



**Submission to the
Joint Committee on
Gender Equality:
Constitutional Change
& Gender Equality**

November 2022

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, including economic, social and cultural 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. This includes recommendations that are derived from the learning and experience of FLAC's work as an Independent Law Centre.

FLAC is a member of the Chief Justice's Access to Justice Committee and the Review Group for the Department of Justice's current Review of the Civil Legal Aid Scheme.

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Introduction

FLAC welcomes the opportunity to make a submission to the Joint Committee on Gender Equality ('the Committee') in relation to the potential amendment of Articles 40.1 (the equality guarantee) and 41 (the family) of the Constitution.

We note the recent publication of the Committee's *Interim Report on Constitutional Change* (the 'Interim Report') and its request for FLAC to provide its "views on the options for wording for amendments to Articles 40.1 and 41 which are proposed in the report" and to state its "preference for wording among the options proposed".

FLAC's Perspective

FLAC's analysis and recommendations are informed by its work as an independent law centre. In recent years, equality and discrimination matters have been a major feature of FLAC's casework arising from services such as its 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.¹

FLAC makes policy recommendations in relation to equality and anti-discrimination law, human rights (including economic, social and cultural rights), and access to justice. For example, in 2017, the UN Committee on the Elimination of Discrimination against Women (UNCEDAW) adopted several recommendations made by FLAC in its concluding observations on Ireland.²

Further, FLAC has fully engaged with the ongoing review of Ireland's equality legislation (which was announced by the Minister for Children, Equality, Disability, Integration and Youth on foot of a campaign by FLAC) and made a detailed submission

¹ In 2021, over one-third of FLAC's active casefiles related to discrimination/equality matters. See: FLAC (2022), [FLAC Annual Report 2021: Towards Equal Access to Justice](#), pp.37-39. See further: FLAC's [Annual Reports for the period 2017 to 2021](#).

² The Committee expressed its concern "that section 14 of the Equal Status Acts 2000-2015 precludes the use of the equality framework to challenge discriminatory laws" and that "legislation which discriminates against women, or has a disproportionately negative impact on women, falls outside the scope of the Equal Status Acts 2000-2015". The Committee therefore adopted FLAC's recommendation for Ireland to "amend section 14 of the Equal Status Acts 2000-2015 to ensure that an effective remedy is available for discrimination that has a legislative basis". See: UN Committee on the Elimination of Discrimination against Women (2017), [Concluding observations on the combined sixth and seventh periodic reports of Ireland](#), Geneva: OHCHR.

to that review.³ In that submission, FLAC noted that improvements in the equality legislation were necessary, in part, because of the weaknesses in the Constitution's equality guarantee – which has been interpreted in an extremely restrictive manner by the Superior Courts (and which also as inherent limitations in its language). As a result, “*Irish constitutional law has rarely been beneficial for disadvantaged groups whether homosexuals, non-Irish nationals, members of the Traveller community, or people with disabilities*”.⁴

Interaction between the Constitution, Legislation & Policy

Changes in the constitutional text may have significant practical and symbolic effects – reflecting the function of a constitution as “*a statement of core values and commitments that constitute or form part of the purpose of the state*”.⁵ The provisions of the Constitution may give rise to effective protection for individuals and groups in practice through legislation, policy and judicial decisions in individual cases. The role of the Constitution in providing such protections, and in shaping law and policy more generally, should be of critical concern to the Committee in their consideration of constitutional change – not least because it is currently examining a swathe of recommendations made by the Citizens’ Assembly in relation to law and policy across numerous areas.⁶

The text of Articles 40.1 and 41 of the Constitution (and the manner in which they have been interpreted by the Superior Courts) have had a clear and continuing impact on law and policy in the State, and by extension the lives and rights of disadvantaged and minority groups, non-marital families and carers. This impact manifests in the ambition of legislation and policy and in terms of the ability of the Oireachtas to implement specific policies. This is evident in, for example, the comments of Dr Catherine Day to

³ FLAC believes that its comprehensive submission provides a blueprint for next generation equality framework and infrastructure which brings about transformative change. See: FLAC (2021), *Submission to the Review of the Equality Acts* (publication and launch forthcoming).

⁴ Colm Ó Cinnéide, ‘[Aspirations Unfulfilled: The Equality Right in Irish law](#)’ (2006) IHRLR 41.

⁵ Jeff King, ‘Constitutions as Mission Statements’ in Denis Galligan and Mile Versteeg (eds) *Social and Political Foundations of Constitutions* (CUP, 2013) 73.

