution currently provides some protection to children's rights in Articles 40-42.

- Article 40.3.1 recognises the "personal rights of the citizen". The courts in interpreting this provision have accepted that children have certain personal rights not expressly stated in



the Constitution.

For example, the Supreme Court found that, "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."⁴ Other case law has established a child's right to be reared with due regard to his or her welfare⁵. In the case of *FN and CO* the court interpreted Article 40.3.1 to include the right of the child, who is of an appropriate age and maturity, to have his or her wishes taken into account by a court when making a decision regarding matters of guardianship or custody.⁶ However, in more recent years, it is noted that the courts are reluctant to expressly recognise children's rights under Article 40.3 independent of their parents (Shannon, 2010 pp. 9 -11; Kilkelly, 2008b p. 65). This is illustrated in the case *N v Health Service Executive (the Baby Ann Case)*⁷. The Supreme Court, overturning the decision of the High Court, ruled that the child known as baby Ann should be returned to the custody of her natural parents who were now married. The High Court had found that it was in the best interests of baby Ann to remain in the custody of her prospective adoptive parents due to the high level of attachment that Ann had developed with her adoptive parents and factors which suggested that the transfer of custody could cause Ann emotional and psychological harm.⁸ However, the Supreme Court's interpretation of the Constitution precluded it from taking a decision which gave consideration to the child's rights independent of her parents and making a decision which took into consideration the best interests of baby Ann. Instead the decision was grounded in the strong Constitutional position of respect for the integrity of the marital family (cf. Kilkelly, 2008b).

2 The Constitution of UNESCO proclaims that the purpose of the Organisation is "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations."

3 For more details on the Children and Youth Programme see www.childrenandyouthprogramme.info.

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

5 *DG v. Eastern Health Board* [1998] 1 ILRM 241 at 262.

6 *FN and CO* [2004] 4 IR 311.

7 *N v Health Service Executive* [2006] 4 IR 374.

8 *N v Health Service Executive* [2006] IEHC 278.

- Article 41 of the Constitution protects the rights of the family. Article 41.1 recognises the family as the fundamental unit of society and guarantees to protect the family “as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.” This provision does not recognise the rights of individual family members, but rather the family unit as a whole (Shannon, 2010, p. 3). Article 41.3.1 further pledges the State “to guard with special care the institution of marriage, on which the family is founded”. Judicial interpretation of these provisions has defined the family as the family based on marriage.⁹ As a result, the constitutional protection afforded to the family in Article 41 applies only to the marital family.
- Article 42 deals with the education of a child, although it has been observed that substantively the Article has more to do with the family than the right to education (Shannon, 2010, p. 3). It acknowledges the right and duty of parents to be the primary educator of the child as opposed to explicitly recognising a child’s right to education. Article 42.5 also provides that in exceptional circumstances the State shall endeavour to supply the place of the parents, where the parents fail in their duty towards their children, but “always with due regard to the natural and imprescriptible rights of the child”.

As is evident from these provisions, there is some recognition of the rights of the child in the Irish Constitution. However, children’s rights are inextricably linked to the rights of the family and there is no explicit Constitutional recognition of children as rights-holders independent of their parents and no recognition of the children’s rights principle that the best interests of the child should be a primary consideration. As a result, in a situation of reconciliation before the courts of the interests of the child and the interests of parents, decisional primacy has been given to parents (see Carolan, 2007). This is set out in more detail in Section 4.

3. Calls for Constitutional Reform

It is the current silence of the Constitution to expressly recognise the rights of the child, which lies behind many of the calls for Constitutional reform over the last 20 years in Ireland. In 1993, the Committee which undertook the Kilkenny Incest Investigation observed that “the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving higher value to the rights of parents than to the rights of children”. The Committee proceeded to recommend 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” (Kilkenny Incest Investigation, 1993). In 1996, the Report of the Constitution Review Group included a recommendation that there should be an express guarantee of certain rights of the child in the Constitution. The Report further proposed that if parental rights and children’s rights were both expressly guaranteed in the Constitution, in the event of a conflict the best interests of the child should be paramount (Constitution Review Group, 1996).

The Government in 2007 presented the *Twenty-Eight Amendment of the Constitution Bill 2007* to Dáil Éireann, which proposed the insertion of a new Article 42A dedicated to children.¹⁰ Later that year a Joint Oireachtas Committee on the Constitutional Amendment on Children was established to examine the wording proposed. In order to assist the Committee in its work, written submissions were sought from interested parties. Advocates of Constitutional reform in their submissions again called for clear

“It is the current silence of the Constitution to expressly recognise the rights of the child, which lies behind many of the calls for Constitutional reform over the last 20 years in Ireland.”

