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‘Work-Based Placement Report for Together (Scottish Alliance for Children’s Rights): The Irish Children’s Rights Referendum’

Camilla Bonifai

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Abbreviations and acronyms

- **CRC** Convention on the Rights of the Child
- **DCYA** Department of Children and Youth Affairs
- **EU** European Union
- **NGO** Non-governmental Organisation
- **OCO** Ombudsman for Children's Office
- **UK** United Kingdom
- **UN** United Nations
- **UNCRC** United Nations Convention on the Rights of the Child

For the purpose of this paper, 'child' and 'children' refer to those under the age of 18 years-old, as per article 1 of the UN Convention on the Rights of the Child.

Chapter 1: Introduction

“The lives of children will not change for the better until the obligations that [the CRC] lays down are taken seriously by legislatures, governments and all others concerned with the daily lives of children” (Freeman 2002, 115)

The United Nation’s Convention on the Rights of the Child

The United Nation Convention on the Rights of the Child¹ (hereinafter the CRC) was adopted on 20 November 1989 by the United Nations (hereinafter the UN) General Assembly setting out the rights of children to ensure they grow up ‘in the spirit of peace, dignity, tolerance, freedom, equality and solidarity’.² The CRC³ sets out the definition of the child as being ‘every human being below the age of 18 unless, under the law applicable to the child, majority is attained earlier’.⁴ This is of the utmost importance as it means that the UN, together with all the signatory States, recognises children as a special group of individuals with particular vulnerabilities and needs who should be recognised as right-holders. The CRC specifically applies to all children without discrimination.⁵

To this date the CRC has been adopted and ratified by 193 out of 194 countries around the world, with the only exception being the United States of America.⁶ States are expected to comply with the CRC’s requirements from the moment of ratification, with a duty to ‘respect, protect and fulfil’⁷ the rights specified therein. As set out in Article 4 ‘State Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in

¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

² *Ibid.*, Preamble of the Convention

³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3, Article 1

⁴ *Ibid.*

⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 2

⁶ UNICEF – The Convention on the Rights of the Child – CRC Turns 20, ‘*About the Convention*’ (Website) Available at: https://www.unicef.org/rightsite/237_202.htm Accessed 10 August 2018

⁷ United Nations Human Rights Officer of the High Commissioner, ‘*International Human Rights Law*’ (Website 2018) <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>> accessed 29 June 2018

the present CRC'.⁸ To do this, the State must put in place a range of measures, including legislation, to ensure the obligations of the CRC are 'respected, protected and fulfilled'.⁹ The State must also ensure that all legislation is compatible with the CRC and that children have domestic and effective remedies to challenge violations of their rights.

According to CRC General Comment no. 5, on the general measures of implementation¹⁰:

*'[...] incorporation of the Convention into domestic law, [...] is the traditional approach to the implementation of the international human rights instruments [...] Incorporation should mean that the [...] Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice.'*¹¹

This emphasises that the recommended way to guarantee the rights laid out in the CRC is through incorporation of the treaty into domestic law.

General comment n. 5: General measures of implementation of the Convention on the Rights of the Child

General Comments are documents issued by the treaty bodies to provide further guidance on implementing treaty obligations.¹² General Comment No. 5¹³ to the CRC sets out the general measures of implementation that every State Party should put in place to ensure effective implementation. It particularly addresses articles 4¹⁴,

⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3, Article 4

⁹ United Nations Human Rights Officer of the High Commissioner, 'International Human Rights Law' (Website 2018) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> accessed 29 June 2018

¹⁰ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention of the Rights of the Child*, 27 November 2003, CRC/GC/2003/5

¹¹ *Ibid.*, IV Legislative Measures, para. 3

¹² United Nations Human Rights Office of the High Commissioner, *Human Rights Treaty Bodies – General comments*, (2018) Available at: <https://www.ohchr.org/en/hrbodies/pages/tbgeneralcomments.aspx> (Accessed: 9 July 2018)

¹³ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5

¹⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1898, United Nations, Treaty Series, vol. 1577, p. 3, Article 4

42¹⁵ and 44, para. 6¹⁶.¹⁷ These, respectively, relate to the implementation of the CRC, the knowledge of the rights to children and adults, and the duty of the Government to make these rights public and available to all.

While the General Comment highlights the obligations that the State Parties must fulfil to comply with the CRC, it also reiterates the importance of the availability of legal redress for every child, and their representatives, when rights are violated.:

'[...] effective remedies must be available to redress violations. This [...] is implicit in the Convention... Children's special and dependent status creates real difficulties for them in pursuing remedies for breach of their rights. [...] States need [...] child-sensitive procedures available for children and their representatives. [...] Where rights are found to have been breached, there should be appropriate reparation [...], as required by article 39'.¹⁸

This explains why the incorporation of the CRC into domestic legislation is the Committee's favoured approach to implementation.

In '[I]ncorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review'¹⁹, the different ways of transposing the CRC measures into domestic law are analysed. It explores direct incorporation, indirect incorporation, as well as non-legal measures of implementation. The report does not suggest one mechanism over another but stresses the importance of giving domestic values to human rights as:

'[T]he fate of human rights – their implementation, abridgement, protection, violation, enforcement, denial, or enjoyment – is largely a matter of national, not international, action'.²⁰

¹⁵ *Ibid.*, p. 3, Article 42

¹⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 44 para. 6

¹⁷ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5

¹⁸ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, Part V para. 24

¹⁹ Laura Lundy, Ursula Kilkelly and Bronagh Bryne, 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review', *International Journal of Children's Rights*, 21(3), 442-463

²⁰ Donnelly, J. *Universal Human Rights in Theory and Practice* (2nd edition) London and Ithaca: Cornell University Press., p. 171

The NGO Together (Scottish Alliance for Children's Rights)²¹, emphasises the importance of direct incorporation in that it 'raises awareness of rights', ensures rights are 'enforceable in law' and provide 'results in terms of improving human rights protection in law and in practice'²², for all children. Strong legislation at a domestic level ensures children's entitlements as rights holders and ensures that States are duty-bound to act compatibility with the CRC. It also provides children with access to remedy through domestic courts if their CRC rights have been breached.

Ireland and the Convention on the Rights of the Child

This report will focus on specific children's rights developments in Ireland. As one of the first 193 signatory States to the CRC, Ireland signed the CRC on the 30 September 1990 and ratified it almost two years later, on 28 September 1992²³ without reservations to its provisions.²⁴ Ireland has only recently begun to take steps to directly incorporate the CRC into domestic law. The UN Committee had to recommend twice, in their Concluding Observations in 1998²⁵ and in 2006²⁶, that Ireland took steps to implement the CRC. In 2010, in honour of the 18th anniversary of the ratification of the CRC in Ireland, Jillian Van Turnhout, Chief Executive of the Children's Rights Alliance, acknowledged the importance of the anniversary, but stated that '[T]o make children's rights a reality we must make children visible in the Constitution and... improve the supports and services available to children and their families'.²⁷ The Constitution of Ireland is the most fundamental piece of legislation in the country. Nevertheless, it does not contain a single *ad hoc* article in relation to

²¹ Together (Scottish Alliance for Children's Rights) *Implementation & monitoring the UN Convention on the Rights of the Child (UNCRC)*, Scotland, UK: Together (Scottish Alliance for Children's Rights)

²² Together (Scottish Alliance for Children's Rights) *Implementation & monitoring the UN Convention on the Rights of the Child (UNCRC)*, Scotland, UK: Together (Scottish Alliance for Children's Rights)

²³ Children's Rights Alliance, '18th Anniversary of Ireland Ratifying the UN Convention' (Website 2010) <http://www.childrensrights.ie/resources/18th-anniversary-ireland-ratifying-un-convention> accessed 29 June 2018

²⁴ Department of Children and Youth Affairs (DCYA), '*International – UN and International Developments*' Available at: < <https://www.dcy.a.gov.ie/docs/EN/State-Boards/1642.htm> > Accessed 15 August 2018

²⁵ UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations: Ireland, 4 February 1998, CRC/C/15/Add.85

²⁶ UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations: Ireland, 29 September 2006, CRC/IRL/CO/2, p.5, 3. General Principles (arts. 2,3, 6 and 12)

²⁷ Children's Rights Alliance, '18th Anniversary of Ireland Ratifying the UN Convention' (Website 2010) <http://www.childrensrights.ie/resources/18th-anniversary-ireland-ratifying-un-convention> accessed 29 June 2018

children's rights. The only part in the Irish Constitution that refers to children are articles 40 to 42.²⁸ These articles only consider a child within the family unit rather than as individuals with its own rights.

Ireland took a step forward in terms of incorporation when, on 10 November 2012, citizens voted in a referendum that aimed to incorporate specific children's rights within the Constitution (albeit covering only a limited set of rights). The referendum proposed a Thirty-First Amendment²⁹ by repealing Article 42.5³⁰, which concerns the State responsibility to intervene in cases where parents fail in their duties³¹, and replacing it with article 42.A³², which recognises the importance of family union but allows for the State's intervention in 'exceptional cases'.³³ The latter also elaborates in relation to adoption, guardianship and the best interest of the child.³⁴

In Ireland, a referendum is the only mechanism through which a constitutional change can be made. The changes proposed through the children's rights referendum had been long called for. Internationally, the UN Committee had been recommending legislative change since 1998.³⁵ Nationally, reports of child abuse and neglect had indicated a strong need for legal reform since the early 1990s. Ireland's laws concerning children had always been oriented around parents and families, rather than around children as rights-holders. In most cases, the best interest of the child was assumed to be served with the parents, rather than analysed on a case-by-case basis. According to Irish law, the family union is intended to be the one founded on marriage (art. 41³⁶). This creates diverse problems for the child born out of wedlock that are only now starting to be addressed after the 2012 vote.