⁶ The Citizens’ Assembly (June 2021), [Report of the Citizens’ Assembly on Gender Equality](#).

the Committee in respect of the impact of Article 41 of the Constitution on social welfare law.⁷

Acknowledging and analysing the impact of the Constitution on law and policy to date illustrates the potential of constitutional reform to facilitate a re-orientation of State policy in areas which are of key concern to the committee: gender equality, equality more generally, and the rights of families and carers. It also allows specific issues which must be addressed by any proposed amendments to be identified. Recent experience of referendums also illustrates that constitutional amendments may facilitate the introduction of landmark measures via legislation.⁸

For the full potential of any constitutional amendments to be realised, the elements of any constitutional rights and protections which they give rise to must be clearly articulated, as must the State's resulting responsibilities in terms of law and policy. Constitutional rights and protections must also be enforceable – with breaches of rights subject to review by the courts by reference to robust and clear constitutional rights, norms and values.⁹

⁷ Joint Committee on Gender Equality (July 2022), [Interim Report on Constitutional Change](#), p.18.

⁸ It is worth observing that the tangible effects of recent landmark referendums were brought about through the legislation which was facilitated by amendments to the Constitution.

⁹ See further: FLAC (2022), *Submission to the Housing Commission Consultation on a Referendum on Housing*, Introduction and Section 3: Key Components of the Right.

Summary & Recommendations

Article 40.1 (The Equality Guarantee)

Any proposed amendment to Article 40.1 must provide for/address the following:

- The Constitution should recognise the fundamental role of equality in a democratic society and equality should not be subordinate to other constitutional norms and values.
- The equality guarantee must be explicitly concerned with both direct and indirect discrimination.
- The Constitution should articulate a substantive conception of equality which imposes both positive and negative obligations on the State. The Constitution (and thus the courts) should be explicitly concerned with full equality in practice, and equality of participation and outcome for individuals and groups.
- The Constitution must require the Superior Courts to apply a higher standard of review to legislation than merely ensuring ‘formal’ or ‘process’-based equality in the manner in which laws are drafted and applied. 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 require the introduction of robust equality legislation (with an emphasis on positive action and positive duties), rather than limiting the scope and effectiveness of such legislation.

In amending the Constitution to meet these objectives, particular regard should be had to European equality law, including the EU Charter of Fundamental Rights and the Equality Directives, which already form part of Ireland’s wider constitutional framework. Drawing on elements of those instruments in the Constitution would ensure cohesion between the two primary sources of equality law in this jurisdiction.

Both of the Suggested Options for amending Article 40.1 included in the Interim Report contain useful elements. However, they could be strengthened by reference to the considerations outlined above, and by being tailored to reflect the grounds protected under the equality legislation.

FLAC believes that the following wording should be adopted by the Committee as their proposed replacement for Article 40.1 of the Constitution:

“1° The State recognises that, in a democratic society, the principles of equality and non-discrimination are fundamental to the common good.

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

3° Discrimination includes direct discrimination, indirect discrimination and discrimination by association, on the ground of 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.

4° With a view to ensuring full equality in practice, the Oireachtas may take legislative and other measures to promote equality and to prevent and compensate for discrimination, disadvantage and social exclusion.”

Article 41.2 (Carers)

Suggested Option 2 is FLAC’s preferred option for amending Article 41.2:

“1° The State recognises that care provided by the home, family and community gives society a support without which the common good cannot be achieved.

2° The State therefore recognises that all persons have the right to affordable, dignified care appropriate to need and shall guarantee this right and the right to a decent standard of living for all carers through its laws, policies and the prioritisation of resources.”

In addition to removing outdated and offensive language from the Constitution, the proposed wording recognises the value of all forms of care and its contribution to the common good. It also provides the most clarity in relation to the nature and extent of the State’s obligations. However, the use of the language “by the home” may require clarification (for example by amending the text to read “...in the home, by family...”). Similarly, Sub-article 2 may benefit from distinguishing between (and further developing) the concepts “dignified care” and “care appropriate to need”.

The proposed amendment would make the absence of any explicit reference to the rights of person with disabilities from the Constitution all the more noticeable. This

could be addressed, in part, by the proposed amendment to the equality guarantee included in this submission. However, it should also give rise to further consideration as to how the Constitution should protect and promote the rights of people with disabilities, including those provided for in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

Article 41.1 (Family & Private Life)

Both suggested options for replacing Article 41.1 of the Constitution propose importing the text of Article 8 of the European Convention on Human Rights into the Constitution. This has the benefit of creating an explicit right to privacy in the Constitution. Suggested Option 2 is FLAC's preferred option as it removes the Convention's reference to interferences with privacy rights for reasons of economic necessity:

“1° Everyone has the right to respect for their private and family life, their home and their correspondence.

