



Recommendations to Strengthen the Proposed 'Family' & 'Care' Constitutional Amendments

January 2024

FLAC has already published a preliminary analysis of the wordings proposed by Government for amendments to the Constitution concerning 'family' and 'care'.¹ That document raised three concerns:

- The lack of clarity around the rationale for the amendments, what they are seeking to achieve, and what they will mean in practical terms for law and policy.
- The amendments (as currently worded) will not deliver meaningful enforceable rights and stronger constitutional protection for women, families and carers - as well as other groups who experience discrimination and disadvantage, such as people with disabilities. Instead, they are focussed on symbolic recognition alone.
- The wordings diverge significantly from the recommendations made by the Citizens' Assembly on Gender Equality and the Joint Oireachtas Committee on Gender Equality.

FLAC has now drafted amendments which would strengthen the wordings and would have a significant impact on their effectiveness in delivering tangible improvements in law and policy and promoting equality and human rights.

We have also set out matters which need to be addressed by Government to provide clarity on the rationale for and intended effects of the proposed new constitutional provisions.

The Referendum Bills will be debated and finalised by the Dáil and Seanad in the final weeks of January 2024. We hope that the matters raised in this document will be addressed during that process and that our recommendations will be adopted.

¹ FLAC (December 2024), [Preliminary Response to Proposed 'Family' & 'Care' Amendments](#).

FLAC (Free Legal Advice Centres) has sought to engage widely and constructively with Government, relevant civil society organisations, policy makers, academics and practitioners in relation to the proposed referendums. Our aim is to ensure that the best and most effective wordings are put to referendum. The Appendix to the Preliminary Response document provides an overview of FLAC's work in relation to the proposed referendums to date.

1. The Proposed 'Care' Amendment

The Fortieth Amendment of the Constitution (Care) Bill 2023 proposes deleting Article 41.2 of the Constitution (the 'women in the home' provision). FLAC supports this. The Referendum Bill (introduced by the Government) also proposes adding a new "Care" Article to the Constitution:

"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."

FLAC strongly recommends amending the Referendum Bill to the effect that the proposed new Article 42B of the Constitution is reworded along the following lines:

FLAC Wording

CARE AND INDEPENDENT LIVING

ARTICLE 42B

The State shall take reasonable measures to support care within families and the wider community and shall promote and protect the rights of people with disabilities to live independently and enjoy full inclusion and participation in the community.

1.1. Absence of an enforceable obligation on the State

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 proposed 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.²

Notably, by contrast to the wording proposed in the relevant Referendum Bill, both the Citizens' Assembly and the Oireachtas Committee suggested a stronger obligation on the which required "reasonable measure to support care".

In light of the above, FLAC recommends that:

- ▶ The proposed Article 42B creates obligations that the State "**shall take reasonable measures**", rather than "shall strive".

1.2. Rights of Persons with Disabilities

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

Article 19 of the UNCRPD (which was ratified by Ireland in 2018) 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)

² In fact, the proposed wording 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. 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.

conflicts with this provision. It represents a missed opportunity for a long overdue constitutional recognition of the rights of persons with disabilities and for the Constitution to catch up with developments such as the ratification of the UNCRPD.

The reworded Article 42B proposed by FLAC above is informed by the provisions of the UNCRPD. Alternatively, the wording proposed by Government could be amended as follows:

- ▶ By placing the phrase “, **having due regard to the rights of persons with disabilities to autonomy and choice as to their living arrangements,**” before the word “shall”.

OR

- ▶ Adding the following after the words “The State”: “, **in addition to their obligations to vindicate the rights of persons with disabilities,**”.

OR

- ▶ Adding an additional obligation to the Article. For example, adding the following after the words “such provision”: “**and promote and protect the rights of persons with disabilities, including their right to full inclusion and participation in the community.**”

A more ambitious approach, which FLAC favours, would involve inserting an entirely new constitutional Article on the rights of persons with disabilities (along with the proposed new Article 42B concerning care). For example, the following wording developed by FLAC and which is derived from the provisions of the UNCRPD:

“Rights of Persons with Disabilities

ARTICLE 42C

- 1. The State shall promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and promote respect for their inherent dignity.**
- 2. The State shall ensure that reasonable accommodation is provided to people with disabilities.³**
- 3. The State recognises the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate**

³ This would resolve the existing issue whereby the Constitution has acted as a barrier to the introduction of reasonable accommodation legislation. In *Re Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996* [1997] 2 IR 321, the Supreme Court 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.

measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:-

- i. 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;
- ii. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- iii. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.”