⁹ See *The State (Nioclau) v An Bord Uchtála* [1966] IR 567 and *In Re JH an Infant* [1985] IR 375.

¹⁰ The Twenty-Eight Amendment of the Constitution Bill 2007 is available to view at <http://www.oireachtas.ie/documents/bills28/bills/2007/1407/b1407d.pdf>

Constitutional recognition of children's rights, including provision for the best interests of the child principle (see for example, Ombudsman for Children, 2008; Barnardos, 2008; The Children's Rights Alliance, 2008; Irish Human Rights Commission, 2006). On the other hand, opponents to Constitutional reform considered that the proposed amendment was not necessary as children's rights are adequately provided for in Article 40 of the Constitution (*see for example*, Parents for Children, 2008; European Life Network, 2008; Pro Life Campaign, 2008). It was also argued that Constitutional reform could have a detrimental affect on parental rights, in terms of unwarranted State intrusion, if parents were not acknowledged as the primary protector of children's rights and best placed to determine what is in the child's interests (Parents for Children, 2008; The Iona Institute, 2008). In its final report in early 2010, the Joint Oireachtas Committee rejected the contention that children's rights are currently adequately protected in the Constitution or that specifically acknowledging their rights will adversely affect the position of the family (Joint Committee on the Constitutional Amendment on Children, 2010, p.67). The Committee achieved all-party consensus on proposed wording to strengthen children's rights, recommending the replacement of existing Article 42 of the Constitution with an amended provision to include express recognition of the rights of all children as individuals.

The publication of the Ryan Report (Commission to Inquire into Child Abuse, 2009), the Report of the inquiry team into the Roscommon child care case (Health Service Executive, 2010) and other recent reports have encouraged a re-thinking on how we care for children in Ireland and maintained the impetus for Constitutional reform. In the lead up to the 2011 general election, each of the main political parties made a commitment in their election manifestos to ensure that children's rights in Ireland are strengthened through a constitutional referendum.¹¹ Calls for Constitutional reform have also been made at the international level. The United Nations Committee on the Rights of the Child has

recommended that the State take further measures to incorporate children's rights into the Irish Constitution. Following its review of Ireland's implementation of the United Nations Convention on the Rights of the Child (UNCRC) in 1998, the Committee in its concluding observations stated:

The Committee recommends that the State party take all appropriate measures to accelerate the implementation of the recommendations of the Constitutional Review Group for the inclusion of all the principles and provisions of the Convention ... thereby reinforcing the status of the child as a full subject of rights (UN Committee on the Rights of the Child, 1998, at para. 24).

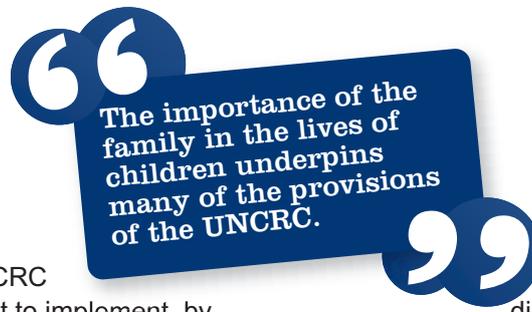
4. The Inter-play of the Rights of the Child and the Rights of Parents

The perceived tension between children's rights and parental rights has always been present and was an issue very much to the fore on the international stage during the drafting process of the UNCRC (*see* Quennerstedt, 2009). The argument that children's rights will undermine and negate parental rights and responsibilities has previously been observed as probably the most "effective political weapon" of opponents to the UNCRC (Kilbourne, 1998). In Ireland, it is an argument rooted in the traditional high regard in which Irish society holds the marital family and the fact that children's rights are inextricably linked to the rights of the family in the Irish Constitution.

The almost universal ratification of UNCRC underscores the widespread acceptance of children's rights.

However, calls for the express recognition of children's rights in the Irish Constitution are in keeping with the growing recognition internationally of children as independent rights holders. The almost universal ratification of UNCRC underscores the widespread acceptance of children's rights.

