Submission by the Irish Penal Reform Trust on the General Scheme of the Guardianship of Infants (Amendment) Bill 2025

11 June 2025

Irish Penal Reform Trust

Established in 1994, the Irish Penal Reform Trust (IPRT) is Ireland's principal independent nongovernmental organisation working for systemic penal reform and change. Our vision is a just, humane Ireland where prison is used as a last resort. We advocate for a progressive criminal justice system that prioritises alternatives to prison, upholds human rights, and champions reintegration. We do this through conducting research, campaigning, and changing attitudes.

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Introduction

1. The Irish Penal Reform Trust (IPRT) welcomes the opportunity to make a submission on the General Scheme of the Guardianship of Infants (Amendment) Bill 2025 ('the Bill').

2. IPRT is Ireland's principal independent non-governmental organisation working for systemic penal reform and change. Our vision is a just, humane Ireland where prison is used as a last resort. Our mission is to advocate for a progressive criminal justice system that prioritises alternatives to prison, upholds human rights, and champions reintegration.

3. As part of our work, IPRT engages with families who are affected by imprisonment, including children who have one or more parents in prison. Domestic violence rates are continuously rising in Ireland, and fatal domestic violence cases raise legitimate concerns about child welfare. IPRT recognises that the rights of the child, including the right of the child to be heard and to have their best interests considered must be paramount in decisions relating to them. This submission highlights concerns arising from Head 2 of the General Scheme from a human rights perspective, both in terms of international and constitutional law.

General observations

4. Article 41 of the Constitution recognises the family as the "natural primary and fundamental group of Society" and explicitly provides protection for families founded on marriage. This right does not extend to unmarried parents and unmarried fathers do not automatically become legal guardians of their children. Given the status of this constitutional right and repeated Supreme Court judgments reiterating its strict interpretation of it,[1] it is important to address the potential conflict between Article 41 and a proposal to remove guardianship rights from a parent outlined in this Bill.

5. The insertion of Article 42A into the Constitution in 2012 created a balancing act between the guardianship rights of a parent and the rights of the child. Article 42A expressly allows for the removal of guardianship under certain circumstances, which are discussed further below. While the right to family life under Article 41 may not be an absolute right, and must be weighed against the rights of the child, it is important to note that when any interference with a right must be proportionate. While protecting a child whose parent has been killed by their other parent is paramount, the introduction of an outright and potentially permanent revocation of guardianship rights of a parent may pose questions on constitutionality. Considering this, IPRT believes that the below recommendations, including the inclusion of a review mechanism, would provide necessary safeguards which may alleviate these concerns.

6. In light of these principles, this submission focuses on the rights of the child who has been affected by fatal domestic violence and how those rights interact with guardianship. As always, IPRT would like to emphasise that the deprivation of a person's liberty is the punishment for the crime they have committed so interference with other rights, including the revocation of guardianship rights, should never be considered as a form of punishment. That it is why it is important that the legislative framework adopts and emphasises a rights-based approach, one which robustly protects the rights of the child to avoid causing further harm to them.

[1] See, for example: *O'Meara & Ors v. Minister for Social Protection & Ors* [2024] IESC 1.

Best interests of the child and child impact assessments

7. The best interests of the child is a core right under both international human rights law as set out in the UN Convention on the Rights of the Child (UNCRC)[2] to which Ireland is a party, and the Irish Constitution. Article 42A of the Constitution protects the rights of all children, with Article 42A.2.1 explicitly providing for the restriction of parental duties and guardianship in 'exceptional cases' where parents fail in their duty towards their children to such extent that 'the safety or welfare' of their children is likely to be 'prejudicially affected'. Article 42A.4 of the Constitution sets out that the best interests of the child shall be the paramount consideration in questions regarding guardianship and that where a child is capable of forming their own views, the views of the child should be given due weight having regard to the age and maturity of the child.

8. The UN Committee on the Rights of the Child has issued clear guidance on the interpretation of the best interests of the child and how to apply it in practice.[3] The Committee acknowledges that the concept of the child's best interests is complex and must be determined on a case-by-case basis according to the specific situation of the child concerned, taking into consideration their personal context, situation and needs. This principle is reflected in the language of Article 42A, which explicitly refers to guardianship in the context of the rights and best interests of the child.

