



Preliminary Response to Proposed ‘Family’ & ‘Care’ Amendments

December 2023

“It is essential to any successful campaign to amend the Constitution that there is absolute clarity about what it is that is sought to be achieved”

– Peter Ward SC (veteran campaigner for constitutional reform)

The wording of proposed ‘family’ and ‘care’ amendments to the Constitution are set out in two recently published Referendum Bills. FLAC has sought to engage widely and constructively with Government, relevant civil society organisations, policy makers, academics and practitioners in relation to the proposed referendums.¹

Our aim is to ensure that the **best and most effective wordings** are put to referendum and that any proposed amendments to the Constitution will deliver meaningful rights and stronger constitutional protection (rather than just symbolic recognition) for all women, families and carers - as well as other groups who experience discrimination and disadvantage, such as people with disabilities.

The wording of an amendment (and the rationale behind it) may have a significant effect on the likelihood that it will be approved by the people.

Preliminary Analysis of the Proposed Amendments

The Explanatory Memorandums which accompany the Referendum Bills do not contain any significant details in relation to the rationale for the amendments or their intended implications in terms of law and policy - and no such information has yet been published elsewhere. There needs to be absolute **clarity around what the wordings are seeking to achieve** so the wordings can be properly considered, debated and, as necessary, amended. This is particularly necessary in circumstances where the wordings published differ significantly from those which were proposed by the Oireachtas Committee on Gender Equality and diverge from the recommendations of the Citizens’ Assembly on Gender Equality.

FLAC’s preliminary analysis gives rise to a number of issues and concerns in relation to both proposed referendums which we believe should be addressed and remedied before (or while) the Referendum Bills proceed through the Oireachtas. It is vital that

¹ Further details on the background to the current proposals, as well as FLAC’s engagement with them and perspective on them are included in the **Appendix** to this document.

adequate time is afforded to that process – so that the rationale for and intended consequences of the proposals are fully understood.

The issues and concerns which arise from our preliminary analysis are as follows:

The Proposed ‘Family’ Amendment

Citizens’ Assembly Recommendation	Current Wording & Proposed Amendment
<p>Article 41 of the Constitution should be amended so that it would protect private and family life, with the protection afforded to the family not limited to the marital family.</p>	<p><i>Art. 41.1</i> 1° The State recognises the Family, whether founded on marriage or on other durable relationships, as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.</p> <p>2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.</p>
	<p><i>Art. 41.3.1</i> 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.</p>

The proposed ‘family’ amendment if enacted would mean that the constitutional protection of the family would no longer be limited to families based on marriage. This is a welcome step.

The expanded definition of ‘family’ proposed is very significant and would seem to extend constitutional protection to (at the very least) single parent families, cohabiting couples in long-term relationships and their children and possibly families where multiple generations live together as one unit.

This expansion of constitutional protection to families founded “on other durable relationships” raises many questions about what the amendment will mean in practical terms i.e. the implications for law and policy in social welfare, taxation, succession, family law and beyond.

While the ultimate power to interpret any provision of the Constitution lies with the Courts, it is vital that the rationale for the wording, its scope and meaning and the expected changes in law and policy are identified at this stage - so that that voters will understand, to the greatest degree possible, the practical implications of the amendment. In the absence of such information, there is a significant risk of confusion amongst voters as to the possible implications of the changes proposed.

The Proposed 'Care' Amendment

Citizens' Assembly Recommendation	Current Wording & Proposed Amendment
<p>Article 41.2 of the Constitution should be deleted and replaced with language that is not gender specific and obliges the State to take reasonable measures to support care within the home and wider community.</p>	<p>THE FAMILY ARTICLE 41 ... 2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home. ... CARE ARTICLE 42B The State recognises that the provision of care, by members of a family to one another by reason of the bonds that exist among them, gives to Society a support without which the common good cannot be achieved, and shall strive to support such provision</p>

The proposed deletion of Article 41.2 achieves the aim (supported by FLAC) of removing outdated and obnoxious gender stereotypes from the Constitution. However, FLAC has significant concerns around the proposed new Article 42B.

The Constitution's 'women in the home' provision has been wholly ineffective in requiring the State to provide meaningful support to women (or anyone) with caring responsibilities. An obligation to "*strive*" to support care is unlikely to be interpreted as imposing any enforceable obligation on the State to support care that is provided in the home or otherwise. The wording recognises care obligations within families but places no equivalent obligation to support that work on the State.

It is unlikely that the new Article 42B proposed will be interpreted as providing any new rights to parents of children with disabilities seeking supports for their child in terms of their care at home or in school, or for people with disabilities or older people seeking to live independent lives.