¹¹ For further details on the commitments made by the main political parties in their election manifestos see the CYP website at http://www.childrenand youthprogramme.info/databank/databank_overview.php



Ireland's ratification of the UNCRC in 1992 signified a commitment to implement, by means of incorporation into Irish law and otherwise, the children's rights principles and standards in the Convention. If one examines the provisions of the Convention, it is evident that the incorporation of children's rights principles and standards into the Irish Constitution need not be viewed as a threat to the rights of the family. The importance of the family in the lives of children underpins many of the provisions of the UNCRC. The preamble, which sets the tone and the spirit in which the Convention should be read, recognises the family as "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children". It acknowledges the importance of affording the family the necessary protection and assistance it requires to assume its responsibilities. Many of the Convention's substantive provisions proceed to recognise and protect the important parent-child relationship. For example, Article 7, protects the right of the child to know and be reared by his or her parents, Article 9 enshrines the right of a child who is separated from one or both parents to maintain regular and direct contact and Article 18 acknowledges that parents have the primary responsibility for the upbringing and development of the child.

Two important provisions of the UNCRC in terms of the inter-play between children's and parental rights are Article 3 and Article 5. Article 3 sets out the best interests of the child principle, which provides that, in all actions concerning children the best interests of the child shall be a primary consideration. What is in the child's best interests or what the factors are to be taken into consideration in determining best interests is not defined in the UNCRC. However, a review of the General Comments and the concluding observations of the United Nations Committee on the Rights of the Child determines the importance the Committee places on undertaking child impact assessments to enhance understanding of what constitutes "best interests" and establishes the requirement that the views of the child are heard in determining best interests (see for example, UN Committee on the Rights of the Child, 2010b; 2010a; 2009; 2003). In making a

judgement of best interests a distinction has also been made between substantive and procedural determinations of best interests, of which both must be taken into account (Archard and Skivenes, 2009). According to Archard and Skivenes a substantive determination takes into account relevant legislation, jurisprudence, published guidance or can be inferred from best practice. The procedural step requires taking into consideration the views of those with the recognised authority to judge the best interests of the child. This can include the parents of the child and, according to the United Nations Committee on the Rights of the Child, hearing the views of the child is a mandatory requirement of this procedural step although it is not the only factor to be taken into consideration (UN Committee on the Rights of the Child, 2009). Article 5 provides that State Parties shall respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance to their child in the exercise of their rights, but in a manner consistent with the evolving capacities of the child. This provision readily acknowledges the role of parents in supporting their children to exercise their rights, while recognising the capacity of children as they mature to exercise their own rights. Looking at the UNCRC as a whole, Kilkelly (2008a, p.11) concludes:

Overall, the Convention is unequivocal about the importance of the family to the child, about the important role that parents play in the child's family, and that the State has a duty to act in a positive manner to support, maintain and if necessary reinstate the family relationship.

The importance of parents and family to a child's development and well-being is widely accepted (Munro 2011; Lalor et al., 2007; Hayes, 2001; Commission on the Family, 1998). This is a view also shared by children. A review of the evidence capturing the views of children on what constitutes well-being, established the importance of having a family and relationships with significant others as fundamental to their perceived well-being (McAuley et al., 2010). In one of these studies reviewed the child's reference to the family was broader than the family based on marriage; the children

interviewed also came from lone-mother, step-parent and foster families (Brannen, Heptinstall and Bhopal, 2000 as cited in McAuley et al., 2010). Whether one takes a child rights or well-being approach there is a broad consensus that a child's interests are generally best protected in the family environment¹².

It has been highlighted that the UNCRC is consistent with the Irish Constitution in terms of its presumption that the family environment is the optimal environment for a child's growth and well-being (Ombudsman for Children, 2008; Kilkelly, 2008a). The Ombudsman for Children has also noted that it is her experience that the parents of children are often the principal advocates of the rights of the child and it is only in a small minority of cases that there is the potential for conflict. Conflict between the best interests of the child and the rights of parents was not the subject of any of the complaints submitted to the Office of the Ombudsman for Children between 2004 and 2008 (*ibid*). Children's rights and parental rights are in the main complementary. Where the difficulty is said to primarily arise in the Irish Constitution, is the lack of explicit recognition of children as independent rights holders and the lack of provision for the best interests of the child principle. In a situation where a conflict arises, such as when a child is at risk of physical or mental harm or abuse within the family environment, the Supreme Court's interpretation of the Constitution has tied the hands of the judiciary in favour of giving primacy to parental rights rather than weighing up all factors, most notably the best interests of the child.