²⁸ The Constitution of the Republic of Ireland, Articles 40 to 42 Bunreacht na hEirann

²⁹ *Ibid.*, 31st Amendment

³⁰ The Constitution of the Republic of Ireland, Article 42.5 Bunreacht na hEirann

³¹ *Ibid.*, Article 42.5 states: 'where the parents... 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'.

³² The Constitution of the Republic of Ireland, Article 42.A Bunreacht na hEirann

³³ The Constitution of the Republic of Ireland, Article 42.A Bunreacht na hEirann states: '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.'

³⁴ *Ibid.*, Article 42.A 2°, 4.A 4 1 ° I and ii Bunreacht na hEirann

³⁵ UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations: Ireland, 4 February 1998, CRC/C/15/Add.85

³⁶ The Constitution of the Republic of Ireland, Article 41 Bunreacht na hEirann

In 2012 UNICEF issued a research report³⁷ shortly after the referendum acknowledging that Ireland had stepped a little closer to incorporation. The report explored the 'legal and non-legal measures'³⁸ of implementing the CRC by comparing 12 different countries. Regarding Ireland, the research found that the main concerns included that '[T]he CRC has not been incorporated into domestic law' and that the Constitution had very limited provisions relating to children.³⁹

In the following chapters these issues will be considered in detail.

A comparison with Scotland

Similarly to Ireland, the United Kingdom (hereinafter the UK) ratified the CRC on 16 December 1991.⁴⁰ The UK did not take any immediate steps to incorporate the CRC into domestic law. As a result, the UN Committee recommended in the Concluding Observations of 2002⁴¹, 2008⁴² and 2016⁴³ that the UK incorporate the CRC.

On 19 February 2014 the *Children and Young People (Scotland) Act 2014*⁴⁴ (the 2014 Act) was passed by the Scottish Parliament and received Royal Assent on 27 March of the same year. The 2014 Act was Scotland's first step to enshrine the CRC into domestic law although providing little legal weight to the CRC's provisions. Together (Scottish Alliance for Children's Rights) highlighted that '[T]here has been widespread disappointment that an opportunity to fully incorporate the CRC into Scots law has been missed by the Scottish Government [...]'.⁴⁵ So whilst the 2014

³⁷ Laura Lundy, Ursula Kilkelly, Bronagh Bryne and Jason Kang, 'The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries' (UNICEF United Kingdom and Queen's University Belfast) 2012

³⁸ *Ibid.*, p. 3

³⁹ Laura Lundy, Ursula Kilkelly, Bronagh Bryne and Jason King, 'The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries' (UNICEF United Kingdom and Queen's University Belfast) 2012 p. 49

⁴⁰ Together (Scottish Alliance for Children's Rights), 'UN Convention on the Rights of the Child' (Website 2018) <http://www.togetherscotland.org.uk/about-childrens-rights/> accessed 29 June 2018

⁴¹ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 9 October 2002, CRC/c/15/Add.188

⁴² UN Committee on the Rights of the Child (2008). Consideration of Reports Submitted by State Parties under Article 44 of the Convention: Concluding Observations: United Kingdom of Great Britain and Northern Ireland

⁴³ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 3 June 2016, CRC/C/GBR/CO/5

⁴⁴ Scottish legislation, Children and Young People (Scotland) Act 2014

⁴⁵ Together (Scottish Alliance for Children's Rights), 'State of the Children's Rights in Scotland', November 2014, p. 11, para. 1.1

Act places the CRC on statute, it can still be seen as a failure to ‘fully commit to the government’s obligations under the CRC.’⁴⁶ Hence, by examining the steps taken in Ireland, the learning for the UK and particularly for Scotland, will be identified.

The report

The aim of this report is to identify the factors that influenced Ireland’s decision to partially incorporate the CRC into domestic law, analyse what the constitutional change entailed, and what impact it has had.

The paper will be divided as follows:

Chapter two sets out the situation in Ireland prior to the 2012 children’s rights referendum. This will include the legal framework surrounding the CRC: the UN Concluding Observations of 1998 and 2006, the implementation of General Comments (specifically no. 5⁴⁷, no. 12⁴⁸, no. 14⁴⁹) and reports issued by children’s rights NGOs which demanded a Constitutional change to better protect the lives of children. The analysis of the legal framework will help to identify the areas that were or still are lacking in jurisprudence.

Chapter three will consider the factors that drove Constitutional change. This includes reports on sexual and physical abuse on children, scandals in the church, case law on adoption and healthcare, and matters where the best interest of the child was not taken as a primary consideration. In addition, this will summarise the arguments and counter-arguments put forward from different groups in relation to the proposed Constitutional change. The suitability of a referendum will be briefly considered in relation to whether it is appropriate to put human rights protections to the popular vote.

Chapter four will consider policy developments that followed from the referendum and explore what has changed in terms of children’s experiences of their rights, drawing from the UN Committee’s latest Concluding Observations issued in 2016.

⁴⁶ Juliet Harris, Director of Together (Scottish Alliance for Children’s Rights)

⁴⁷ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5

⁴⁸ UN Committee on the Rights of the Child (CRC), *General comment no. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12

⁴⁹ UN Committee on the Rights of the Child (CRC), *General comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14

The chapter will consider the impact that the Constitutional change has had on children and young people's lives, and whether the steps taken meet the UN Committee's requirements.

[Chapter five](#) will provide a conclusion summarising and reiterating the main findings from which learning can be taken for Scotland and the wider UK.

Chapter 2: The legal framework (pre-referendum)

This chapter will analyse the legal framework in relation to children's rights prior to the 2012 children's rights referendum and identify the areas that were and still are lacking in protection. The section will be divided as follows:

Subsection 2.1 will consider the framework prior to the referendum, identifying what protection children were afforded under the Irish Constitution, and where there were gaps.

Subsection 2.2 will highlight issues raised through the recommendations from the UN Committee especially in relation to the legal framework.

Subsection 2.3 will highlight issues raised through reports and recommendations from Irish children's rights NGOs.

What was the situation in Ireland prior to the Referendum on the Thirty-First Amendment?

The legal protection of specific children's rights in Ireland prior to the November 2012 referendum was basically non-existent. The Irish Constitution barely mentioned children and did not grant them any enforceable rights. The CRC sets out specific rights for children under the age of 18 years old. However, whilst the Constitution affords rights to children as citizens of Ireland, it does not include specific rights for children. The only rights that can be considered being in place for children⁵⁰ are in relation to family. Hence, the Constitution fails to address several issues that ought to be carefully considered from a rights-perspective, such as adoption, guardianship and the best interest of the child. Jillian Van Turnhout, in 2010, two years before the referendum stated that the 'Constitution, written in a different era, 'was a major stumbling block'⁵¹ in terms of children's rights. Many NGOs, politicians and human rights activists pushed for a change in the legislative framework. The Irish NGO Children's Rights Alliance argued that the legal framework:

'created four problems: [...] poor decision-making for children, it failed to adequately support families and to protect children, that children's voices were not considered in

⁵⁰ The Constitution of the Republic of Ireland, Article 40 to 42 Bunreacht na hÉirann

⁵¹ Jillian Van Turnhout (2010) *The time is ripe for children's rights referendum* in Claire McGing (2014) *The Children's Referendum 2012*, Irish Political Studies, 29:3, 471-479, p. 472

*judicial or administrative decisions about them, and that it was virtually impossible for abandoned children to be adopted, particularly if their parents were married.*⁵²

Adoption, as just one example, was a particular rights issue, discriminating against children in relation to the marital status of their biological parents.

Before 2015, Irish law set out that children whose parents could not care for them could not be adopted if their mother and father were married. This issue affected almost 2,000 children.⁵³ In law, there was an implied assumption that the best interest of the child is served with the family, which is the union based on marriage. This can be controversial when dealing with particular cases where, even though acknowledging the importance of the family union, courts need to identify on a case-by-case basis what is in the best interest of the child.^{54 55}

Another example can be given in relation to guardianship of fathers in unmarried couples. Prior to 2015 the mother and father, when unmarried, did not have the same rights in relation to the child. The mother was immediately the guardian of the child from the moment he/she is born. However, the father would have had to apply, together with the mother, if he also wanted to be the guardian.⁵⁶ The law would need to be changed⁵⁷ if fathers were to have equal rights and children to have the right to a relationship with both parents.^{58 59}

These were only two of many children's rights issues in Ireland prior to the 2012 referendum. Subsequently in the report the legal reforms made in regards to adoption and guardianship will be looked at in more detail.