The recognition of family care alone is not sufficient to strengthen the rights of carers and to ensure substantive improvements in law and policy i.e. measures which would improve the lives of carers. In fact, it could be seen as a constitutional endorsement of the *status quo* where women predominantly bear the brunt of providing unpaid care and let the State 'off the hook'. The experience of legal instruments which recognise care in other countries - without

creating positive obligations on the State - supports this view. Those laws have been criticised for shifting the responsibility for long-term care onto unpaid carers.²

Further, the addition of the proposed new Article 42B would create a situation where the only mention of people with disabilities in the Constitution is an implicit reference to them as the subject of family care. This may create a tension between the Constitution and the provisions of the UNCRPD (which is underpinned by the principle of autonomy for people with disabilities) and give constitutional expression to harmful stereotypes.

Article 19 of the UNCRPD recognises “the equal right of all persons with disabilities to live in the community, with choices equal to others” and obliges parties to the Convention to “[ensure] that...Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement...”. The proposed new wording (with the emphasis on the provision of care in the home by families) is incongruent with this provision.

FLAC would encourage the Government to engage with civil society in relation to the wording of the proposed new provision.

² Luke Clements who is a legal expert on care and disability - and who regularly represents carers and parents of children with disabilities - has considered legal instruments which ‘recognise’ care in several countries and concludes that they are: “...essentially rhetorical measures, heavy on process and exceedingly light on substance: responses that place little or no strain on the public purse. As Levitas has observed, ‘recognizing the value of unpaid work... means not recognizing its full economic value, since its cheapness is its main recommendation’.” See: Luke Clements (2013), [Does your carer take sugar? Carers and human rights: the parallel struggles of disabled people and carers for equal treatment](#).

In the UK, the Carers Recognition Act 1995 did not create any duty on the State to provide supports to carers – even on foot of an assessment of the carer’s needs. The tangible benefits of this piece of “recognition” legislation are, as a result, entirely unclear and the position of carers in the UK (and the supports available to them) are still completely unsatisfactory. In the USA, CARE Act legislation – which provides for recognition of family caregivers in patients’ medical records - has been described as “[shifting] responsibility for long-term care (and associated risk) onto unpaid carers”. See: Luke Clements, *Clustered Injustice and the Level Green*, (Legal Action Group, 2020), at p.62-6.

APPENDIX – Background to the Proposed Referendums, FLAC’s Perspective and our Engagement with the Proposals to date

In June 2021, the Citizens’ Assembly on Gender Equality³ published its report – which included three recommendations for constitutional reform in relation to equality, the family and care⁴.

The Joint Oireachtas Committee on Gender Equality was established to consider the recommendations of the Assembly.⁵ In December 2022, the Oireachtas Committee published its final report setting out its proposed wording for amendments to Articles 40 and 41.⁶

In March 2023, the Government announced its intention “to hold one or more referendums on this issue [gender equality]”.⁷ In December 2023, the Government “approved proposals for two referendums”⁸ (in relation to ‘family’ and ‘care’) and Referendum Bills were published.⁹

In addition to a submission to the Oireachtas Committee¹⁰, FLAC provided a number of submissions¹¹ and reports¹² to Government in relation to the potential constitutional amendments. This included a final submission on “Standards & Suggested Wording for Constitutional Amendments in relation to the Equality Guarantee, replacing the ‘Women in the Home’ Provision & the Non-Marital Family”.¹³

³ The Assembly was established in July 2019 to “consider gender equality and make recommendations to the Oireachtas to advance gender equality...”. See: [Terms of Reference](#) for the Citizens’ Assembly on Gender Equality.

⁴ The Citizens’ Assembly (June 2021), [Report of the Citizens’ Assembly on Gender Equality](#), p.12.

⁵ In July 2022, the Oireachtas Committee published an “Interim Report on Constitutional Change” which set out “various options for constitutional text which could form the basis of amendments to give effect to the recommendations of the Citizens’ Assembly”. See: Joint Committee on Gender Equality (July 2022), [Interim Report on Constitutional Change](#).

⁶ Joint Committee on Gender Equality (December 2022), [Final report: Unfinished Democracy - Achieving Gender Equality](#).

⁷ Department of the Taoiseach (8 March 2023), [Press Release: Taoiseach and Minister O’Gorman announce holding of referendum on gender equality](#).

⁸ Department of the Taoiseach (6 December 2023), [Government approves proposals for referendums on family and care](#).

⁹ Houses of the Oireachtas (8 December 2023), [Thirty-ninth Amendment of the Constitution \(The Family\) Bill 2023 & Fortieth Amendment of the Constitution \(Care\) Bill 2023](#).