Presently in Ireland the situation is guided by the Supreme Court's finding that there is a Constitutional presumption that the welfare of the child is best protected within the family (that is the

family based on marriage) unless there are "compelling reasons" why this cannot be achieved.¹³ This sets a very high threshold for State intervention in family life and has previously been identified as potentially placing children at risk in circumstances where the family, for a range of reasons, fail to provide or adequately care for their children (Barnardos, 2007; Law Society's Law Reform Commission, 2006). It could prevent, or at a minimum create a perception which prevents, the courts and

children's services intervening in family life to adopt the appropriate remedies specific to the child's needs and best interests. It has also been identified as preventing decisions being made on the merits of the case with the best interests of the child being a primary consideration (Kilkelly, 2008a).

Currently, in Ireland the importance of protecting the welfare of the child is reflected in legislation. Section 3 of the Guardianship of Infants Act, 1964, provides that:

Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.

However, in light of the Constitutional presumption that the welfare of the child is best protected within the family, a review of the case law determines that decisions are based not on all the evidence before the court, but on the presumption emanating from Article 41 and 42 of the Constitution that the welfare of the child is best protected by the decisions of its parents



12 This further strengthens the premise as outlined in the first CYP report that rights and well-being are mutually reinforcing concepts, in that, the realisation of children's rights leads to improved child well-being, while improving child well-being furthers the realisation of children's rights: The Children and Youth Programme (2011) *A Right's Based Approach to Monitoring Children and Young People's Well-Being*.

13 *In Re JH an Infant* [1985] IR 375.

14 This case law includes, *North Western Health Board v HW and CW* [2001] 3 IR 622 (the PKU Case); *N and Others v Health Services Executive* [2006] 4 IR 374 (the Baby Ann Case).

(Carolan, 2007).¹⁴ The Child Care Act, 1991 also provides that it is the function of every health board (now the Health Service Executive) to promote the welfare of children and Section 3(2)(c) of this Act explicitly requires that, in carrying out this function, regard must be had to the Constitutional principle that it is generally in the best interests of the child to be brought up in his or her own family.

This level of protection afforded to the family unit in the Irish Constitution is only applicable to families where the parents are married. The high threshold for intervention in family life and the application of the Constitutional presumption that the welfare of the child is best protected within the family, applies to children of marital families. This creates an unequal level of protection for children of marital and non-marital families. In the case of the marital family, greater protection has been afforded to parental autonomy as opposed to the best interests of the child.

5. Key Messages: Building a Stronger Culture of Children's Rights

Having broadly set out the current status of the Constitutional protection afforded to children's rights in Ireland and examined the inter-play of children's rights and the family, in the context of the current Constitutional provisions, the CYP offers the following key messages.

1. Children's rights in Ireland should be afforded greater protection. The express recognition of children as rights holders in the Irish Constitution is one means of working towards achieving a stronger culture of children's rights.
2. Children's and parental rights are in the main complementary. Building a stronger culture of children's rights in Ireland would strengthen the position of children, their parents and those advocating on behalf of children to defend the rights of the child.

3. While there is a general consensus that a child's interests are best protected in the family environment, where a child is at risk within the family home stronger recognition of children's rights would allow the correct balance to be maintained between children's and parental rights and between a family's right to privacy and the need for appropriate intervention to safeguard the child from harm.
4. A stronger culture of children's rights in Ireland could serve to ensure that all children equally have their rights respected, irrespective of their family status.

5.1 The need for a greater recognition of the rights of the child in Ireland

Ireland is emerging from a very difficult period, where some children, both in the care of the State and in the care of their families were not provided with adequate protection and support. While there is no one response in terms of ensuring children are better protected and supported, building a stronger culture of children's rights in Ireland could create a society that places a greater emphasis and respect on a child's safety, dignity and human rights. A key finding of an Amnesty International Report was that it is essential to strengthen the recognition of children's rights in Ireland (Holohan, 2011). This Report, which undertook a detailed analysis of the systematic failures that enabled the abuses outlined in the Ferns, Ryan, Murphy and Cloyne Reports, acknowledged the link between strengthening children's rights in Irish society and providing express recognition for the rights of the child in the Irish Constitution. Providing greater recognition to the rights of the child would also be consistent with Ireland's commitment to human rights under international law.

This direct connection, between building a stronger culture of children's rights and greater recognition of the rights of the child in the Constitution, has been acknowledged elsewhere. It has been observed that, in terms of Irish jurisprudence, while there is no certainty that the courts will give due weight to the rights of the child in cases before it, according children rights in the Irish Constitution independent of their parents will ensure that these rights will be taken into account as part of judicial consideration (Nolan, 2007). Constitutional recognition of children's rights would also go beyond according children legal rights. The Constitution, as Ireland's over-arching legal framework, has a major impact on Irish law as well as policy and practice. The Constitution's current silence on acknowledging children as independent rights holders has been reported to hamper the promotion and protection of children's rights in Ireland at the policy and practice level (Kilkelly, 2008a; Barnardos, 2007).

