



# Standards & Suggested Wording for Constitutional Amendments in relation to the Equality Guarantee, replacing the ‘Women in the Home’ Provision & the Non-Marital Family

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## About FLAC

**FLAC (Free Legal Advice Centres)** is an independent human rights and equality organisation, which exists to promote equal access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights. FLAC operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information, and runs a nationwide network of legal advice clinics where volunteer lawyers provide basic free legal advice.

As an Independent Law Centre, FLAC takes on a number of cases in the public interest each year. As well as being important for the individual client, these cases are taken with the aim of benefiting a wider community. FLAC also operates a Roma Legal Clinic, Traveller Legal Service and LGBTQI Legal Clinic.

FLAC makes policy recommendations to a variety of bodies, including to Oireachtas Committees and international human rights bodies.

## 1. Introduction

The proposed referendums to amend the constitutional provisions concerning equality, family and care represent a significant opportunity for an enhanced and effective equality guarantee, for effective rights for women, carers (who are mainly women) and people with disabilities to be inserted into the Constitution, and for the constitutional protection of the family to be explicitly extended to non-marital families. FLAC wants to ensure that the full potential of this opportunity is realised.

It is vital that there is absolute clarity about the intended effects of any proposed amendment - what real changes will be brought about in terms of law and policy for women, carers (who are predominantly women), non-marital families, and other disadvantaged groups. How these desired outcomes will be achieved through the referendum wording should also be clear.

The question of whether the amendments will be transformational or will achieve only symbolic change will depend on the precise wording chosen. It is essential that the wording is sufficiently robust, detailed, and clear.

## 2. Background

In June 2021, the Citizens' Assembly on Gender Equality<sup>1</sup> published its report – which included three recommendations for constitutional reform in relation to equality, the family and care<sup>2</sup>.

The Joint Oireachtas Committee on Gender Equality (the 'Oireachtas Committee') was established to consider the recommendations of the Assembly.<sup>3</sup> In December 2022, the Oireachtas Committee published its final report setting out its proposed wording for amendments to Articles 40 and 41.<sup>4</sup>

In March 2023, the Government announced its intention “*to hold one or more referendums on this issue [gender equality]*” in November 2023 and indicated that “*agreement... of wording for the proposed referenda, [is] to be concluded by mid-May*”.<sup>5</sup>

No wording has been published to date – giving rise to media speculation around the fate of the proposed referendums<sup>6</sup> and calls for clarity from civil society organisations<sup>7</sup>. The Taoiseach has since indicated that it remains the Government's to proceed with the Referendums in November.<sup>8</sup>

In addition to a submission to Oireachtas Committee<sup>9</sup>, FLAC has made two submissions to the Inter-Departmental Referendums Committee (established by Government to make policy proposals in relation to the proposed referendums).<sup>10</sup>

## ***FLAC's Work***

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.<sup>11</sup>

FLAC has also engaged continuously with other civil society organisations in relation to the proposed referendums, as well as with Government, politicians and the Inter-Departmental Committee.

### ***Concerns about Oireachtas Committee wording***

FLAC is concerned that suggested wording which emerged from the Oireachtas Committee fails to provide meaningful rights for carers, additional rights for women, and does not make any provision at all for rights for people with disabilities and other disadvantaged individuals and groups. While it recognises non-marital families, which is welcome, it does not sufficiently provide for equivalent right for such families. The Oireachtas Committee proposal to amend the equality guarantee Article 40.1 will not transform the equality guarantee into an effective bedrock of protection.

FLAC's research and engagement in this area has illustrated that the proposed referendums raise numerous complicated (but not insoluble) legal and policy issues – as well as issues which are potentially politically contentious. However, we have made numerous detailed recommendations as to how rights-based constitutional reform may be achieved. These recommendations are based on our experience as an Independent Law Centre (where we have frequently sought to rely on the existing constitutional provisions and the equality legislation on behalf of clients), as well as international standards and best practice.

Along with veteran campaigners for progressive constitutional reform<sup>12</sup> and the Electoral Commission<sup>13</sup>, FLAC<sup>14</sup> is concerned that the arbitrary November deadline will not provide sufficient time to draft the most effective wording and have a comprehensive information campaign on distinct and complex issues which will allow voters to know exactly what is being proposed and why.