¹⁰ FLAC (November 2022), [Submission to the Joint Committee on Gender Equality: Constitutional Change & Gender Equality](#).

¹¹ FLAC (May 2023), [Submission to the Inter-Departmental Committee: Referendums on Family, Care and Equality](#) & FLAC (May 2023), [Supplemental Submission to the Inter-Departmental Referendums Committee: Ensuring Constitutional Protection for Non-Marital Families](#).

¹² In May 2023, FLAC held a workshop where leading legal practitioners and academics offered their views on the current proposals, as well as on FLAC’s analysis of the wording recommended by the Oireachtas Committee and its own recommendations in relation to the wording. A report on that workshop provides an overview of the matters raised at that workshop and FLAC’s key findings and recommendations which emerged from it. See: FLAC (July 2023), [Report on FLAC Consultation with Academics & Legal Practitioners: Wording for Amendments to Articles 40 and 41 of the Constitution](#).

¹³ FLAC (September 2023), [Standards & Suggested Wording for Constitutional Amendments](#).

FLAC is an independent human rights and equality organisation, which exists to promote equal access to justice. Our analysis and recommendations are informed by our work representing clients.¹⁴ In our casework, FLAC has sought to rely on the Constitution (in particular, the Equality Guarantee and the provisions concerning the family) in cases concerning discrimination, housing and homelessness, and social welfare (including in relation to the entitlements of non-marital families). As a result, we are keenly aware of the limitations of the current constitutional provisions.

FLAC's primary concern in engaging with the Government in relation to the referendums has been to ensure that any proposed amendments to the Constitution will deliver meaningful rights and stronger constitutional protection for all women, families and carers – rather than just symbolic recognition.

We have also highlighted the need for absolute clarity on the rationale for any proposed constitutional amendment and their intended effects. While the important symbolic effects of an amendment may be easily identified, the practical effects require careful consideration and detailed explanation - in order to avoid unintended consequences and to allow voters to understand why an amendment is necessary.

In *Heneghan v Ireland*¹⁵, the “*hapless, incoherent and confused*” wording of the seventh amendment to the Constitution was strongly criticised by the Supreme Court. The lack of clarity around the effects of that amendment meant that it was left to the Court to “*confront fundamental issues around how it should interpret an opaque constitutional provision of this kind*”.

Article 42A (which became part of the Constitution after a referendum in 2012) has been criticised for failing to deliver on the promise of “Children’s Rights”. Over 10 years since it was enacted, it is clear that the change which the amendment offered in terms of children’s rights has been minimal to date.

¹⁴ FLAC is an Independent Law Centre. In recent years, equality and discrimination matters have been a major feature of FLAC’s casework, including cases arising from our Roma Legal Clinic, Traveller Legal Service and LGBTQI Legal Clinic. FLAC regularly represents clients in equality cases before tribunals such as the Workplace Relations Commission and in the courts.

¹⁵ *Heneghan v Minister for Housing, Planning & Local Government & Ors* [2023] IESC 7.

The wording of that amendment¹⁶ (and the process by which it was arrived at) have both been criticised. O'Mahony writes that the impact of Article 42A has "[fallen] below expectations".¹⁷ His analysis highlights issues with the process which gave rise to the wording for Article 42A which ultimately went to referendum: "*There was no call for submissions; no public hearings or debates; and no report explaining the rationale behind the wording. The new wording was not even officially published...*". Similarly, he describes the process through which that wording was finalised as follows:

"It is difficult to document the exact process that brought about this watering down of the wording, as there were no formal submissions or hearings, and no report was published explaining the wording in detail. In the absence of a clear record of the process leading to these changes, one can only speculate as to the motivations and influences behind them."

It should also be highlighted that the wording of an amendment (and the rationale behind it) may have a significant effect on the likelihood that it will be approved by the people. In his personal submission to the Housing Commission's Referendum Sub-Committee, veteran campaigner for constitutional reform Peter Ward SC contends that "*it is essential to any successful campaign to amend the Constitution that there is absolute clarity about what it is that is sought to be achieved*". In this regard, it is worth highlighting that the watered-down "Children's Rights" barely inspired people to go to the polls and passed by an unexpectedly narrow margin.

¹⁶ Doyle and Kenny link the "emptiness of the [Children's Rights] referendum proposal" with the failure to properly consider why such an amendment was needed in the first place. They argue that the proposal for the insertion of Article 42A was based on a "*false diagnosis of a constitutional malaise*" i.e. a misunderstanding of the legal and practical necessity for such an amendment.

Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum' in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart Publishing 2017).

¹⁷ Conor O'Mahony, 'Falling short of expectations: the 2012 children amendment, from drafting to referendum' (2016) 31(2) *Irish Political Studies*, 252-281.