2° There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

However, FLAC would advise caution around including the words “their home” in the proposed amendment. The Constitution already provides for strong protection of the home in Article 40.5 (concerning the inviolability of the dwelling) and the manner in which these two provisions would interact is unclear.

Article 41.3.1 (The Family)

FLAC's preferred option in respect of Article 41.3.1 is Suggested Option 1, which provides for a positive obligation on the State in relation to families and removes the privileged position afforded to the marital family in the constitutional order:

“The State pledges itself to guard with special care the family, including but not limited to the marital family.”

However, the extent of the State's obligations arising under this suggested wording could benefit from further detail/development.

1. Article 40.1 (The Equality Guarantee)

Chapter 1 of the Interim Report considers the Citizens' Assembly recommendation in relation to Article 40.1 of the Constitution (the 'Equality Guarantee'), and includes two suggested options for amending the constitutional text in light of that recommendation:

Article	Current Wording	Citizens' Assembly Recommendation	Interim Report Implementation Options
40.1	<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>	<p>Article 40.1 of the Constitution should be amended to refer explicitly to gender equality and non-discrimination.*</p>	<p>Suggested Option 1 All persons shall, without distinction of sex or gender, be held equal before the law.</p> <p>The State in its enactments shall have due regard to the principles of equality and non-discrimination.</p> <hr/> <p>Suggested Option 2 All persons shall be held equal before the law without discrimination on any ground such as gender, race, colour, national, ethnic or social origin, association with a national minority, sexual orientation, language, religion or belief, political or any other opinion, property, birth, disability, age, or other status.</p>
<p>* Page 9 of the 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".</p>			

Before discussing these proposals, this submission will examine the existing equality guarantee, its weaknesses, its discordance with European and international law, and its impact on Irish equality and anti-discrimination law:

1.1. Equality, the Equality Guarantee and its Interpretation

Equality is a vital concept: it is a fundamental and foundational ideal of any democratic society, and it is a living concept.¹⁰

Traditional understandings of equality as a concept place an emphasis on treating likes alike and prohibiting arbitrary or illegitimate discrimination. Such approaches, when applied by courts or lawmakers, have been referred to as ‘process’, ‘formal’ or ‘strictly anti-discrimination’ conceptions of equality. Since the latter half of the twentieth century, multifaceted ‘substantive’ conceptions of equality have emerged.¹¹ Equality may now be understood as requiring both positive and negative measures to be achieved i.e. both the elimination of discrimination in all its forms *and* the active promotion of equality of opportunity, participation and outcome.¹² This has been reflected in national and international legal developments (such as the creation of positive duties to promote equality and obligations to provide reasonable accommodations).

While it is sufficiently broad to encompass a more demanding understanding of equality¹³, the equality guarantee in Article 40.1 of the Constitution has not been interpreted by the Superior Courts in such a way. The authors of the definitive text on the Constitution remark that “*in contrast to comparative and international jurisprudence, jurisprudence on the guarantee of equality in the Irish Constitution is*

¹⁰ Evolving conceptions of equality arising in legal, political and philosophical discourse reflect the relational nature of the concept of equality, which continuously evolves in light of economic and social developments which alter the position of individuals and groups within society. Put simply, as society changes, so does the meaning of what it means to be an equal member of that society.

¹¹ See, for example: Sandra Fredman (2017), *Substantive Equality Revisited*, 14 International Journal of Constitutional Law 712.

¹² Fredman has written that “the right to equality must be multidimensional, simultaneously redressing disadvantage; addressing stigma, stereotyping prejudice and violence; facilitating participation; and accommodating difference and addressing the need for structural change”. See: Sandra Fredman, Aaron Reeves and Megan Campbell (2020), *Palliation or protection: How should the right to equality inform the government’s response to Covid-19?*, International Journal of Discrimination and the Law (Vol. 20(4) 183–202).