In 2011 the Office of the Ombudsman for Children commissioned an analysis of ten investigations undertaken by the Office from a children's rights perspective. Following the analysis, a key observation made was that the best interests of the child principle did not to any great extent, if at all, guide administrative actions or decision-making (Kilkelly, 2011). The investigations reviewed included issues related to school transport, local authority housing provision and special needs provision. Stronger constitutional recognition of children's rights has the potential to embed children's rights principles and standards into all decision making by public bodies and to inform the practice of those working with children, thereby indirectly influencing change and contributing to the promotion and protection of the rights of the child. Having reviewed the place of children's rights in national constitutions throughout all regions of the world, Tobin (2005, p. 86) concluded that:

[w]hile the constitutional recognition of children's rights offers no guarantees with respect to the enjoyment of their rights, at a minimum it legitimises political discourse on children's rights, allowing children to be seen and, increasingly, heard.

5.2 Children's and parental rights are in the main complementary and would strengthen the position of parents to advocate for the rights of their child

Developing a stronger culture of children's rights in Ireland would strengthen the position of children, their parents and those advocating on behalf children to defend their rights. As noted above, the Ombudsman for Children has found that parents and families are often the principal advocates of the rights of the child. Stronger recognition of children's rights would aid parents and those advocating on behalf of children in their efforts to vindicate a child's rights or to support the child in realising their rights, whether it be their right to education, healthcare, the right to have their voice heard or otherwise.

The Constitution's current silence on acknowledging children as independent rights holders has been reported to hamper the promotion and protection of children's rights in Ireland at the policy and practice level.

5.3 A stronger recognition of children's rights would allow the correct balance to be maintained between children's and parental rights and between a family's right to privacy and the need for appropriate intervention to safeguard the child from harm.

As set out in section 4, it is broadly agreed that a child's rights and well-being are normally best protected within the family environment. However, in a situation where the family are not making decisions based on the child's best interests or are struggling to protect the child from harm, a stronger recognition of children's rights could serve to protect their interests and safeguard them from potential risk or harm. In these circumstances children deserve, and have a right to be, adequately protected by the State. This may require the provision of alternative care. However, a stronger recognition of children's rights could also ensure a child's right to family life is protected. This may involve the provision of early intervention and support to the family to

enable the child to safely remain within the family environment, but also where the child is separated from one or both parents, it would require recognition of their right to maintain personal relations and direct contact with their parents.

Canavan (2010) has noted that recent reports of inquiry are illustrative of some of these issues. He observes that, notwithstanding the complexities involved, a basic argument can be made in relation to the Monageer Case that a stronger culture of children's rights in society may have resulted in a different outcome for the children who did not receive adequate protection and tragically lost their lives.¹⁵ While, on the other hand the Ryan report, which focuses on children in the care of the State, is illustrative of the importance of protecting a child's right to family life.¹⁶ Strengthening the position of children's rights in Ireland could provide the framework for achieving the correct balance between children's and parental rights, ensuring primacy is given to the best interests of the child. It could also achieve the correct balance between a families' right to privacy and the need for intervention, including where appropriate for support services, to ensure a child's right to be protected from harm.

5.4 A stronger culture of children's rights in Ireland could serve to ensure that all children equally have their rights respected, irrespective of their family status.

As set out in Section 4, the current Constitutional provisions give rise to an unequal level of protection for children of marital and children of non-marital families. This does not adequately reflect the family structure in all its forms in society today. Figures show that one-in-four

children now live in a family that does not conform to the traditional model of a married couple, both of whom are in their first marriage (Lunn and Fahy, 2011). The Growing Up in Ireland study also established that almost one fifth (18%) of nine year olds live in single parent families (Growing Up in Ireland, 2009). A stronger recognition of children's rights in Irish society would require adherence to the basic principle of non-discrimination. This could ensure improved equality of protection, in terms of recognition of all children as individual rights holders, whether the child is raised in a marital or non-marital family.

6. Conclusion

A referendum to strengthen the visibility of children's rights in the Irish Constitution is one step, but an important step, towards building a stronger culture of children's rights in Ireland. In an effort to contribute to a more informed debate on children's rights in Ireland, specifically on the topic of children's rights and the family, this commentary is the first in a series of responses offered by the CYP and the two UNESCO Chairs regarding the proposed Constitutional referendum.