The United Nation's Concluding Observations

⁵² Children's Rights Alliance. (2012) *Children's Referendum: A legal and Policy Overview* in Claire McGin (2014) *The Children's Referendum 2012*, Irish Political Studies, 29:3, 471-479, p. 472

⁵³ Children's Right Alliance (2012) *Is the Government Keeping its promises to Children?* Report Card 2012, 1-76, p. 63

⁵⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3, Art. 3

⁵⁵ *Ibid.*, p. 3, article 21

⁵⁶ Treoir (2016) *Fathers*, Available at <http://www.treoir.ie/groups/father/> (Accessed: 5 July 2018)

⁵⁷ Prior to the referendum the Oireachtas, Children and Family Relationships Act 2015, Part 9 of 2015 was introduced

⁵⁸ According to the new legislation Children and Family Relationships Act 2015, Part 9 of 2015, fathers need to be able to prove that they have lived with the mother for at least 12 months including three months after the child being born. More information can be found at Treoir (2016) *Fathers*, Available at <http://www.treoir.ie/groups/father/> (Accessed: 5 July 2018)

⁵⁹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, article 7

Approximately every five years⁶⁰, State Parties that have ratified the CRC are subject to an examination of progress by the UN Committee. As part of this examination, State Parties have to submit a report detailing the steps taken to protect, respect and fulfil the rights enshrined in the CRC. Following the examination, the UN Committee issues a set of Concluding Observations highlighting the ‘observations and recommendations’ referring ‘both to the positive aspects of a State’s implementation of the treaty and areas where the treaty body recommends that further action needs to be taken’.⁶¹ In relation to Ireland, and prior to the children’s referendum in 2012, the UN Committee issued two reports: one in 1998⁶², and one in 2006.⁶³ Among the recommendations of 1998, the Committee urged the Irish Government to ‘take further steps to ensure that the Convention is fully incorporated as part of the domestic law, taking due account of its general principles [...]’.⁶⁴ Similarly, the 2006 Concluding Observations’ report reiterated this recommendation, advising Government to ensure that the best interest of the child principle is ‘applied to all political, judicial and administrative decisions’.⁶⁵ The Committee also suggested that the Government ‘strengthen its efforts to ensure, including through Constitutional provisions, that children have the right to express their views in all matters affecting them and to have those views given due weight’.⁶⁶ This demonstrates how important it is for a State party to incorporate, or use other legislative measures, to enforce the CRC in domestic law. The UN’s Concluding Observations provide a clear roadmap for governments of the legislative and policy measures needed to properly implement the CRC. They also provide a strong lever with which National Human Rights Institutions and NGOs can advocate for change. The Children’s Rights

⁶⁰ For more information on the CRC reporting cycle visit: Equality and Human Rights Commission (2018) *Convention on the Rights of the Child*, Available at: <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/convention-rights-child> (Accessed: 6 July 2018)

⁶¹ Office of the United Nations High Commissioner for Human Rights (2012) *Human Rights Treaty Bodies*, Available at: <http://www2.ohchr.org/english/bodies/treaty/glossary.htm> (Accessed: 5 July 2018)

⁶² UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Ireland*, 4 February 1998, CRC/C/15/Add.85

⁶³ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Ireland*, 29 September 2006, CRC/IRL/CO/2

⁶⁴ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Ireland*, 4 February 1998, CRC/C/15/Add.85, E. Suggestions and recommendations para. 25

⁶⁵ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Ireland*, 29 September 2006, CRC/IRL/CO/2, p.5, 3. General Principles (arts. 2,3, 6 and 12) para. 23 (b)

⁶⁶ *Ibid.*, p. 4, para. 19

Alliance highlighted that by ratifying the CRC 'Ireland committed itself to promote, protect and fulfil the rights of children as outlined in the articles of the Convention'⁶⁷, hence incorporation had to be the next, natural step to take. Emily Logan⁶⁸, the former and first Ombudsman for Children, also advocated, for a Constitutional change, until, finally, in 2006 Bertie Ahern TD, the then prime minister, declared that there would be a referendum to amend the Constitution to give stronger protection to children's rights.⁶⁹

Reports by Children's Rights NGOs

NGOs and human rights activists had been promoting and advocating for Constitutional change for many years.

⁶⁷ Children's Rights Alliance. (2012) *Children's Referendum: A Legal and Policy Overview*, in Claire McGing (2014) *The Children's Referendum 2012*, Irish Political Studies, 29:3, 471-479, p. 471

⁶⁸ Irish Human Rights and Equality Commission, *Emily Logan, Chief Commissioner*, available at: <https://www.ihrec.ie/about/chief-commissioner-members-of-ihrec/emily-logan-chief-commissioner/> (Accessed: 6 July 2018)

⁶⁹ Claire McGing (2014) *The Children's Referendum 2012*, Irish Political Studies, 29:3, 471-479, p. 472

One of the main organisations was Barnardo's, which published 'The Case for Constitutional Change'⁷⁰ in 2007 to set out why a referendum on children's rights was needed and what the amendments should include. Barnardo's stated that it '... believes that all children deserve to be fully protected by it [the Constitution] in their own rights rather than seen as a unit of a family'.⁷¹ In the same year, the Children's Rights Alliance of Ireland set out that the rights that needed protection under the Constitution were:

- 1) Express Rights for children;
- 2) Equality and non-discrimination (art. 2 CRC⁷²);
- 3) Best interests of the child: (art. 3 CRC⁷³);
- 4) The right to be heard: (art. 5 and art. 12 CRC⁷⁴);
- 5) Societal position and authority of the family;
- 6) Right to family life and continuity of care: (art. 20 CRC⁷⁵);
- 7) Protection from abuse: (art. 19 CRC⁷⁶);
- 8) Duty of the State to fulfil its duty to intervene to uphold the child's rights: (art. 20 CRC⁷⁷);
- 9) Adoption of children of marital families: (art. 21 CRC⁷⁸);
- 10) Right to identity: (art. 8 CRC⁷⁹);
- 11) Definition of the Child: (art. 1 CRC⁸⁰).⁸¹

⁷⁰ Barnardos: No child gets left behind (2007) *The Case for Constitutional Change*, Dublin, Ireland: Fergus Finlay

⁷¹ Barnardos: No child gets left behind (2007) *The Case for Constitutional Change*, Dublin, Ireland: Fergus Finlay, Foreword p. 3

⁷² UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3, art. 2

⁷³ *Ibid.*, art. 3

⁷⁴ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3, Art. 5 and 12

⁷⁵ *Ibid.*, art. 20

⁷⁶ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3, art. 19

⁷⁷ *Ibid.*, art. 20

⁷⁸ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3, art. 21

⁷⁹ *Ibid.*, art. 8

⁸⁰ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3, art. 1

⁸¹ Children's Rights Alliance, *The Constitution and Children – A Position Paper on the Proposed Referendum on Children's Rights*, (2007), P. 11

It is clear that NGOs like Barnardo's and the Children's Rights Alliance have influenced constitutional change, which are now being addressed in the Constitution and through new legislation.

This will be further considered to determine whether progress has been made and what impact it has had. The following section will focus on the factors that drove constitutional change.

Chapter 3: What drove Constitutional Change?

This chapter will analyse the factors that influenced the decision to have a referendum to amend the Constitution to better support children's rights.

The chapter will be divided as follows:

- Subsection 3.1 will explore the range of reports, case law, reviews and investigations into child abuse, neglect and adoption that influenced the decision to seek constitutional change.
- Subsection 3.2 will summarise the arguments for and against constitutional change made prior and during the referendum.
- Subsection 3.3 will discuss the issues around the use of referenda to make decisions on minorities' and human rights.

The evidence for constitutional change – reports, case law, and investigations

Many factors drove constitutional change. Reports of child abuse and neglect, as well as issues around adoption, strongly highlighted the need for stronger protections for children's rights. Prior to the 2012 referendum, Ireland confirmed 1,500 cases of child abuse in 2011⁸² and 2,000 children living in child care as they were not eligible for adoption.⁸³

From as early as 1993 there had been a number of reviews, reports, case law and investigations that revealed clear failures to address children's rights and to protect the most vulnerable. This section will not include every single report or case that was issued in the years preceding the referendum. Nevertheless, the aim is to provide a reasoning behind the main issues that were present and that needed to be addressed.

In 1993 one of the most significant investigations took place: *the Kilkenny investigation*.⁸⁴ The case concerned the rape of a 16-year-old by her father, from

⁸² Central Statistic Office – Ireland, 'Garda Recorded Crime Statistics 2007-2011' (Report 2007-2011) https://www.cso.ie/en/media/csoie/releasespublications/documents/crimejustice/2011/gardacrimestats_2011.pdf accessed 23rd July 2018

⁸³ Carl O'Brien, 'Reforms may make 2,000 children eligible for adoption' *The Irish Times* (Ireland, 27th November 2014)

⁸⁴ Kilkenny incest investigation/ [investigation headed by Catherine McGuinness]; report presented to Mr Brendan Howlin T.D. Minister for Health by South Eastern Health Board May 1993

which she had a child. The man was sentenced to 7 years in prison after pleading guilty to the charges of assault, incest and rape. The case and its short sentence caused outrage in Ireland and in the rest of the world. Subsequent to the investigation, social workers reported that incest was a widespread practice in Ireland and that in '1984 there were 408 instances of reported sexual abuse of children, including incest'.⁸⁵ It was clear that change was needed to provide stronger protection of children's rights to address these issues.⁸⁶

In 1996, the *Constitutional Review Group* (CRG)⁸⁷ issued a report recommending the amendment of article 41⁸⁸ and 42⁸⁹ of the Constitution in order to guarantee the protection of children's rights including the right to be registered⁹⁰ and the right to be taken care of by his/her parents.⁹¹

In 1998, in the case of *IO'T v B*⁹², the Court, indirectly, took into consideration the best interest of the child. The case concerned the plaintiff who argued that it was his constitutional right (even though unenumerated⁹³) to know the identity of his mother under article 40.3.⁹⁴ Article 40.3 protects the personal rights of the individual and the relation between mother and child.⁹⁵ The Court upheld the right of the child to know the mother's identity, acknowledging that this might conflict with the mother's right to privacy but ruling that the latter was not protected under the Constitution.⁹⁶ Hence, the Court ruled in favour of the plaintiff. Whilst this was a step forward in terms of courts recognising children's rights, subsequent cases did not continue this trend.