¹³ Ben Mitchell (2015), *Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law*, The Irish Jurist, 53(1), 36-57.

remarkably underdeveloped and, to date, the debate about the differing conceptions of equality has, to a large extent, passed Article 40.1 by.¹⁴

Although “*the text of Article 40.1 permits a range of possible equality approaches*”, the Supreme Court has generally adopted a limited ‘process’-based approach:

“[The] Supreme Court has adopted what Doyle describes as a ‘process conception’ of equality. A distinction made in law between individuals and groups will be contrary to Article 40.1 if it is arbitrary, or not reasonably capable of being supported by reference to the difference of capacity that is cited as justification, or is unrelated to the purpose of the legislation in question. The focus of this approach is ensuring that the process of differentiating between individuals and groups is legitimate. It does not concentrate upon the potential for legislation or executive action to contribute to group subordination, nor does it make reference to an overarching standard of how citizens should be treated with equal respect: the Supreme Court’s approach is built around securing equality of concern in how law is made and applied, not in securing ‘substantive equality’ or ‘equality of respect’ as an ultimate good.”¹⁵

The Supreme Court has held that a piece of legislation which discriminates or which interferes with the constitutional guarantee of equality will still be constitutional, so long as the legislation is rational and pursues a legitimate objective. By contrast with other fundamental rights guaranteed by the Constitution, the Court has not held that any interference with the right to equal treatment must be proportionate to the legitimate objective being pursued and has recently asserted that there is “no real conflict” between a standard of review based on ‘rationality’ rather than ‘proportionality’.¹⁶

Another similar feature of the restrictive interpretation of the equality guarantee is that, despite its prominent place in the constitutional catalogue of fundamental rights, it has consistently been subordinated to other norms and rights in the Constitution (such as the constitutional protections of private property and the marital family). For example,

¹⁴ Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (2019, Bloomsbury Professional, 5th Edn.) at para. 7.2.05.

¹⁵ Colm Ó Cinnéide, ‘[Aspirations Unfulfilled: The Equality Right in Irish law](#)’ (2006) IHRLR 41.

¹⁶ [Donnelly v Minister for Social Protection & Ors](#) [2022] IESC 31 at para. 197.

in the recent case of *O'Meara v Minister for Social Protection & Ors*¹⁷, a family (represented by FLAC) challenged their exclusion from Widow's, Widower's or Surviving Civil Partner's (Contributory) Pension Scheme. Mr O'Meara had applied for the payment after the death of his long-term partner (who he had resided with for over two decades). 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.¹⁸

Further, concerns around the separation of powers and a high degree of judicial deference to the Oireachtas has meant that Article 40.1 is even less effective in cases concerning socio-economic rights. This was evident in the recent Supreme Court decision in *Donnelly v Minister for Social Protection & Ors*, where O'Malley J noted that, in adjudicating on equality cases, “[the] court will... have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy”.¹⁹

Ó Cinnéide observes that while the courts have sometimes adopted an ‘anti-discrimination’ approach to equality in cases concerning civil and political rights, the more limited ‘process’-based approach is employed in cases concerning socio-economic rights (i.e. in areas such as social welfare and housing). As a result, the equality guarantee “*confines itself to protecting the individual against certain forms of prejudice, without being concerned with challenging the inherent inequalities of existing social structures*”.²⁰

Finally, decisions of the Supreme Court have also limited the extent to which the Constitution provides protection against indirect discrimination and discrimination by association. Comments by the then Chief Justice in *Fleming v Ireland* suggested that indirect discrimination could only be contrary to the Constitution where it gives rise to

¹⁷ [O'Meara v Minister for Social Protection & Ors](#) [2022] IEHC 552.

¹⁸ FLAC (2022), Press Release: “[Oireachtas must address lack of recognition for bereaved members of Cohabiting Couples and their families](#)”.

¹⁹ [Donnelly v Minister for Social Protection & Ors](#) [2022] IESC 31 at para. 188(iv).

²⁰ Colm Ó Cinnéide, ‘[Aspirations Unfulfilled: The Equality Right in Irish law](#)’ (2006) IHRLR 41.

an interference with a fundamental right other than equality.²¹ She then rejected the submission that the Court should adopt an “*effects-based [equality] analysis*”²² of legislation and stated that the Court did not accept that indirect discrimination by association could offend Article 40.1 of the Constitution²³. However, in his judgment in *O v Minister for Social Protection*²⁴, O’Donnell J (as he then was) found that discrimination by association or indirect discrimination may both give rise to a finding of unconstitutionality. However, he also stated that discrimination occurring indirectly and by association are both factors which should lead to Court to apply a lower level of scrutiny in assessing whether legislation is unconstitutional. In that case, the Court ultimately decided the denial of Child Benefit to asylum seekers with Irish citizen children did not constitute unconstitutional discrimination against those children (as compared with other Irish citizen children).

As a result of the factors outlined above, “*Irish constitutional law has rarely been beneficial for disadvantaged groups whether homosexuals, non-Irish nationals, members of the Traveller community, or people with disabilities*”.²⁵

The recent decision in *Donnelly* has confirmed that these factors remain features of constitutional equality law. The judgment also raises further concerns about the burden of proof (and what evidence can be used to satisfy it) in equality cases.

