

THE REFERENDUM
COMMISSION'S
INDEPENDENT
GUIDE



The
Children
Referendum

Saturday November 10th
www.referendum2012.ie

The Referendum Commission

The Referendum Commission is an independent body set up by the Referendum Act 1998. The Chairperson of the current Commission is Ms Justice Mary Finlay Geoghegan. The other members are: Mr Kieran Coughlan, Clerk of Dáil Éireann; Ms Deirdre Lane, Clerk of Seanad Éireann; Ms Emily O'Reilly, Ombudsman; Mr Seamus McCarthy, Comptroller and Auditor General.



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Message from the Chairperson

On Saturday, November 10th 2012, you will be asked to vote on a proposal to change the Constitution of Ireland. The proposed changes to the Constitution concern the rights of children. The proposal is to add a new Article 42A to the Constitution and to delete the existing Article 42.5.

How you vote in the referendum is for you to decide. However, the Referendum Commission urges you to inform yourself about the proposed change and to vote. The Constitution is important. It is the fundamental law of our State. It was put in place by a referendum of the people and can be changed only by a referendum. It sets the standards for all State activity. It must be respected and obeyed by all including the Dáil and Seanad, the Courts and the public service. It is your Constitution and you have the power to decide whether or not to change it.

In this guide, we provide a short description of the proposed change and the text of certain other existing articles of the Constitution relating to personal rights, family and education which may be relevant to your consideration of the proposal. We will have further information on our website.

This guide does not argue for a yes or no vote but we do strongly encourage you to vote.

A handwritten signature in blue ink that reads "M. Finlay Geoghegan".

Mary Finlay Geoghegan
Chairperson
Referendum Commission

www.referendum2012.ie



The proposed change to the Constitution

On Saturday, November 10th 2012, you are asked to vote yes or no to a proposal to include in the Constitution a new Article 42A and at the same time remove the current Article 42.5.

If a majority of voters votes yes in this referendum, the existing Article 42.5 will be removed and a new Article 42A will become part of the Constitution. All other articles of the Constitution will remain in place.

If a majority votes no, there will be no change to the Constitution.

While the proposed new Article has a number of parts to it, you may only vote yes or no to the total proposal. You may not vote to adopt only part of the proposed Article 42A nor may you vote to adopt it and retain Article 42.5 in its present form.



The proposed new Article

Children Article 42A

- 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.



What are the proposed changes to the Constitution?

There are four main elements to the proposal.

1. Explicit obligation to protect and vindicate rights of children

If adopted, the proposed Article 42A.1 will introduce an explicit statement in the Constitution recognising and affirming that children have natural and imprescriptible rights and stating that the State has an obligation to ensure, as far as practicable, that those rights are protected and vindicated. The Courts have held “imprescriptible”, in other articles of the Constitution, to mean that which “cannot be lost by the passage of time or abandoned by non-exercise” or “lost or forfeited through the wrongful act of a third party”.

At present, the Constitution does not contain an explicit guarantee by the State to protect and vindicate the rights of all children in these terms. However, the existing Article 42.5 does refer to the natural and imprescriptible rights of the child as a matter to which the State shall have due regard when trying to supply the place of parents who fail in their duty towards their children. In the absence of an explicit guarantee, the Courts have identified certain children’s rights from this Article and from other articles of the Constitution.

The new Article 42A.1 includes a statement in respect of children’s rights which is explicit, is concerned solely with the rights of children and recognises and affirms such rights in a single clause. The rights referred to in the proposal are not listed. It will be a matter for the Courts, on a case by case basis, to identify the rights protected by this provision.



2. State intervention if parents fail in their duty

The existing Article 42.5 would be replaced by the proposed Article 42A.2.1°.

Article 42.5

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.



Article 42A.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.

At present, the Constitution provides in Article 42.5 that the State, as guardian of the common good, may intervene and try to supply the place of the parents if the parents fail in their duty towards the child. The State may intervene only in exceptional cases and the intervention must have due regard for the child’s rights.

This will remain the position if the proposal to amend the Constitution is passed. However, there will be a number of changes.



The changes will be:

- » The proposed new Article explicitly provides that it applies to all parents whether or not they are married to each other.
- » The existing Article provides that intervention may occur if the parents fail in their duty towards the child for physical or moral reasons. The proposed new Article provides that the intervention may occur if the parents fail in their duty towards their children to such an extent that the child's safety or welfare is likely to be prejudicially affected.
- » The existing Article requires the State to use **appropriate** means and does not require that those means be set out in law. The proposed new Article provides that the State's intervention must use **proportionate** means which must be set out in law.

3. Adoption

The proposed change to the Constitution contains two provisions dealing with adoption.

- » If the proposal is passed, the proposed Article 42A.2.2° will mean that the State must put laws in place allowing for the adoption of any child, whether or not the parents are married to each other, if the following conditions are met:
 - That the parents have failed in their duty towards the child for a period of time, this period to be specified in law.
 - That the best interests of the child require that adoption take place.
- » The proposed Article 42A.3 will mean that laws must be passed to allow for any child to be adopted by being voluntarily placed for adoption.

Current adoption law allows for the child of unmarried parents to be placed for adoption and to be adopted. At present, there is no law permitting married parents to voluntarily place a child for adoption. Adoption law at present provides that orders for the adoption of children of married parents may be made only in very limited circumstances involving the effective abandonment of parental rights.



4. Best interests and views of the child

Many of the current laws relating to children provide that, in making decisions in particular cases, the Courts must consider the “best interests” or the “welfare” of the child to be the paramount consideration. There is no specific requirement to this effect expressed in the text of the Constitution at present.

The proposed Article 42A.4.1° makes explicit reference to the best interests of the child as the paramount consideration when significant decisions in relation to the child are being made. It means that laws must be passed to require that the best interests of the child must be the paramount consideration when a Court is making any decision in relation to:

- » Proceedings taken by the State where it intervenes to protect the safety and welfare of a child.
- » Issues of adoption, guardianship, custody of, or access to, a child in proceedings between any persons.

The proposed Article 42A.4.2° provides that laws must be passed which require that in the above proceedings, as far as practicable, the views of a child capable of forming his or her own views be obtained and given due weight having regard to the age and maturity of the child.

The views of the child are obtained and taken into account in many court proceedings at present but there is no explicit constitutional reference to the views of the child as a consideration in determining proceedings.





Other articles of the Constitution

If the proposed Article 42A becomes part of the Constitution, it will be read in conjunction with other relevant articles.

The following articles appear the most relevant in this context. They (except for Article 42.5) will remain in place if the new Article 42A is included in the Constitution.

Personal Rights Article 40

- ...
- 3** 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
- 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.
- ...

The Family Article 41

- 1** 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
- 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
- ...
- 3** 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.
- ...



Education Article 42

- 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 the religious and moral, intellectual, physical and social education of their children.
- 2** Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.
- 3** 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.
- 2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.
- 4** The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.
- 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.

Article 42.5 above will be deleted if the referendum proposal is passed.



**MAKE SURE YOU'RE INFORMED
BEFORE YOU VOTE
SATURDAY NOVEMBER 10TH**