¹⁵ For full details of the Monageer Inquiry see Monageer Inquiry (2008) Report Presented to Ms. Mary Harney T.D. Minister for Health and Children and Mr. Dermot Ahern T.D. Minister for Justice, Equality and Law Reform.

¹⁶ For details on the Ryan Report see Commission to Inquire into Child Abuse (2009) Final Report of the Commission to Inquire into Child Abuse dated 20th May 2009. In particular Volume I, Chapters 2 and 3, describe the model childcare at the time, whereby children were committed to institutions, primarily if they were deemed 'needy' or due to their involvement in a criminal offence or non-attendance at school, with little regard to the child's interests or family and parental rights and an unwillingness to consider alternatives.

bibliography.

Archard, D. and Skivenes, M. (2009) 'Balancing a child's best interests and a child's views', *International Journal of Children's Rights*, 17(1), 1-21.

Barnardos (2007) *The Case for Constitutional Reform*.

Barnardos (2008) *Barnardos' submission to the Joint Committee on the Constitutional Amendment on Children: Proposed Amendment to Article 42 (A) of the Constitution*.

Canavan, J. (2010) 'Family Support: Policy, Practice and Research into the Future', *Administration*, 58(2), 15-32.

Carolan, E. (2007) 'The Constitutional Consequences of Reform: Best Interests after the Amendment', *Irish Family Law Journal*, 3(9).

Commission on the Family (1998) *Final Report of the Commission on the Family to the Minister for Social, Community and Family Affairs*, Dublin: The Stationary Office.

Commission to Inquire into Child Abuse (2009) *Final Report of the Commission to Inquire into Child Abuse dated 20th May 2009*.

Constitution Review Group (1996) *Report of the Constitution Review Group*, Dublin: The Stationary Office.

European Life Network (2008) 'Submission to the Joint Oireachtas Committee on the Constitutional Amendment on Children'.

Growing Up in Ireland (2009) *Growing Up in Ireland: The Lives of 9-Year Olds: Child Cohort*, Dublin The Stationary Office.

Hayes (2001) 'Cherishing all Children of the Nation Equally: State Provision and Responsibility for Children in Ireland' in Cleary, Phadraig, N. G. and Quin, eds., *Understanding Children Volume 2: Changing Experiences and Family Forms*, Cork: Oak Tree Press.

Health Service Executive (2010) *Roscommon Child Care Case: Report of the Inquiry Team to the Health Service Executive*.

Holohan, C. (2011) *In Plain Sight: Responding to the Ferns, Ryan, Murphy and Cloyne Reports*, Dublin: Amnesty International Ireland.

Irish Human Rights Commission (2006) *Irish Human Rights Commission: Submission to the UN Committee on the Rights of the Child: On Ireland's Second Periodic Report under the UN Convention on the Rights of the Child*, Dublin IHRC.

Joint Committee on Health and Children (2012) *Health Committee welcomes commitment to hold Children's Referendum this year [Press Release]*, Available at: <http://www.oireachtas.ie/parliament/mediazone/pressreleases/name-6738-en.html>.

Joint Committee on the Constitutional Amendment on Children (2010) *Twenty-Eight Amendment of the Constitution Bill 2007: Proposal for a Constitutional Amendment to Strengthen Children's Rights - Final Report*, Dublin: The Stationery Office.

Kilbourne, S. (1998) 'Opposition to U.S. Ratification of the United Nations Convention on the Rights of the Child: Responses to Parental Rights Arguments', *Loyola Poverty Law Journal*, 4, 55 -112.

Kilkelly, U. (2008a) 'Children's Rights and the Family: Myth and Reality', *Studies*, 97(385), 7-18.

Kilkelly, U. (2008b) *Children's Rights in Ireland: Law Policy and Practice*, Dublin: Tottel Publishing.

Kilkelly, U. (2011) *A Children's Rights Analysis of Investigations*, Ombudsman for Children.

Kilkenny Incest Investigation (1993) *Report Presented to Minister Brendan Howlin T.D. Minister for Health by South Eastern Healthboard*, Dublin: The Stationary Office.

Lalor, K., Devlin, M. and Róiste, Á. D. (2007) *Young People in Contemporary Ireland*, Dublin: Gill & Macmillan.

Law Society's Law Reform Commission (2006) *Rights-Based Child Law: The Case for Reform*.

Lunn, P. and Fahy, T. (2011) *Households and Family Structures in Ireland*, Dublin: ESRI and the Family Support Agency.