⁸⁵ Olive Braiden, director of the Dublin Rape Crisis Centre, in James F. Clarity, 'Rape-Incest Case in Ireland Provokes Furor' *The New York Times* (1993)

⁸⁶ In particular article 19 CRC covers the protection from violence abuse and neglect. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

⁸⁷ Report of the Constitution Review Group, The Constitution Review Group, Dublin, Stationary Office, 1996

⁸⁸ The Constitution of the Republic of Ireland, Article 41 Bunreacht na hEirann

⁸⁹ *Ibid.*, Article 42

⁹⁰ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3, Article 7

⁹¹ Report of the Constitution Review Group, The Constitution Review Group, Dublin, Stationary Office, 1996

⁹² *IO'T v B* [1998] 2 IR 321

⁹³ Hamilton CJ, pp. 345-348 in Dr Conor O'Mahony, senior lecturer in Constitutional Law at Univeristy Collage Cork, Constitution Project @UCC, '*Adoption Tracing and the Constitution: No Referendum Required*'. Available at: <<http://constitutionproject.ie/?p=331>> Accessed: 24 August 2018

⁹⁴ The Constitution of the Republic of Ireland, Article 40.3 Bunreacht na hEirann

⁹⁵ *Ibid.*

⁹⁶ Dr Conor Mahony, Constitution Project @UCC, '*Adoption, Tracing and the Constitution: No Referendum Required*'. Available at <<http://constitutionproject.ie/?p=331>> Accessed: 24 August 2018

The *TD case*⁹⁷, in 2001, concerned ‘disadvantaged children in need of accommodation and treatment in high support units’.⁹⁸ The Government ‘failed in their obligations to vindicate these rights’⁹⁹, even though the High Court had ordered an injunction.¹⁰⁰ The Supreme Court held that ‘even though children’s rights were at stake, it could not interfere with Government’s exercise of its power, upholding... the ‘separation of powers principle’¹⁰¹, demonstrating the lack of legal redress¹⁰² and ‘effective remedy’¹⁰³ to allow children to uphold their rights.’¹⁰⁴

The 2006 *Baby Ann Case*¹⁰⁵ was one of the most significant cases to demonstrate the need for constitutional change. A young child with unmarried parents was in the process of being given up for adoption and had settled with her adoptive family. However, the biological parents married and withdrew their consent to adoption. The marriage of the birth mother and father was decisive. As per Constitution the best interest of the child was sought to be with the family, which is the union of the biological parents through matrimony. The appeal was therefore allowed on constitutional grounds with ‘reluctance and some regret’¹⁰⁶ as the ‘immediate or summary change of custody is virtually certain to cause severe psychological damage to the child’.¹⁰⁷ The absence of domestic legislation specific for the

⁹⁷ T.D. (a minor suing by his mother and next friend M.D.) and Other Applicants v The Minister for Education, Ireland, The Attorney General, The Eastern Health Board and by order, the Minister for Health and Children [2001] 4 L.R.

⁹⁸ *Ibid.*, p. 259

⁹⁹ T.D. (a minor suing by his mother and next friend M.D.) and Other Applicants v The Minister for Education, Ireland, The Attorney General, The Eastern Health Board and by order, the Minister for Health and Children [2001] 4 L.R., p. 259

¹⁰⁰ T.D. (a minor suing by his mother and next friend M.D.) and Other Applicants v The Minister for Education, Ireland, The Attorney General, The Eastern Health Board and by order, the Minister for Health and Children [2000] 2 I.R. 62

¹⁰¹ Barnardo’s: No child gets left behind (2007) The Case for Constitutional Change, Dublin, Ireland: Fergus Finlay, p. 7 ‘Absence of an Effective Remedy’

¹⁰² UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, Part V para. 24

¹⁰³ Barnardo’s: No child gets left behind (2007) The Case for Constitutional Change, Dublin, Ireland: Fergus Finlay, p. 7 ‘Absence of an Effective Remedy’

¹⁰⁴ UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, Part V para. 24

¹⁰⁵ N. & Anor. V Health Service Executive & Ors [2006] IESC 60, [2006] 4 IR 374, [2006] 4 IR 470

¹⁰⁶ Justice Mc Guinness in Children’s Rights Alliance, ‘*Baby Ann Judgement is a Clear Example of Why we Need a Referendum on Children’s Rights*’ (13 November 2006) Available at: <https://www.childrensrights.ie/sites/default/files/press_materials/files/BabyAnnJudgRefNeeded131106_0.pdf> Accessed: 24 August 2018

¹⁰⁷ *Ibid.* – Justice Mc Guinness reporting on medical expert witnesses

protection of children's rights made it impossible for the Courts to uphold the best interests of the child in this case.

Notwithstanding, in 2006 there were many recommendations pushing towards a constitutional change. The *All-Party Oireachtas Committee on the Constitution 2006*¹⁰⁸ recommended that article 41 of the Constitution¹⁰⁹ should include '[A]ll children, irrespective of birth, gender, race or religion, are equal before the law. In all cases where the welfare of the child so requires, regard shall be had to the best interests of the child.'¹¹⁰ This would, in effect, insert a provision in the Constitution to enshrine the best interest of the child principle.

As well in the same year, with the *Review by the Office of the Minister for Children*¹¹¹, Brian Lenihan, TD, the Minister for Children, announced a review of the Constitution to ensure better protections for children's rights.¹¹² The *An Taoiseach*, the Prime Minister for Ireland, stated that:

*'[I]t appears increasingly clear that the inadequate recognition in our Constitutional law of the rights of children as individuals has to be addressed. That is an essential first step in creating a new culture of respect for the rights of the child.'*¹¹³

He followed on to call for a constitutional referendum on children's rights.¹¹⁴¹¹⁵ Finally, the *Joint Committee on Child Protection 2006*¹¹⁶ made a further case for constitutional change, in relation to preventing the sexual abuse of children.¹¹⁷

¹⁰⁸ Tenth Progress Report: The Family. The All-Party Oireachtas Committee on the Constitution, Dublin, Stationary Office, 2006

¹⁰⁹ The Constitution of the Republic of Ireland, Article 41 Bunreacht na hEirann

¹¹⁰ Tenth Progress Report: The Family. The All-Party Oireachtas Committee on the Constitution, Dublin, Stationary Office, 2006, p. 124

¹¹¹ Barnardo's: No child gets left behind (2007) The Case for Constitutional Change, Dublin, Ireland: Fergus Finlay, p. 12

¹¹² Barnardo's: No child gets left behind (2007) The Case for Constitutional Change, Dublin, Ireland: Fergus Finlay, p. 12

¹¹³ *Ibid.*, p. 12

¹¹⁴ Clair McGing (2014) The Children's Referendum 2012, Irish Political Studies, 29:3, 471-479, p. 472

¹¹⁵ The Irish Prime Minister, Bertie Ahern did not fix a date as he stated that '[I]t is far better that we have a meaningful consultation, rather than trying to fix words and dates' and had to await approval from the Cabinet. This can be found at: Michael O'Regan, '*No date for the children's rights referendum*', The Irish Times (22 November 2006). Thus, it took six years for the children's rights referendum to take place.

¹¹⁶ Barnardo's: No child gets left behind (2007) The Case for Constitutional Change, Dublin, Ireland: Fergus Finlay, p. 12

¹¹⁷ *Ibid.*, p. 12

Three years later, other significant cases reinforced the need for constitutional change. The *Roscommon Child Care Case*¹¹⁸ had very similar facts to the *Kilkenny Investigation*.¹¹⁹ In the *Roscommon Case*, a mother was sentenced to seven years in prison for beating, abusing and neglecting her six children.

In 2009, widespread child abuse was uncovered in the Catholic Church.¹²⁰ The newspaper '*The Guardian*' together with the so-called *Ryan Report*¹²¹ reported the "[E]ndemic' rape and abuse of Irish children in Catholic care', which affected up to 30,000 children.¹²²

¹¹⁸ Roscommon Child Care Case, Report of the Inquiry Team to the Health Service Executive. 27th October 2010, available at: <https://www.tusla.ie/uploads/content/Publication_RoscommonChildCareCase.pdf> Accessed: 23rd July 2018

¹¹⁹ Kilkenny incest investigation/ [investigation headed by Catherine McGuinness]; report presented to Mr Brendan Howlin T.D. Minister for Health by South Eastern Health Board May 1993

¹²⁰ Henry McDonald, "Endemic' rape and abuse of Irish children in Catholic care, inquiry finds' *The Guardian* (Ireland, 20th May 2009)

¹²¹ Office of the Minister for Children and Youth Affairs: Department of Health and Children, 'Report of the Commission to Inquire into Child Abuse, 2009' [2009] *Ryan Report* https://www.dcyh.gov.ie/documents/publications/implementation_plan_from_ryan_commission_report.pdf Accessed: 23rd July 2018

¹²² Henry McDonald, "Endemic' rape and abuse of Irish children in Catholic care, inquiry finds' *The Guardian* (Ireland, 20th May 2009)

The *Ryan Report* took into consideration all institutions that provided services for children and young people and made 20 recommendations to ensure children are properly protected. As a result, a plan was implemented to make children's lives better and safer. This:

- Addressed 'the effects of past abuse'¹²³;
- Developed and strengthened 'national child care policy and' evaluated 'its implementation'¹²⁴;
- Strengthened the 'regulation and inspection'¹²⁵;
- Improved the 'management of children's services'¹²⁶;
- Gave effect to the 'voice of the child'¹²⁷;
- Revised 'Children First, the national guidance for the protection and welfare of children and' underpinned the guidance by way of legislation.^{128 129}

The Ryan Report, together with all the other recommendations, were a step forward towards a stronger protection of children's rights. Nevertheless, even though the recommendations had been made, substantial changes couldn't be realised without constitutional amendment. In 2011, the *PKU Case*¹³⁰ concerned a new-born whose parents refused to give their consent for a PKU test, a non-invasive routine examination performed on all new-borns in order to test against eight different types

¹²³ Minister for Children and Youth Affairs: Department of Health and Children, 'Report of the Commission to inquire into Child Abuse, 2009' [2009] Ryan Report https://www.dcy.gov.ie/documents/publications/implementation_plan_from_ryan_commission_report.pdf Accessed: 23rd July 2018, p. 65, 66