1.3. Recognition of ‘Family Care’ Only

Neither the Citizens’ Assembly nor the Oireachtas Committee proposed limiting the new constitutional provision to ‘family care’. The Citizens’ Assembly recommendation referenced care in the “wider community” and the Oireachtas Committee wording referred to care “outside the home”.

The reworded Article 42B proposed by FLAC above recognises care in the wider community and supports for independent living. Alternatively, the Government’s proposed wording could be amended as follows:

- ▶ Replacing “by members of a family to one another by reason of the bonds that exist among them,” with “**within families and the wider community**”.

OR

- ▶ Adding the following after the words “by members of a family to one another by reason of the bonds that exist among them”: “**and within the wider community**”.

1.4. All or nothing approach

The current Referendum Bill creates a binary choice between:

- Voting no and retaining the existing ‘women in the home’ provision (Article 41.2).
- Voting yes and:
 - deleting Article 41.2, and
 - inserting the new ‘care’ provision (Article 42B).

The two proposed changes that a yes vote would bring about raise quite distinct issues and are, essentially, wholly separate proposals. However, both proposals are being presented to voters as a compound amendment. There is no third option for the simple deletion of the

offensive (and meaningless) ‘women in the home’ provision (without replacing it or adding any new provisions).

From a democratic perspective, this is regrettable. It limits the choice available to voters and effectively coerces voters who wish to remove offensive language from the Constitution to support the addition of an entirely new Article.

It may be worth exploring whether it would be possible to de-couple the proposals currently being put to one ‘care’ referendum i.e. by holding separate referendums on the deletion of Article 41.2 and the insertion of the new Article 42B.

2. The Proposed ‘Family’ Amendment

Constitutional Amendments Proposed in the Thirty-ninth Amendment of the Constitution (The Family) Bill 2023

Art.41.1

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.

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.

Art. 41.3.1

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.

2.1. Lack of Clarity as to the Implications of the Amendment for Law and Policy

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. FLAC welcomes this.

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” (on equal footing with families “founded on marriage”) 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. It cannot credibly be suggested that a major amendment to the constitutional definition of ‘the family’ has no foreseeable consequences for existing law and policy.

It is vital that the rationale for the wording, its scope and meaning, and the expected changes in law and policy are identified (to the greatest degree possible) at this stage. In the absence

of such information, there is a significant risk of confusion amongst voters as to the possible implications of the changes proposed. It also heightens the significant risk of misinformation around the proposal (a risk which the Government itself has already identified).

Before or during the consideration of the relevant Referendum Bill by the Oireachtas, the Government should:

- ▶ Outline the research which has been conducted as to the implications of the ‘family’ amendment on existing legislation. The Inter-Departmental Committee which was formed to prepare for the referendums compiled lists of legislation which refer to the family and marriage. The Government should publish any research conducted by that Committee, the Office of the Attorney General or others as to the impact of the proposed amendments on that legislation.
- ▶ The Government should commit to expanding State supports for families (including through taxation and social welfare) to, at the least, families based on long-term co-habitation. It should also commit to additional supports for single-parent families.
- ▶ Draft legislation as a matter of urgency outlining the changes in law and policy required by the amendments which should be published before the Referendum.

If the approach outlined above is not taken by the Government, it is likely that diverse families will have to look to the courts to define and give effect to their new constitutional rights.

2.2. “durable relationships”

The use of the term “durable relationships” in the constitution is novel. On the face of it, it would appear to provide that single-parent families will enjoy constitutional protection (on the basis that those families are founded on the relationship between a parent and their child or children). However, out of an abundance of caution, it may be worth considering amending the proposed new wording as follows:

- ▶ Adding the following after “durable relationships”: **“such as that which exists between parents and children”**.

Conclusion

FLAC believes that the recommendation outlined above would greatly strengthen and clarify the current proposals – and ensure that the referendums are not a missed opportunity for equality and human rights.

Relatedly, we hope to see the Government commit to developing an amendment to the Constitution’s “equality guarantee” (Article 40.1) – which could have a transformative effect for all groups who experience discrimination and disadvantage.