### 3. Overarching Recommendations

- **Voters should know what real changes will be made to the lives of women, carers (who are predominantly women), non-marital families, and other disadvantaged groups:**
  - Any wording(s) which emerge from the Inter-Departmental Committee or from the Cabinet, should be accompanied by a detailed explanation of the rationale for the amendments and what they will mean and require in terms of changes in policy and law.
- **The work, and time, involved in finalising the wording should dictate the timing of the referendums – not the other way around:**
  - Where necessary to ensure the best possible wording, Inter-Departmental Committee or Government should engage in further consultation with relevant legal and constitutional experts, as well as stakeholders and rights-holders.
  - Given the range of issues arising and number of disadvantaged groups and individuals potentially impacted by any proposed amendment to the Constitution's equality guarantee, it may be necessary to consider that provision by way of a separate process. Such a process could take place alongside the ongoing review of the equality legislation.

### 4. Standards & Suggested Wording

Based on the extensive research and engagement undertaken by FLAC over the past year, as well as its submissions and reports over that period in relation to amending Articles 40 and 41 of the Constitution, the sections below set out a number of standards for what proposed amendments to those provisions could and should achieve. They also provide examples of potential wording which would meet the criteria identified.

## Article 40.1 (The Equality Guarantee)

Citizens' Assembly Recommendation	Current Wording
Article 40.1 of the Constitution should be amended to refer explicitly to gender equality and non-discrimination. <sup>15</sup>	<p>All citizens shall, as human persons, be held equal before the law.</p> <p>This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.</p>

### Standards for amending Article 40.1:

- The Constitution should recognise the **fundamental role of equality in a democratic society** and equality should not be subordinate to other constitutional rights or norms.<sup>16</sup>
- The equality guarantee must prohibit **discrimination in all its forms**, including indirect discrimination (i.e. discrimination by impact).<sup>17</sup>
- Article 40.1 should be amended to include a broad, **non-exhaustive list of protected grounds** which reflect national equality legislation and the international human rights treaties that Ireland has signed.
- The Constitution must require the Superior Courts to apply a **higher standard of review** to legislation than the standard applied currently (which merely ensures 'formal' or 'process'-based equality). Any interference with the equality rights provided for in the Constitution must only come about as a proportionate means of pursuing a legitimate objective.
- The Constitution should reflect the need for **strong equality legislation** (with an emphasis on positive action, positive duties and reasonable accommodation for people with disabilities), rather than limiting the scope and effectiveness of such legislation.

### Suggested Wording:

- FLAC has formulated wording (informed by the interpretation by the Courts of the equality guarantee to date, EU and international human rights and equality law, and international best practice), which we believe demonstrates how the standards above may be met by a constitutional amendment to Article 40.1:

## **ARTICLE 40**

**1° The State recognises that, in a democratic society, the principles of equality and non-discrimination are fundamental to the common good.<sup>18</sup>**

**2° All persons shall be held equal before the law and shall enjoy the equal benefit and protection of the law<sup>19</sup> without discrimination, save only for measures which constitute a proportionate means of achieving a legitimate aim.<sup>20</sup>**

**3° Discrimination includes direct discrimination, indirect discrimination and discrimination by association<sup>21</sup>, on the ground of sex, gender, race, colour, nationality, ethnicity (including membership of the Traveller community), disadvantaged socio-economic status, sexual orientation, language, religion or belief, political opinion, disability, age, family status, civil status, other such status, or a combination of grounds.<sup>22</sup>**

**4° With a view to ensuring full equality in practice<sup>23</sup>, the Oireachtas may take legislative and other measures to promote equality and to prevent and compensate for discrimination, disadvantage and social exclusion.<sup>24</sup>**

**5° In order to promote equality and eliminate discrimination, the State shall take all appropriate steps to ensure that reasonable accommodation is provided to people with disabilities.<sup>25</sup>**

## Articles 41.1 & 41.3.1 (Family)

Citizens' Assembly Recommendation	Current Wording
<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 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>

### Standards:

- Any amendment to Article 41 must remove the barrier (which is created by the current wording of Article 41.3.1) to **non-marital families enjoying constitutional protection**.
- Ideally, any amendment to Article 41 would also **ensure that supports provided by the State to families (including through taxation and social welfare policy) should not discriminate between marital and non-marital families.**<sup>26</sup>

### Suggested Wording:

- In FLAC's view, the first criteria outlined above may be achieved through **the deletion of the words "on which the Family is founded"** from Article 41.3.1.
- The second could be achieved through the **addition of words to the following effect to Article 41.1.2: "..., and shall through its enactments protect and promote the rights of all families, including marital and non-marital families"**.