McAuley, C., Morgan, R. and Rose, W. (2010) 'Children's Views on Child Well-Being' in McAuley, C. and Rose, W., eds., *Child Well-Being: Understanding Children's Lives*, London: Jessica Kingsley.

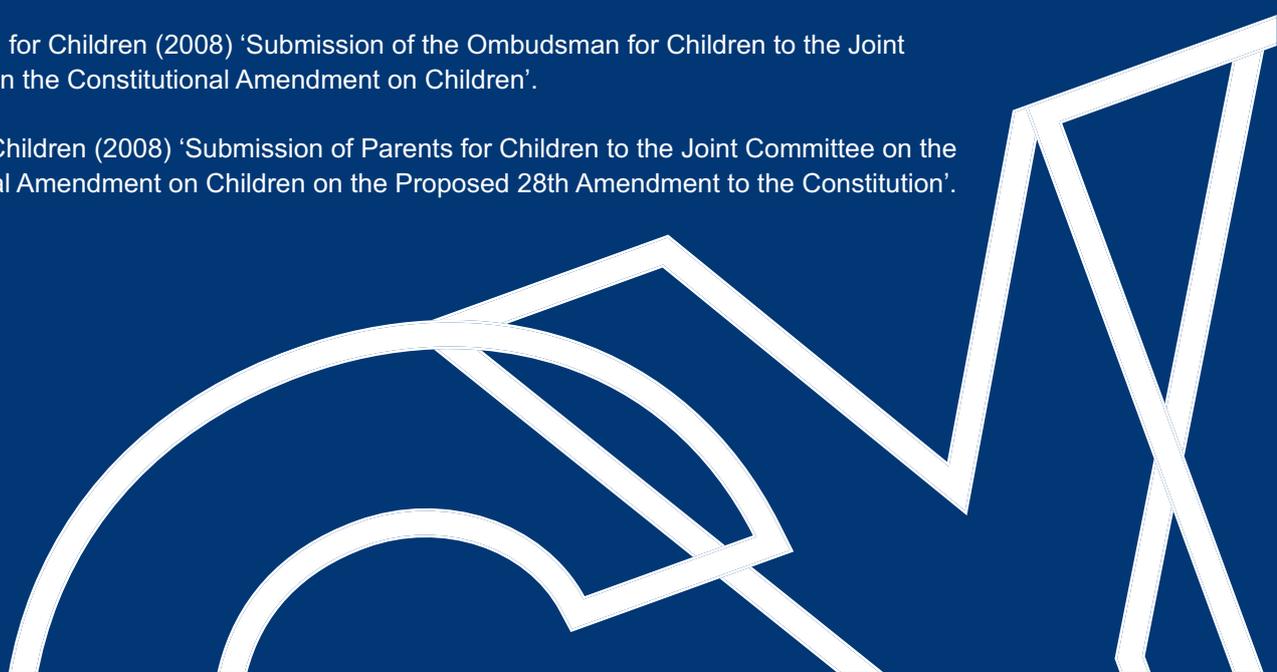
Monageer Inquiry (2008) *Report Presented to Ms. Mary Harney T.D. Minister for Health and Children and Mr. Dermot Ahern T.D. Minister for Justice, Equality and Law Reform*.

Munro, E. (2011) *The Munro Review of Child Protection Interim Report: The Child's Journey*.

Nolan, A. (2007) 'The Battle(s) over Children's Rights in the Irish Constitution', *Irish Political Studies*, 22(4), 495-516.

Ombudsman for Children (2008) 'Submission of the Ombudsman for Children to the Joint Committee on the Constitutional Amendment on Children'.

Parents for Children (2008) 'Submission of Parents for Children to the Joint Committee on the Constitutional Amendment on Children on the Proposed 28th Amendment to the Constitution'.



Pro Life Campaign (2008) 'Submission to Oireachtas Committee'.

Quennerstedt, A. (2009) 'Balancing the Rights of the Child and the Rights of Parents in the Convention on the Rights of the Child', *Journal of Human Rights*, 8, 162 -176.

Shannon, G. (2010) *Child Law*, 2nd ed., Dublin: Thomas Reuters.

The Children's Rights Alliance (2008) 'The Twenty-Eight Amendment of the Constitution: Submission to the Joint Committee on the Constitutional Referendum on Children'.

The Children and Youth Programme (2011) *A Right's Based Approach to Monitoring Children and Young People's Well-Being*.

The Iona Institute (2008) 'Submission to the Joint Oireachtas Committee on Children's Rights on the proposed constitutional amendment'.