9. IPRT notes that the current provisions if enacted would apply retrospectively and that the Child and Family Agency would have six months to apply to the court for an order after the commencement of the legislation. This could potentially apply pressure to an already overstretched system. IPRT ask the Committee to consider how this could best be managed to ensure that each individual case is properly assessed on its own circumstances and that decisions are made in a

[2] Article 3, UN Convention on the Rights of the Child.
[3] UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* CRC/C/GC/14. Available here.

measured and meaningful way given the significance and impact of the potential revocation of guardianship rights.

Head 2: Amendment of Guardianship of Infants Act 1964

10. Head 2 contains proposed sections to be inserted after section 6F of the 1964 Act. These sections relate to substantive and procedural aspects of restriction or removal of guardianship rights in fatal domestic violence or a serious offence resulting in the incapacitation of another parent or guardian of the child.

11. IPRT is concerned by the automatic nature of section 6(G) of the Bill. Without including a requirement to assess the best interests of the child or take account of their views in line with their maturity as a factor for consideration at this first instance stage in proceedings, it is unclear if section 6(G) fulfils the requirements under Article 42A. IPRT believes that for a guardianship order to be constitutionally sound, an assessment of the best interests of the child in question should be carried out on a case-by-case basis as soon as possible, with the views of the child considered as part of its assessment.

12. The process for the making of an application by the Child and Family Agency is not clearly set out in the Bill. No provision is set out in the Bill for a best interests assessment to be made by the Child and Family Agency ahead of an application under section 6(G). Very often children with a parent in prison are not consulted about the contact that they wish to have or not have with their parent in prison. The British-based charity Prison Reform Trust has developed a Child Impact Assessment framework "to ensure children who have a parent in the justice system feel listened to, supported, and included in decision-making about that support".[4] It provides specific questions related to the experience of a child with a parent in prison and was developed in consultation with children and young people with lived experience.

[4] Prison Reform Trust, *A Child Impact Assessment Framework: Support for children with a parent in contact with the justice system* (2022). Available at: https://prisonreformtrust.org.uk/project/women-the-criminal-justice-system/child-impact-assessment-project/.

13. While IPRT believes that every child experiencing parental imprisonment should undergo a child impact assessment, this tool could be particularly useful in terms of the proposals in this Bill and adapted to help determine the views of the child in these circumstances. IPRT recommends that provision be made for a child impact assessment to be made ahead of any application to the court seeking an order to remove guardianship rights, and that this assessment should inform the decision of the Child and Family Agency whether to make an application. This should be an additional procedure, to be completed separate to the appointment of a guardian *ad litem* (GAL), and prior to an application under sections 6(G)(10) and (11).

14. A child impact assessment, centred around the individual child's personal circumstances, would allow the needs of the child to be identified at an early stage in the process so that adequate supports are put in place. Separate to the guardianship status of the parent in prison, the imprisonment of a household member is a recognised Adverse Childhood Experience ('ACE'),[5] and children who have a parent in prison are five times more likely to be exposed to other ACEs than children without an imprisoned parent.[6] Given this, the identification of the needs of the child or children concerned is key to adopting a care strategy and reducing the risk of harm to the child. Any process around guardianship decisions where a parent has taken the life of the other parent must be trauma-informed and recognise that children in these circumstances may present with complex needs, particularly if there was ongoing abuse in the home that the child witnessed or experienced directly.

15. As noted by the 'Study on Familicide & Family Violence Death Reviews', ascertaining the views of the child in circumstances where domestic violence or coercive control took place requires "specialised risk

[5] Center for Disease Control and Prevention. (2021). About the CDC-Kaiser ACE Study [online]. Available: https://www.cdc.gov/. See also: Irish Penal Reform Trust, *Piecing it together: Supporting Children and Families with a Family Member in Prison in Ireland* (July 2021), available here.
[6] Turney, K. (2018). Adverse childhood experiences among children of incarcerated parents. Children and Youth Services Review, Vol 89, pp.218-225.

assessment expertise".[7] IPRT welcomes the provision in section 6(G)(10) that a GAL may be appointed by the court if deemed "necessary in the best interest of the child to do so", however, we note that this is discretionary. IPRT also welcomes that the views of the child will be sought to inform the child rights report that a GAL will provide to the court if one is sought, but we believe that a GAL should be appointed in each case as a default. Aside from the question of guardianship rights, IPRT also recommends that the GAL should seek to ascertain what if any relationship or contact the child wishes to have with their parent in prison using the child impact assessment framework already cited.