## Article 41.2 (Care)

Citizens' Assembly Recommendation	Current Wording
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.	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.

### Standards:

- **Out-dated gender stereotypes must be removed** from the Constitution.
- Constitutional reform should recognise **people with disabilities as** autonomous individuals and rights-holders and **not reinforce perceptions of groups such as people with disabilities and older people as subjects of care** (which may arise if 'care' is recognised with no reference to the rights of those groups).
- Constitutional reform should facilitate a **re-orientation of State policy** in relation to 'care'. This should involve facilitating measures:
  - to tackle the disproportionate burden placed on women in terms of caring responsibilities, rather than reinforcing the status quo where women bear a disproportionate burden.
  - promoting independent-living for people with disabilities (as required by the UN Convention on the Rights of Persons with Disabilities).

### Suggestions re Wording:

- The **deletion of Article 41.2** would meet the first criteria outlined above.
- The **rights of woman, older people, families and people with disabilities should all be strengthened** by constitutional reform on foot of the deletion or replacement of Article 41.2. It should also be noted that a **strong equality guarantee** (such as the proposed replacement for Article 40.1 set out above) would allow for the **introduction of specific policies (i.e. positive action measures) in relation to each such group.**

## Endnotes

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<sup>1</sup> 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.

<sup>2</sup> “(1) Article 40.1 of the Constitution should be amended to refer explicitly to gender equality and non-discrimination. (2) 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. (3) 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.” See: The Citizens’ Assembly (June 2021), [Report of the Citizens’ Assembly on Gender Equality](#), p.12.

<sup>3</sup> The Oireachtas Committee began its work by considering the recommendations of the Assembly in relation to constitutional reform and conducted targeted stakeholder consultation through public and private meetings of the Committee. 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”. The Interim Report also noted that the Oireachtas Committee would “[seek] the views of interested stakeholders, citizens, and members of the public on these options”. See: Joint Committee on Gender Equality (July 2022), [Interim Report on Constitutional Change](#).

<sup>4</sup> Joint Committee on Gender Equality (December 2022), [Final report: Unfinished Democracy - Achieving Gender Equality](#).

<sup>5</sup> Department of the Taoiseach (8 March 2023), [Press Release: Taoiseach and Minister O’Gorman announce holding of referendum on gender equality](#).

<sup>6</sup> Irish Times (23 August 2023), [Inside Politics Podcast: Crime on the public’s mind becomes a problem for politicians](#), at 14:07.

<sup>7</sup> National Women’s Council (23 August 2023), [Press Release: Organisations call for wording on upcoming referendum to be published](#).

<sup>8</sup> Irish Times (6 September 2023), [Two referendums set to be held on gender equality, says Taoiseach](#).

<sup>9</sup> FLAC (November 2022), [Submission to the Joint Committee on Gender Equality: Constitutional Change & Gender Equality](#).

<sup>10</sup> 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](#).

<sup>11</sup> FLAC (July 2023), [Report on FLAC Consultation with Academics & Legal Practitioners: Wording for Amendments to Articles 40 and 41 of the Constitution](#).

<sup>12</sup> At FLAC’s workshop, Peter Ward SC stressed that the success of any referendum campaign depends on clarity as to what the constitutional amendment seeks to achieve and as much unanimity over the proposed wording as possible. He expressed surprise that there was such a strong emphasis on holding the referendums in November 2023 in circumstances where there were still concerns over the appropriate wording. He questioned how work on how proposals were presented as part of a campaign could proceed in circumstances where the proposals (and their implications) remain unknown.

Mr Ward highlighted that he was most concerned by the proposal to amend Article 40.1 (the equality guarantee). He noted that equality is a huge area and that, in the absence of a compelling rationale for the proposed amendment, a debate around what equality means and who will benefit from the proposed amendment may overshadow the substantive issues. Mr Ward noted that any campaign will already have to grapple with complex questions around the meaning of “care” and the definition of “family” – and what the implications of amendments in those areas will be. As a result, there is a risk of confusion and one issue

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overwhelming the consideration of others. See: FLAC (July 2023), [Report on FLAC Consultation with Academics & Legal Practitioners: Wording for Amendments to Articles 40 and 41 of the Constitution](#).

<sup>13</sup> Irish Times (28 July 2023), [Gender equality referendum date thrown into doubt by time needed for information campaign](#).

<sup>14</sup> Irish Times (5 September 2023), [Head-to-head: Should 'women in the home' referendum be delayed? Ivana Bacik and Eilis Barry share their views](#).