Tobin, J. (2005) 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights', *South African Journal on Human Rights*, 21, 86-126.

UN Committee on the Rights of the Child (1998) *Consideration of Reports Submitted by States Parties under Article 44 of the Convention on the Rights of the Child: Concluding Observations of the Committee on the Rights of the Child: Ireland*, Geneva: UN Committee on the Rights of the Child.

UN Committee on the Rights of the Child (2003) *General Comment No. 5: General measures of Implementation of the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/5.

UN Committee on the Rights of the Child (2009) *General Comment No 12: The Rights of the Child to be Heard*, Geneva: UN Doc. CRC/C/GC/12.

UN Committee on the Rights of the Child (2010a) *Consideration of Reports Submitted by States Parties under Article 44 of the Convention on the Rights of the Child. Concluding Observations: Spain*, Geneva: UN Doc. CRC/C/ESP/CO/3-4.

UN Committee on the Rights of the Child (2010b) *Consideration of Reports Submitted by States Parties under Article 44 of the Convention on the Rights of the Child. Concluding Observations: Sri Lanka*, Geneva: UN Doc. CRC/C/LKA/CO/3-4.



UNESCO

UNESCO works to create the conditions for dialogue among civilisations, cultures and peoples, based upon respect for commonly shared values. It is through this dialogue that the world can achieve global visions of sustainable development encompassing observance of human rights, mutual respect and the alleviation of poverty, all of which are at the heart of UNESCO's mission and activities.

The broad goals and concrete objectives of the international community – as set out in the internationally agreed development goals, including the Millennium Development Goals (MDGs) – underpin all UNESCO's strategies and activities. Thus UNESCO's unique competencies in education, the sciences, culture and communication and information contribute towards the realisation of those goals.

UNESCO's mission is to contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information.

UNITWIN

The UNITWIN/UNESCO Chairs Programme advances research, training and programme development in higher education by building university networks and encouraging inter-university cooperation. Established in 1992, today 715 UNESCO Chairs and 69 UNITWIN Networks are established within the Programme, involving over 830 institutions in 131 countries.

UNESCO Chairs and UNITWIN Network projects undertake training, research, information sharing and outreach activities in UNESCO major programmes areas (education, natural sciences, social and human sciences, culture, and communication and information). UNESCO Chairs and UNITWIN Networks provide an innovative modality for international academic cooperation and capacity building, acting as think tanks and as bridge builders between research and policy making, and between academia and civil society.

THE UNESCO CHAIRS

University of Ulster

The Chair, held by Professor Alan Smith, is located in the School of Education. Established formally in 1999, the Chair has a programme of work in Education for Pluralism, Human Rights and Democracy. Building on from the work of the Chair, the UNESCO Centre was founded in 2001 and has, for the past ten years, engaged in research, development and teaching in the areas of: Children and Youth; Education, Health and Well-being; and Conflict and International Development.

NUI Galway

The Chair, held by Professor Pat Dolan, is part of the Child and Family Research Centre (CFRC) located in the School of Political Science and Sociology. Established formally in 2008, the Chair has a core programme of work promoting civic engagement for children and youth. The Chair operates in the wider context of the CFRC, which has been engaged over the previous ten years in undertaking research, evaluation and training in the areas of Family Support and Youth Development.

BRIDGE BUILDING

As members of the UNESCO international education network, UNESCO Chair holders are encouraged to act as "bridge builders" by establishing and sustaining dynamic links between the academic world, civil society, local communities, research and policy-making. The Children and Youth Programme in Northern Ireland and Ireland presents an exciting opportunity to develop such links and to create a programme which is endorsed by UNESCO and which will be recognised nationally and internationally as a major component of the work of the two UNESCO Chairs.

With support from

The
A T L A N T I C
Philanthropies



United Nations
Educational, Scientific and
Cultural Organization



- UNESCO Chair in Education for Pluralism, Human Rights and Democracy
- UNESCO Chair in Children, Youth and Civic Engagement

Children and Youth Programme

t. +44 (0)28 7012 3593

f. +44 (0)28 7012 3021

e. comms@childrenandyouthprogramme.info

Twitter: @UNESCOcyp

www.childrenandyouthprogramme.info

UNESCO Centre

School of Education

University of Ulster

Cromore Road

Coleraine

Co. Londonderry

BT52 1SA

Northern Ireland

www.ulster.ac.uk/unescocentre

UNESCO Child and Family Research Centre

School of Political Science and Sociology

National University of Ireland

Galway

Ireland

www.childandfamilyresearch.ie