Compliance with Fair Procedures and Costs

16. While section 6(G)(6)(b) enables the court to impose conditions relating to a periodic review, there is no clarity on how such a review would operate or how an application for review might be brought. IPRT recommends including a provision which sets out a formal procedure for reviewing an order which removes the convicted guardian from office with due regard given to the best interests and voice of the child in line with their evolving capacity. Furthermore, the need for a review of the decision becomes heightened where a child's wishes may change as they mature or as time passes.

17. It is unclear if the guardian whose rights the Child and Family Agency is seeking to remove will automatically be made a party to the proceedings. While this may be assumed, in the interests of fair procedures and due process IPRT recommends that this is explicitly stated in the legislation and that provision is made for civil legal aid to be made available to the convicted guardian if they do not have the means to engage their own legal representation.

18. Subsection (13) provides that the GAL's fees and expenses, if one is appointed, "shall be paid by such parties to the proceedings concerned, and in such proportions, or by such party to the proceedings, as the court may determine". Under s.26 of the Child Care Act 1991 (as amended), the Child and Family Agency incurs the costs of the GAL as a

[7] Department of Justice, *Study on Familicide & Family Violence Death Reviews*, (DOJ, 2022) p.156.

default. Section 26(3) of that Act provides that the Agency can apply to the court to "order any other party to the proceedings in question to pay to the Agency" the costs of the GAL. IPRT recommends that the same provisions apply in the current Bill to ensure that all children, regardless of circumstance, are afforded the same access to a GAL in situations where guardianship may be altered.

Approach in England and Wales: Prohibited Steps Order and Reviews

19. The apparent total revocation of guardianship rights as opposed to suspension or restriction with review departs from standards and practice in other jurisdictions, including England and Wales. The Victims and Prisoners Act 2024 in England and Wales makes provision for the restriction of parental responsibility where one parent kills the other parent.[8] Prohibited Steps Orders are used to restrict guardianship in specific circumstances. A Prohibited Steps Order is a form of injunction usually issued on application by the Family Courts. It is designed to prevent a specific action from being taken concerning a child without the court's permission and ensure that interference with family and guardianship rights are proportionate.

20. The current Bill closely reflects the provisions in the Victims and Prisoners Act 2024 which requires the Crown Court in England and Wales to make a prohibited steps order during the sentencing of a parent with 'parental responsibility' the equivalent to guardianship rights) if that person is convicted of the murder of the other parent. However, the current Bill before the Oireachtas does not reflect the subsequent provisions on a review of the order. IPRT recommends adopting a model similar to that used in a Prohibited Steps Order, whereby there is a formal review process. This includes situations where a person is later acquitted of the murder or manslaughter of the other parent.

21. While an order may be made on the basis of the child's welfare and best interests at the time that their guardian is sentenced, the risk to the child may diminish over time if the convicted guardian demonstrates genuine remorse and meaningfully engages in rehabilitation over time.

[8] Section 18, Victims and Prisoners Act 2024.

The views of the child in these circumstances, in line with their capacity and evolving maturity, must be a central factor for consideration if any review of the order were to take place. IPRT suggests that the Committee consider these types of situations in the context of the Bill and put in place appropriate safeguards to ensure that the full order could be varied if it is in fact found to be in the best interests of the child at a later date.

Conclusion

22. Children with a parent in prison are often described as the 'hidden' victims of the penal system, with trauma further compounded where that parent has killed their other parent. IPRT believes that any response to these circumstances must adopt a rights-based approach to ensure that the rights of the child are central and their best interests are paramount in the process of guardianship proceedings. While the Bill in its current form contains rights-based language which reflects Article 42A and the UN Convention on the Rights of the Child, the lack of formal assessment of the child's needs and views and the lack of clarity on a review mechanism leaves significant gaps both in the protection of the rights of children in these circumstances and could be subject to legal challenge if the guardian's right to fair procedures are deemed inadequate.