¹²⁴ *Ibid.*, p. 67

¹²⁵ This should be done through Government agencies but also with independent inspections which are considered to be essential. See Office of the Minister for Children and Youth Affairs: Department of Health and Children, 'Report of the Commission to inquire into Child Abuse, 2009' [2009] Ryan Report https://www.dcy.gov.ie/documents/publications/implementation_plan_from_ryan_commission_report.pdf Accessed: 23rd July 2018, pp. 68 and 69

¹²⁶ *Ibid.*, pp. 70-73

¹²⁷ Minister for Children and Youth Affairs: Department of Health and Children, 'Report of the Commission to inquire into Child Abuse, 2009' [2009] Ryan Report https://www.dcy.gov.ie/documents/publications/implementation_plan_from_ryan_commission_report.pdf Accessed: 23rd July 2018, p. 73

¹²⁸ Office of the Minister for Children and Youth Affairs: Department of Health and Children, 'Report of the Commission to inquire into Child Abuse, 2009' [2009] Ryan Report https://www.dcy.gov.ie/documents/publications/implementation_plan_from_ryan_commission_report.pdf Accessed: 23rd July 2018, p. 74

¹²⁹ Barnardo's: No child gets left behind (2007) *The Case for Constitutional Change*, Dublin, Ireland: Fergus Finaly

¹³⁰ *The North Western Health Board v H.W. and C.W.* [2001] 3 L.R.

of illnesses/diseases. Mrs Justice Denham stated that '[O]nly in exceptional circumstances would the court intervene and make contrary to the decisions of parents regarding procedures for their children'.¹³¹ The Supreme Court ruled in favour of the parents, on constitutional grounds¹³², neglecting once again the best interest of the child and favouring parents' rights.¹³³

Arguments made for and against constitutional change

A range of arguments were made for and against constitutional change in the run up to the children's rights referendum. The 'yes' vote supporters were mainly human rights activists, NGOs for children's rights, and individuals who believed children needed stronger rights protections. On the other hand, the 'no' voters believed that children were already protected as individuals under the Constitution, that there was no need for legislative change, and the protection of children's rights may undermine parents' rights. Others were not even sure what the referendum was about.¹³⁴ The majority (the yes vote) was slim, with only 58%.¹³⁵

What were the arguments of people who voted 'yes'?

In a nutshell, individuals that voted yes believed that children needed specific rights protections enshrined in the Constitution. The reasons stem from the cases and reports previously discussed, but also from a culture that for too long failed to listen to children or address their needs. The 'yes' voters cited poor decision-making, both in relation to individual children as well as support for families to enable them to adequately protect children. This poor decision-making was identified across all

¹³¹ Mrs Justice Denham in Mary Carolan, 'Court rejects health board challenge to couple on test for son' The Irish Times 9 November 2001

¹³² *Ibid.* page 622 - The Constitution of the Republic of Ireland, Article 41 Bunreach na hEirann

¹³³ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3, Article 3

¹³⁴ The Referendum Commission's Report, 'Referendum on the 31st Amendment of the Constitution (Children) Bill 2012' Available at: <https://www.citizensassembly.ie/en/Manner-in-which-referenda-are-held/Report-of-RefCom-on-Children-Referendum.pdf> Accessed: 24th August 2018, Chapter 4, p. 8 – 41% did not understand it, while 34% understood it well

¹³⁵ Department of Children and Youth Affairs, 'The Referendum Relating to Children' Available at: https://www.dcyu.gov.ie/viewdoc.asp?fn=/documents/child_welfare_protection/childrensreferendum.htm Accessed: 23rd July 2018

areas of the state, including within government, the Oireachtas and the Courts.¹³⁶ The issue of adoption, previously discussed, was a strong factor in influencing a ‘yes’ vote as a result of the way it discriminates against children with married parents. There were strong arguments against the implied presumption under articles 41 and 42 of the Constitution¹³⁷ that the best interest of the child is served with the family, and that as per the Constitution family’s rights supersede children’s rights. As a result, the ‘yes’ voters primarily called for constitutional protections for the welfare of the child, for children to be heard in matters that directly concern them, and fair rights-based adoption measures for all children, regardless of family circumstances.¹³⁸

What are the arguments of people who voted ‘no’?

On the contrary, individuals who voted ‘no’ did not believe that children needed further protection under the Constitution, or specific rights that only applied to them. They were wary of how children’s rights might be implemented and believed that children’s rights may diminish or remove parents’ rights. Judge Adrian Hardiman, a ‘no’ voter, on this issue, pointed out that:

‘The Constitution does not prefer parents to children. The preference the Constitution gives is this: it prefers parents to third parties, official or private, priests or social worker, as the enablers and guardians of the child’s rights.’¹³⁹

Whilst he states that constitutional protections of parents’ rights are not stronger than those of children, he reaffirms the assumption parents are always the best protectors of their children’s rights. Judge O’Flatherty supported this view, stating that a

¹³⁶ Department of Children and Youth Affairs, ‘*Children and young people’s experiences of participation in decision-making at home, in schools and in their communities*’, available at: <<https://www.dcy.gov.ie/documents/publications/20161110ChildandYoungExperienceDecisionMakinHomeSchoolCommunity.pdf>> accessed: 24 August 2018

¹³⁷ The Constitution of the Republic of Ireland, Articles 41 and 42 Bunreacht na hEirann

¹³⁸ UCC, Child law Clinic, School of Law, University Collage Cork and Queen’s University Belfast. ‘*Case Study: The ‘Children’s Referendum’ 2012 Advancing Children’s Rights: Capturing The Learning of the Atlantic Philanthropies grantees in Ireland*’

¹³⁹ Supreme Court Judge Adrian Hardiman, [2006] IESC 60 in Richard Albert, Xenophon Contiades, Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (1stedn, Hart Publishing, North America (US and Canada) 205

constitutional amendment was not needed as children are protected like each and every citizen within the Constitution.¹⁴⁰

In addition, a significant case that might have influenced many voters before the vote from a 'yes' to a 'no' was the Supreme Court case of *McCrystal v Minister of Children and Youth Affairs & Ors*.¹⁴¹ The plaintiff claimed that the referendum campaign by the Minister for Children and Youth Affairs breached the Constitution as they were promoting a 'yes' vote. The Court found in favour of the plaintiff only a few days before the referendum, and therefore people felt confused and more inclined to a 'no' vote after the judgement.^{142 143}

Should human rights be voted on and is a referendum the right way?

In Ireland the only way to pass an amendment on the Constitution is through public vote, i.e. a referendum.¹⁴⁴ This allows individuals to express their opinions on pressing matters, permitting them to have their say, by agreeing or disagreeing. It is widely questioned as to whether or not it is appropriate to put human rights protections to the majority vote.¹⁴⁵ Human rights should not be a public decision, as they are rights we are conferred to as humans from the moment of birth and States have a duty to 'protect, respect and fulfil'¹⁴⁶ them.¹⁴⁷

Ireland recently had another vote through referendum over whether to allow same-sex marriage. Many say that this 'sets a dangerous precedent for other nations

¹⁴⁰ H. O'Flaherty: 'We don't need a referendum to protect our children's rights' *The Irish Independent* (11 September 2012); V. Browne (moderator), TV3 Children's Referendum Debate, 31st October 2012

¹⁴¹ *McCrystal v The Minister for Children and Youth Affairs & Ors* [2012] IEHC 419

¹⁴² See the case of *Jordan & Jordan v Minister for Children and Youth Affairs & ors* [2015] IESC 33 (2015), where Joanna Jordon attempted to have referendum results annulled in light of the *McCrystal Case*

¹⁴³ Conor O'Mahony (2016) Falling short of expectations: the 2012 children amendment, from drafting to referendum, *Irish Political Studies*, 31:2, 252-281, pages. 268-269

¹⁴⁴ Citizens Information (2018) *Constitutional Referendum*, Available at: http://www.citizensinformation.ie/en/government_in_ireland/elections_and_referenda/referenda/constitutional_referendum_in_ireland.html (Accessed: 24th July 2018)

¹⁴⁵ Annie Hoey, 'We Shouldn't Be Voting on Human Rights' (The University Times) 24 November 2017

¹⁴⁶ United Nations Human Rights Officer of the High Commissioner, 'International Human Rights Law' (Website 2018) <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>> accessed 29 June 2018

¹⁴⁷ Annie Hoey, 'We Shouldn't Be Voting on Human Rights' (The University Times) 24 November 2017

where public opinion might not be so tolerant'.¹⁴⁸ The logic behind referenda is to allow the law to change by amending obsolete legislation to better fit today's world, but '[W]hat does happen when a democratic decision constitutes a human rights violation?'.¹⁴⁹ The balance between democracy and human rights is not easy: on one hand, democracy gives 'an individual the possibility to participate in the opinion-building and decision-making process of the legal system he/she lives in as a citizen'¹⁵⁰; on the other hand by allowing a democratic vote on human rights 'it is imaginable that a majority is in favour of something which violates the human rights of a minority'¹⁵¹. Kirchsclaeger¹⁵² suggests that human rights and democracy go 'hand in hand'¹⁵³, nevertheless States are under a duty to protect the rights of minorities. A perfect example of this is offered by Margaret Talbot¹⁵⁴ who wrote: '[I]f you grew up in the 1960s and 70s, it was quite possible to know adults who said [...] 'I'm all for civil rights. But marriage between Negroes and whites? I don't know'¹⁵⁵, which is not dissimilar to what we might still hear today about same-sex marriage or even children's rights. Focusing on children, in the 2012 referendum, the majority (the adults) were asked to vote for a minority (the children), and the minority, in this case, was not even allowed to vote due to their age. This could have caused a restriction of rights, and thus, discrimination against a minority group. Dr. Ronan McCrea had 'mixed feelings about the Irish Government's decision to hold a referendum' as the outcomes of referenda are always uncertain.¹⁵⁶

¹⁴⁸ Saeed Jamali Dehghan (2015) 'A referendum is not the way to go when it comes to gay rights or minority issues', *The Guardian*

¹⁴⁹ Peter G. Kirschlaeger, 'The Relation between Democracy and Human Rights'. *Globalistic and Globalization Studies* 2014 112-125, p. 112

¹⁵⁰ *Ibid*, p.120

¹⁵¹ Peter G. Kirschlaeger, 'The Relation between Democracy and Human Rights'. *Globalistic and Globalization Studies* 2014 112-125, p. 112

¹⁵² *Ibid*.