<sup>15</sup> Page 9 of the Oireachtas Committee Interim Report includes the following in a summary of the evidence of Dr Catherine Day (Chair of the Citizens' Assembly) to the Committee: "There was much discussion at the Assembly about discrimination and its multiple forms. There are different kinds of minorities, who already suffer from the inequalities of gender, multiplied by other inequalities. That is why the recommendation is to insert something that refers to gender equality and non-discrimination more generally, which would cover all of that. Thus, according to Dr Day the recommendation of the Citizens' Assembly is not referring to non-discrimination on the basis of gender alone. The citizens wanted to pare down the recommendation to the essence of what they would like to see in a future legal text". See: Joint Committee on Gender Equality (July 2022), [Interim Report on Constitutional Change](#).

<sup>16</sup> For example, in the recent case of *O'Meara v Minister for Social Protection & Ors* [2022] IEHC 552, a family (represented by FLAC) challenged their exclusion from Widow's, Widower's or Surviving Civil Partner's (Contributory) Pension Scheme. The application was refused on the basis that the couple had not been married. Heslin J decided that, for reasons including "the special place of marriage in the Constitution", the legislation governing the scheme was not contrary to the Constitution's equality guarantee.

<sup>17</sup> Currently, decisions of the Supreme Court have limited the extent to which the Constitution provides protection against indirect discrimination and discrimination by association.

<sup>18</sup> This sub-article is designed to address the continued downgrading of equality in the current constitutional order. This is necessary in light of the interpretation of the current equality guarantee by the courts.

For a detailed overview of the relevant case law, see: FLAC (November 2022), [Submission to the Joint Committee on Gender Equality: Constitutional Change & Gender Equality](#), sections 1.1 & 1.3, and FLAC (May 2023), [Submission to the Inter-Departmental Committee: Referendums on Family, Care and Equality](#), Introduction.

<sup>19</sup> This language is derived from the Canadian and South African constitutions – both of which provide for multi-faceted and substantive conceptions of equality. Section 9 of the Constitution of the Republic of South Africa recognises "the right to equal protection and benefit of the law". Similar wording is used in section 15 of the Canadian Charter of Rights and Freedoms.

<sup>20</sup> European equality law instruments have been interpreted so as only to permit exceptions to the principle of non-discrimination which are proportionate.

The European Court of Human Rights assesses whether a difference of treatment contrary to Article 14 of the European Convention on Human Rights may be permitted by reference to principle of proportionality. The Court of Justice of the European Union adopts a similar approach in assessing limitations to the prohibition on discrimination set out in Article 21 of the Charter of Fundamental Rights. The language of proportionality is also used in the exceptions provided for in the EU Equality Directives.

<sup>21</sup> International instruments, such as the EU Equality Directives, are specifically concerned with the multiple forms discrimination may take. For example, Article 2(1) of the Race Equality Directive provides that "the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin".

By contrast, decisions of the Supreme Court have limited the extent to which the Constitution provides protection against indirect discrimination and discrimination by association. See: FLAC (November 2022), [Submission to the Joint Committee on Gender Equality: Constitutional Change & Gender Equality](#), pp.4-5.

<sup>22</sup> This list of grounds reflects Article 14 of the European Convention on Human Rights, national equality legislation and the international human rights treaties to which Ireland is party.

<sup>23</sup> EU Equality Directives provide for the introduction of "measures to prevent or compensate for disadvantages" - "[with] a view to ensuring full equality in practice". See: Article 5, Race Equality Directive.

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<sup>24</sup> The South African Constitution and the Canadian Charter of Rights and Freedoms both specifically provide for positive action measures through legislation and other measures. The South African Constitution also provides that “National legislation must be enacted to prevent or prohibit unfair discrimination”.

<sup>25</sup> The Supreme Court previously struck down draft employment equality legislation on the basis that the reasonable accommodation provisions it imposed were an unconstitutional interference with the property rights of employers. See: *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321.

The wording proposed by FLAC to specifically provide for reasonable accommodation is drawn from Article 5(3) of the United Nations Convention on the Rights of Persons with Disabilities.

<sup>26</sup> The Irish Courts have accepted the view of the European Court of Human Rights to the effect that the European Convention on Human Rights (despite containing protection for private and family life which is not limited to the marital family) allows for differential treatment between marital and non-marital families. For further detail, see: FLAC (May 2023), [\*Supplemental Submission to the Inter-Departmental Referendums Committee: Ensuring Constitutional Protection for Non-Marital Families\*](#).