¹⁵³ Peter G. Kirschlaeger, 'The Relation between Democracy and Human Rights'. *Globalistic and Globalization Studies* 2014 112-125, p. 119

¹⁵⁴ Margaret Talbot (2012) 'Wedding Bells', *The New Yorker*, (May 21, 2012)

¹⁵⁵ *Ibid*.

¹⁵⁶ King's College London (2016) *Referendums on the Human Rights of Minorities: Same-Sex Marriage in Ireland and Slovenia*, Available at: <https://www.kcl.ac.uk/law/tli/news/newsrecords/referendums-on-the-human-rights-of-minorities.aspx> (Accessed: 24th July 2018)

Chapter 4: Post-Referendum

Chapter 4 will consider developments in relation to children's rights that followed from the referendum. It will analyse the extent to which Ireland is meeting the obligations enshrined in the CRC and the impact that the developments have had on children.

Subsection 4.1 will consider the new legislation put in place after the referendum, and in particular after 2015, when the referendum result was transposed into law through the *Thirty-First Amendment of the Constitution Act*.¹⁵⁷

Subsection 4.2 will analyse any impact the referendum result has had in meeting CRC obligations, including General Comments and Concluding Observations.

Subsection 4.3 will study the impact on children lives by considering the *Children's National Strategy on Children and Young People's Participation in Decision Making 2015-2020*¹⁵⁸ together with *Better Outcomes Brighter Futures* policy framework 2014-2020.¹⁵⁹

Post referendum legislative developments

Following on from the 2012 children's rights referendum, Ireland introduced *ad hoc* legislation to further protect children's rights to run alongside the planned amendment to the Constitution.¹⁶⁰ This legislation included issues of adoption, guardianship, family and gender and was introduced immediately after the referendum, in the 2012/2013 period, as well as after the *Thirty-First Amendment of the Constitution*¹⁶¹ came into force, in 2015.

New legislation introduced in the 2012/13 period included:

¹⁵⁷ Irish Legislation, Thirty-First Amendment of the Constitution (Children) Act 2015

¹⁵⁸ Department of Children and Youth Affairs, '*National Strategy on Children and Young People's Participation in Decision-Making 2015-2020*', Available at: <https://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> (Accessed: 24th July 2018) - Ireland is the first Country in the European Union to have a National Strategy on Children and Young People's Participation in Decision-Making

¹⁵⁹ Department of Children and Youth Affairs, '*Better Outcomes Brighter Futures: The National Policy Framework for Children & Young People*' 2014-2020, Available at: https://www.dcy.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf (Accessed: 24th July 2018)

¹⁶⁰ Irish Legislation, Thirty-First Amendment of the Constitution (Children) Act 2015

¹⁶¹ *Ibid.*

- The *Child and Family Agency Act 2013*¹⁶², transposed into law in 2014. The aim of the act is of '[S]upporting and promoting the development, welfare and protection of children, and the effective functioning of families'.¹⁶³ This legislation, among many other matters, affirms the need to give children primary consideration in decisions affecting their lives and their families.
- The *Human Rights and Equality Commission Act 2014*¹⁶⁴ was introduced to further protect human rights, including children's rights. The Act established an independent body which promotes human rights on a policy level by reviewing 'the effectiveness of human rights and equality law' and legally by 'giving practical help, including legal assistance to help people defend their right'.¹⁶⁵

Following the implementation of the Amendment of the Constitution, further legislation came into force:

- The *Children and Family Relationship Act 2015*¹⁶⁶ provides guidance in relation to matters of adoption, guardianship and custody, also in cases of donor-assisted human reproduction. This was only made possible as a result of the Amendment to the Constitution.
- The *Gender Recognition Act 2015*¹⁶⁷ amends past legislation and provides for gender recognition certificates, for example in passports and documents of any kind.
- The *Adoption Act 2017*¹⁶⁸ addressed previous concerns with the *Adoption Act 2010*¹⁶⁹. It ensures that all children are viewed as equal in terms of eligibility for adoption and that the marital status of parents will no longer be a determining factor in assessing the eligibility of a child.¹⁷⁰ The right to adopt with the 2017 Act extends

¹⁶² Irish Legislation, Child and Family Agency Act 2013

¹⁶³ TUSLA – Child and Family Agency 'About Us. Welcome to the Child and Family Agency website' Available at: <<https://www.tusla.ie/about/>> Accessed: 28th July 2018

¹⁶⁴ Irish Legislation, Irish Human Rights and Equality Commission Act 2014

¹⁶⁵ Irish Human Rights and Equality Commission, 'Who we are' Available at: <https://www.ihrec.ie/about/who-we-are/> Accessed 15 August 2018

¹⁶⁶ Irish Legislation, Children and Family Relationship Act 2015

¹⁶⁷ Gender Recognition Act 2015

¹⁶⁸ Irish Legislation, Adoption (Amendment) Act 2017

¹⁶⁹ Irish Legislation, Adoption Act 2010

¹⁷⁰ Adoption (Amendment) Act 2017 (19th July 2017) Section 10, Amendment of section 20 of Principal Act

to couples that have been cohabiting for at least a period of three years.¹⁷¹ It ensures that the best interest of the child is paramount (art. 3 of the CRC)^{172 173} and defines a child as someone who is 'less than 18 years on age'¹⁷⁴ (art. 1 CRC).¹⁷⁵

These changes and improvements made through the Constitution and with the introduction of new legislation were acknowledged by the UN Committee in the Concluding Observations of 2016¹⁷⁶, as they addressed previous recommendations made in 1998¹⁷⁷ and 2006¹⁷⁸. Despite these significant developments, the 2016 Concluding Observations¹⁷⁹ are still clear that Ireland need to do more to fully implement all the obligations enshrined in the CRC.

Nevertheless, the referendum has clearly helped to support a culture change in which children are beginning to be recognised as right-holders by the legislature.

Post referendum policy developments

Legislation is only one aspect of the range of measures needed to uphold children's rights. However, the significant changes to legislation made since the referendum are ensuring that many of the international requirements set by the UN through its General Comments and Concluding Observations are beginning to be met. It will be important to scrutinise the extent to which these new legislative measures are applied by Courts.

As well as at a legislative level, the referendum has impacted on policy development, including the *Children's National Strategy*. In 2015 the first *National Strategy on*

¹⁷¹ Adoption (Amendment) Act 2017 (19th July 2017) Section 3, Amendment of section 3 of Principal Act

¹⁷² *Ibid.*, Section 9, Amendment of section 19

¹⁷³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 3

¹⁷⁴ Adoption (Amendment) Act 2017 (19th July 2017) Section 12, Amendment of Section 23

¹⁷⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 1

¹⁷⁶ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Ireland*, 29 January 2016

¹⁷⁷ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Ireland*, 4 February 1998, CRC/C/15/Add. 85

¹⁷⁸ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Ireland*, 29 September 2006, CRC/C/IRL/CO/2

¹⁷⁹ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Ireland*, 29 January 2016

*Children and Young People's Participation in decision-making 2015-2020*¹⁸⁰ was introduced. The strategy monitors what is done to further children's rights and, specifically ensures that children and young people are involved and listened to in day to day decisions on matters which regard their lives. The National Strategy recognises 'that children and young people are not 'being in becoming', but rather are 'citizens of today' with the right to be respected and heard during childhood [...]'¹⁸¹, and hence it follows the principles of the CRC. One of the ways in which this is achieved is with the *Better Outcomes Brighter Futures* policy framework 2014-2020¹⁸², which in 2014 set an agenda in relation to the implementation and development of children's rights:

*'Brighter Future has adopted an outcomes approach and is based on five interconnected¹⁸³ and reinforcing national outcomes for children and young people. The importance of [...] having a voice in decisions that affect their lives is integral to all five outcomes areas.'*¹⁸⁴

Better Outcome, Brighter Futures works together with the *National Strategy* to ensure that these goals are achieved. These rights-based frameworks are all significant developments that have only been put in place subsequent to the referendum.

¹⁸⁰ Department of Children and Youth Affairs, '*National Strategy on Children and Young People's Participation in Decision-Making 2015-2020*', Available at: <<https://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf>> (Accessed: 24th July 2018)

¹⁸¹ Department of Children and Youth Affairs, '*National Strategy on Children and Young People's Participation in Decision-Making 2015-2020*', Available at: <https://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> (Accessed: 24th July 2018), page v – DR. James Reilly, TD (Minister for Children and Youth Affairs)

¹⁸² Department of Children and Youth Affairs, '*Better Outcomes Brighter Futures: The National Policy Framework for Children & Young People*' 2014-2020, Available at: https://www.dcy.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf (Accessed: 24th July 2018)

¹⁸³ The five outcomes are: 1. Active and healthy, 2. Achieving in all area of learning and development, 3. Safe and protected from harm, 4. Economic security and opportunity, 5. Connected, respected and contributing. These can be found at: Department of Children and Youth Affairs, '*National Strategy on Children and Young People's Participation in Decision-Making 2015-2020*', Available at: <https://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> (Accessed: 24th July 2018), page 2

¹⁸⁴ Department of Children and Youth Affairs, '*National Strategy on Children and Young People's Participation in Decision-Making 2015-2020*', Available at: <https://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> (Accessed: 24th July 2018), page 2

The impact on children's lives

It has only been three years since the enactment of the Amendment of the Constitution. As such it is not possible to fully assess its impact on children's lives or on their experience of their rights. Nevertheless, the Strategy ensures that children are heard and their matters are taken into account in a range of decisions that affect their lives, including Court proceedings, where children previously rarely had a voice, education, healthcare and development of policy, legislation and research.¹⁸⁵ One way of assuring that these requirements are met is through the Ombudsman for Children's Rights¹⁸⁶, which in Ireland has the role to investigate complaints regarding breach of rights, according to Section 7 of the *Ombudsman for Children Act 2002*.¹⁸⁷¹⁸⁸ In 2016 the Ombudsman for Children's Office (OCO) issued a consultation paper¹⁸⁹ welcoming the National Strategy on decision-making as a great initiative, followed by recommendations to help implement it. The OCO, in its role to protect children's rights also issues reports¹⁹⁰ relating to the complaints received. These take the form of case studies covering a range of issues (i.e. health, education, housing) and explain how the Ombudsman has actively intervened to protect these rights.

Through the Constitution, Ireland is enshrining children's rights from 'scratch' and is putting in place the legislation, policy and strategy to provide meaningful protections for children's rights and become an example the world can look at.

¹⁸⁵ Citizen Information, 'National policy on children and young people' (Website 2017) <http://www.citizensinformation.ie/en/birth_family_relationships/children_s_rights_and_policy/national_children_s_strategy.html> Accessed: 5 August 2018

¹⁸⁶ Ombudsman do leanai for children, 'What is the Ombudsman for Children's Office?' (Website 2018) <https://www.oco.ie/> Accessed: 5 August 2018

¹⁸⁷ Irish Legislation, Ombudsman for Children Act 2002, Section 7

¹⁸⁸ The Ombudsman also has the responsibility to encourage 'public bodies to develop policies, practice and procedure that promote children's rights', to give 'advice at Ministerial level on legislative and public policy developments relating to the rights and welfare of children', to consult 'with children' on 'issues relating to their rights and welfare that are of concern' to them, and to raise 'awareness relating to the rights and welfare of children, including the principles and provisions' of the CRC. – Available at Ombudsman for Children's Office, 'The Ombudsman for Children's Office submission for the Department of Education and Skills with respect to its Discussion Paper on a Regulatory Framework for School Enrolment', November 2011, Available at: <<https://www.education.ie/en/Parents/Information/School-Enrolment/Organisation-and-Representative-Group-Submissions/Ombudsman-for-Children-s-Office-OCO-.pdf>> Accessed 15 August 2018

¹⁸⁹ Ombudsman for Children's Rights Office, 'Statement of Strategy 2016-2018', Consultation Paper, Department of Education and Skills (8 June 2016)

¹⁹⁰ Ombudsman do leanai for children, Complaints, 'Case Studies' (Website), Available at: <https://www.oco.ie/complaints/case-studies/> Accessed: 24 August 2018

Chapter 5: Conclusion

To conclude and provide a summary of what has been discussed in this report, the following sections will cover:

Subsection 5.1 will give an overview of the goals of this report. This will constitute a summary of the information that can be found in the paper: the provisions of the CRC and its implementation, the legal framework in Ireland, what drove constitutional change, and the post-referendum period.

In subsection 5.2 will explore what learning Scotland can draw from developments in Ireland.

Subsection 5.3 will reiterate and draw final considerations in regards to the topics discussed herein.

Have the goals of the report been met?

The paper's goal is to provide insight into the 2012 children's rights referendum held in Ireland. This has been done throughout the report, firstly by briefly introducing the Convention on the Rights of the Child in the [first](#) chapter. By doing this the implementation, according to General Comment No.5¹⁹¹, of the CRC into Irish law was also discussed, as well as the extent to which Ireland was meeting its CRC obligations.

In chapter 2 a deeper analysis of children's rights protections in Ireland was provided. This explored the legal framework prior to the referendum and drew from the Concluding Observations¹⁹² issued by the UN Committee to Ireland and the NGOs reports.¹⁹³ Both recommended the immediate incorporation of the CRC into domestic law.

¹⁹¹ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5

¹⁹² UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations: Ireland, 4 February 1998, CRC/C/15/Add.85 and UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations: Ireland, 29 September 2006, CRC/IRL/CO/2, p.5, 3. General Principles (arts. 2,3, 6 and 12)

¹⁹³ See Chapter 2.3 of this report

The goal of this chapter was to consider the legislative children's rights protections in place in Ireland. It revealed how the Constitution¹⁹⁴ was preventing children's rights from being protected and did not set out children as right-holders.

Chapter 3 examined the reasons behind constitutional change. Firstly, evidence, including case law, reports, investigations and reviews were considered to understand the situation prior to the vote in the referendum and why the Amendment¹⁹⁵ was so important. This identified key children's rights issues, including problems with adoption, lack of protections for the best interests of the child, and cases of violence, abuse and neglect of children.¹⁹⁶

This chapter, in addition, studied the vote itself. The argument and counter arguments for the 'yes' and 'no' voters were discussed. These ranged from wanting to assure enforceable rights for children to parents fearing losing their own rights. Also, the suitability of referenda as the instrument to vote on human rights issues was examined. On the latter the view taken was that human rights should not be voted on at all, as the majority should not be voting on minority rights, especially when the minority, in this case, children, are not allowed to vote due to their age.¹⁹⁷

Finally, chapter 4 investigated on the post-referendum period. This considered the impact of the referendum on children's lives by analysing developments in legislation and policy put in place after the vote. Whilst acknowledging the steps taken by Ireland to guarantee children's rights, (e.g. through the implementation of new laws in the post-2012 period, and the introduction of National Strategies which specifically aim at giving due weight to children's voices¹⁹⁸), this paper recognises that the impact on children and young people's lives has yet to be fully realised or assessed.

To conclude, the paper will draw out learning from Ireland that is of relevance to Scotland. The similarities and differences between the two countries will be examined, especially in relation to the Constitution.

Although this report does not cover all the implications into the incorporation of the CRC in Ireland, it offers an overview of the situation before and after the vote.

¹⁹⁴ The Constitution of the Republic of Ireland, Bunreacht na hEirann

¹⁹⁵ Irish Legislation, Thirty-First Amendment of the Constitution (Children) Act 2015

¹⁹⁶ See Chapter 3.1 for specific examples

¹⁹⁷ Child Rights International Network – CRIN '*CRIN'S submission for OHCHR's in depth study of human rights with regard to young people*' 12 January 2018

¹⁹⁸ See Chapters 4.1 and 4.2 of this paper

What can Scotland learn?

As we previously briefly noted in chapter 1 of this paper¹⁹⁹, Scotland, since ratifying the CRC as part of the UK in 1991, has only taken piecemeal steps to incorporate the CRC into domestic law. The introduction of the *Children and Young People (Scotland) Act 2014*²⁰⁰ whilst welcomed as a positive development, fails to provide any enforceable protection of children's rights and was seen as a missed opportunity by many NGOs who had been pushing for years for Scotland and the UK to fully incorporate the CRC.²⁰¹ Scotland and the rest of the UK can, nevertheless, take Ireland as an example when considering how to take steps towards incorporation as 'in Scotland, most children and young people's rights are currently seen as guiding rather than binding'²⁰² and children have currently no legal redress for violations of their CRC rights. In 2017, the Scottish Government²⁰³ committed to: 'undertake a comprehensive audit on the most practical and effective way to further embed the principles of the Rights of the Child into policy and legislation, including the option of full incorporation into domestic law'.²⁰⁴ Ireland in this regard can provide a useful case study to inform of these developments.

Ireland's primary piece of legislation is the Constitution, therefore the natural first step was an amendment to include children's rights. On the contrary, the UK, as well as Scotland, has an uncodified Constitution²⁰⁵, thus incorporation will have to be approached from a different perspective, by introducing statutory rights enforceable in domestic Courts.

¹⁹⁹ Chapter 1.4 'A Comparison with Scotland', in this paper

²⁰⁰ Scottish legislation, Children and Young People (Scotland) Act 2014

²⁰¹ Together (Scottish Alliance for Children's Rights), 'State of the Children's Rights in Scotland', November 2014, p. 11, para. 1.1

²⁰² Together (Scottish Alliance for Children's Rights), 'Sweden to incorporate the UNCRC into law', available at: <<http://www.togetherscotland.org.uk/news-and-events/news/detail/?news=1661>> accessed 15 August 2018

²⁰³ Scottish Government, 'A Nation with Ambition', The Government's Programme for Scotland 2017-2018

²⁰⁴ Scottish Government, 'A Nation with Ambition', The Government's Programme for Scotland 2017-2018, p. 81

²⁰⁵ The British Library, 'Britain's unwritten constitution' (Website 2015) <<https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution>> Accessed: 6 August 2017

One of the issues previously discussed in chapter 3.3²⁰⁶ is the vote on human rights via referendum. As it has been analysed, this entails a majority voting for a minority, and while in Ireland this had a positive outcome, many issues could have arisen. A referendum is contrary to the principle of human rights which places States under an obligation to protect minorities. In Ireland, the Constitution can be amended only through public vote, and the result on the referendum on the Thirty-First Amendment was of a very slim majority for the 'yes' vote. Scotland and the rest of the UK do not have this 'restriction'. Parliament can indeed decide to pass legislation and incorporate the CRC independently from public opinion, hence fulfilling its obligations to the human rights treaties to which it is signatory, regardless of public opinions.

Scotland can also learn from Ireland that these changes do not happen overnight: it took from 2012 to 2015 for the Thirty-First Amendment to come into force, and legislation is slowly being introduced with time. As seen in the previous subsection, the impact on children's lives is not yet fully visible and policy objectives and laws are not the only way that these rights are guaranteed. However, developments to legislation and policy are a first step towards ensuring progress is made and that children and young people are involved in informing decisions that affect their lives. Incorporation of the CRC into domestic law provides an important role in supporting the culture change needed to uphold children's rights at every level.

Ireland has set a good precedent for Scotland, the UK and the rest of the countries which have ratified but not yet implemented the CRC. Scotland can be guided by Ireland, learning what has had a positive impact and what hasn't and taking the next natural step towards incorporation.

Final Considerations

Changing and amending legislation is at the core of every jurisdiction. Laws change continually over time to adapt to new ways of living, cultures and technologies. Hence, laws that previously were unthought of are now at the basis of Constitutions and legislations across the world.

As repeatedly stated, Ireland has a strong Constitution that is at the core of its jurisdiction. For a long time, many laws remained unchanged for a number of

²⁰⁶ Chapter 3.3, 'Should be Human Rights be voted on and is a Referendum the right way?', on this paper

reasons: the strong religious presence in the country, together with political and cultural motifs. Recently Ireland has, nevertheless, taken many steps forward with citizens having an appetite to further respect, protect and fulfil rights of minorities. In the past years the referendum on children's rights was not the only one that passed, as there was also one on same-sex marriage and this years' amendment to legalise abortion.²⁰⁷ This shows Ireland's commitment towards integration and promotion of human rights.

As this report has proven, the mere act of passing a referendum to guarantee better protection of rights is simply not enough. Nevertheless, children are now recognised as right-holders under Ireland's most important piece of legislation, and their best interests, should, now always be given primary consideration. Changes are likely to be more apparent when Courts start adjudicating on these matters. Decisions made at Parliament, in Government and in Courts will be influenced by the Amendment and ensure a focus on children's rights. The Amendment will mean that Ireland will develop and evolve to put children's rights at the heart of every decision and listening to their voices. This will not only make Ireland one of the best places for children to grow up in, but also it will set precedence for many other countries to follow, starting with Scotland.

²⁰⁷ Irish Legislation, Eight Amendment of the Constitution Act 1983

Appendix 1: General Comments

In appendix 1 a brief overview of the General Comments that apply to this report will be presented. Specifically, General Comment no. 5 on the general measures of implementation; General Comment no. 12 on the right of the child to be heard and General Comment no. 14 on the right of the child to have his or her best interests taken as a primary consideration.

General Comments

General Comments are documents issued by the treaty bodies covering numerous topics, 'from the comprehensive interpretation of substantive provisions [...] to general guidance on the information that should be submitted in State reports relating to specific articles of the treaties'.²⁰⁸ Therefore, they provide further general guidance to the CRC, for State parties to be able to fully interpret and apply the CRC on a domestic level.

General Comment no. 5

As previously mentioned, General comment no. 5 concerns the General measures of implementation of the CRC, covering specifically article 4, 42 and article 44 paragraph 6.²⁰⁹ Implementation is defined as 'the process whereby state parties take action to ensure the realisation of all rights in the Convention for all children in their jurisdiction'.²¹⁰ Therefore, it is particularly fundamental, as implementation is the first step to securing children's rights.

The General Comments, together with establishing the need for legal redress, and to have domestic legislation put in place, as discussed in chapter 1.2, also

²⁰⁸ United Nations Human Rights Office of the High Commissioner, Human Rights Treaty Bodies – General comments, (2018) Available at: <https://www.ohchr.org/en/hrbodies/pages/tbgeneralcomments.aspx> (Accessed: 9 July 2018)

²⁰⁹ See for reference: Chapter 1.3, General comment no. 5: General measures of implementation on the Convention of the Rights of the Child, p. 2

²¹⁰ UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, Part I Introduction, para. 1

recommends the Government to adopt ‘rights-based national strategy’²¹¹ and to report periodically to the UN Committee so that the UN has a mean to ensure that Children’s rights are being respected and that the State Party is always taking steps forward.²¹²

General Comment no. 12

General comment no. 12 was issued in 2009 and concerns the right of the child to be heard. The General comment applies to article 5 CRC, concerning the capacity of the child, and article 12 CRC, on the right to be heard.²¹³ This is significant because it means that a child should be given the opportunity to express his/her views on matters that strictly regard him or her. These can include matters of healthcare, education, political decisions or in a court of law. Children, according to the CRC and General comment no. 12, are capable of their own views in ‘accordance with age and maturity’.²¹⁴ ²¹⁵ Therefore, no children should be deprived of the right to be heard and his or her opinions should be given due weight (Art. 12.1).

General comment no. 12 establishes nine requirements that ought to be followed to ensure that children are listened to and feel that their views are being taken into consideration and respected. These include giving appropriate training to adults, so they understand what is expected of them, being in a safe and child-friendly environment, being transparent and informative and follow-up evaluations to show what has been done in response to the demands raised by children.

These obligations can be summarised with the clear scheme provided by Laura Lundy²¹⁶, the Co-Director of the Centre for Children’s Rights, which determines the four fundamental conditions for a child to be heard: space, audience, voice and influence.

²¹¹ UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, Para. 28

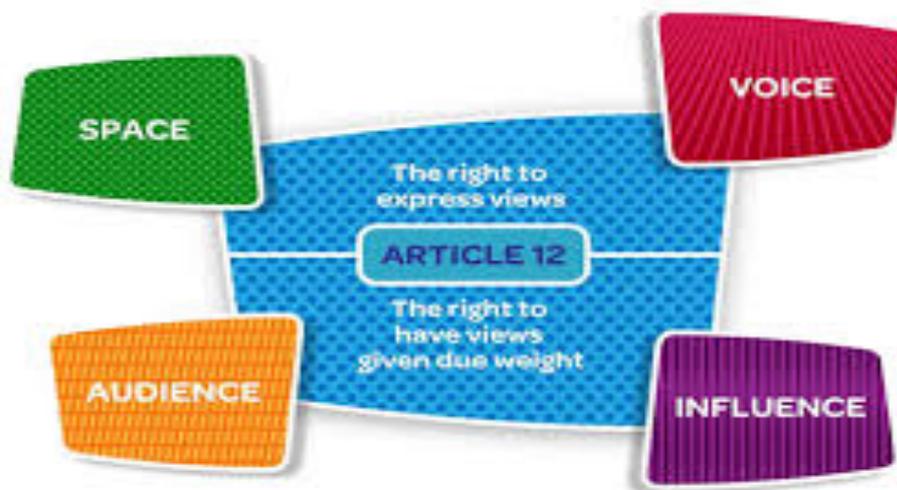
²¹² *Ibid.*, Para. 18

²¹³ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p. 3, Article 12

²¹⁴ *Ibid.* Article 12.1

²¹⁵ Gerison Lansdown, Every Child’s Rights to be Heard – A resource guide on the committee on the rights of the child general comment no.12, (2011) UNICEF and Save the Children

²¹⁶ Queen’s University Belfast, Professor Laura Lundy, Profile (Website) Available at: [https://pure.qub.ac.uk/portal/en/persons/laura-lundy\(78db8e68-97f3-49a0-9473-42b1bb6f9c9\).html](https://pure.qub.ac.uk/portal/en/persons/laura-lundy(78db8e68-97f3-49a0-9473-42b1bb6f9c9).html) (Accessed: 6 July 2018)



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The scheme gives a visual understanding of Article 12 of the CRC as well as General comment no. 12.

General Comment no. 14

General Comment no. 14 concerns the Right of the Child to have his or her best interests taken as a primary consideration. This principle is rooted in article 3 of the CRC, that specifically regards the best interest of the child principle but can also be found in article 9, on the separation from parents, article 10, on family reunification, 18, on parental responsibilities and state assistance, 20, on children unable to live with their family, 21, on adoption and 37(C), on inhumane treatment and detention.^{218 219} In general comment no. 14, the Committee states that the best interest of the child can be considered as a ‘threefold concept’ being a 1) substantive right, 2) fundamental interpretative legal principle and 3) a rule of procedure.²²⁰ Respectively, this means that when different interests are been taken into consideration, the best interest of the child must be given paramount importance; if

²¹⁷ Laura Lundy, ‘Voice’ Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child, *British Educational Research Journal*, Vol. 33, No. 6 (2007), pp. 927-942, p. 932

²¹⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Vol. 1577, articles 9, 10, 18, 20, 21, and 37 (C)

²¹⁹ UNICEF, United Kingdom, *How we Protect Children’s Rights – With the UN Convention on the Rights of the Child*, Available at: <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/> (Accessed: 6 July 2018)

²²⁰ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 para. 1)*, 29 May 2013, *CRC/C/GC/14*, p. 4, para. 6

there is more than one interpretation to a legal principle, one must follow the one that better serves the best interest of the child; finally, when a decision is made concerning children, the possible implications must be taken into account. In addition, when deciding the best interest of the child in question, various elements must be taken into consideration:

- 'a) the child's views;
- b) the child's identity
- c) Preservation of the family environment and maintaining relations
- d) Care, protection and safety of the child
- e) Situation of vulnerability
- f) The child's right to health
- g) The child's right to education'.²²¹

The best interest of the child principle is particularly important as children are a vulnerable category, which often depends on adults, who sometimes have to make decisions on their behalf, to protect them. Therefore, the best interest of the child is particularly important in Ireland, together with the other 192 ratifying State parties, because it ensures that when an adult is forced to have to make a decision for a child, he/she has in mind their best interest and acts accordingly. If this principle did not exist, trivial elements could easily interfere, not allowing a decision to be made in the child's best interest, as in the example concerning the marital status of the parents.

²²¹ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 para. 1), 29 May 2013, CRC/C/GC/14, p. 13, part 1 Elements to be taken into account when assessing the child's best interests, para. 52-79

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