1.2. Equality in European & International Law

By contrast with Article 40.1 of the Constitution, the international²⁶ and regional human rights instruments to which Ireland is subject, as well as European Union law give rise to comprehensive equality obligations with significant fields of application.

²¹ [Fleming v Ireland](#) [2013] IESC 29 at para. 133.

²² *ibid* at para. 135.

²³ *ibid* at para. 136.

²⁴ [O v Minister for Social Protection](#) [2019] IESC 82.

²⁵ Colm Ó Cinnéide, ‘[Aspirations Unfulfilled: The Equality Right in Irish law](#)’ (2006) IHRLR 41.

²⁶ The international human rights instruments to which Ireland is a party require that the rights enumerated are to be enjoyed without discrimination. A number of international human rights instruments such as the Convention on the Elimination of all forms of Discrimination against Women, the Convention for the Elimination of all forms of Racial Discrimination and the Convention on the Rights of Persons with Disabilities are specifically designed to eliminate discrimination.

Article 14 of the European Convention on Human Rights prohibits discrimination on a wide range of grounds in relation to the enjoyment of the rights guaranteed under the Convention. The prohibition on discrimination has a wide and significant reach.²⁷ The European Court of Human Rights ('the ECtHR') considers a difference of treatment to be discriminatory if it has "*no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised*".²⁸

The European Union has competence to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation, under Article 19 of the Treaty on the Functioning of the European Union (TFEU). The Equality Chapter in the Charter of Fundamental Rights of the European Union ('the Charter') recognises that equality is a multifaceted concept which gives rise to a fundamental right to equal treatment. In addition to a general guarantee of equality before the law (Article 20) and a prohibition of discrimination on grounds including sex, race and disability (Article 21), the Charter contains a specific guarantee of equality between men and women (Article 23), as well as provisions relating to the equality rights of children (Article 24), the elderly (Article 25) and persons with disabilities (Article 26). Article 23 specifically refers to the need for positive action measures for the promotion of equality: "*The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex*". Articles 25 and 26 are specifically concerned with promoting equality of participation: "*The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life*"; "*The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.*"

In assessing whether a limitation on the prohibition on discrimination in Article 21 of the Charter of Fundamental Rights is justified, the Court of Justice of the European

²⁷ The prohibition of discrimination under the ECHR only applies where discrimination occurs within the scope of another right under the Convention. However, the European Court of Human Rights (ECtHR) has clarified the role of Article 14 by finding that there does not have to be a breach of the substantive right involved to apply the Article 14 prohibition on discrimination, provided that the discrimination is experienced within the field of that substantive right. See: *E.B v France* (2008) ECHR 55.

²⁸ See, for example: *Stec v United Kingdom* (2006) 43 EHRR 1017, §51.

Union ('the CJEU') carries out its assessment by reference to the principle of proportionality set out in Article 52 of the Charter.²⁹

The EU Equality Directives³⁰ are a legislative expression of the fundamental right of equal treatment enshrined in the Charter.³¹ The Directives specifically state that the prohibition of discrimination encompasses both direct and indirect discrimination. 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*". Further, through 'positive action' provisions, the Directives allow for the introduction of measures which actively promote equality and combat disadvantage and social exclusion linked to discrimination:

"With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."³²

Finally, the Directives only provide for exceptions to the principle of equal treatment (i.e. instances where discrimination may be permissible) where it can be demonstrated that the interference with the right to equality comes about as a proportionate means of achieving a legitimate aim. For example, Article 4 of the Race Equality Directive provides for "*genuine and determining occupational requirement*" exceptions to the prohibition of discrimination on the ground of race, but only "*provided that the objective is legitimate and the requirement is proportionate*". Similarly, Article 4(5) of the Gender Goods and Services Directive provides that the "*Directive shall not preclude*

²⁹ See, for example: Judgment of 29 April 2015, *Léger*, C-528/13, EU:C:2015:288, §§51-69.

³⁰ Directive 2000/43 (the Race Directive) implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The Race Directive prohibits discrimination on the grounds of racial or ethnic origin in employment as well as in relation to social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing.

Directive 2000/78 (the Framework Directive) prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation in employment.

Directive 2004/113 (the Gender Goods and Services Directive) prohibits discrimination based on gender in the "access to and supply of goods and services".

Directive 2006/54 (the Recast Directive) prohibits gender discrimination in employment.

³¹ See, for example: Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 47.

³² Article 5, Race Equality Directive.

differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.

1.3. The Constitution and Equality Legislation

Ireland’s national equality legislation should give effect to the EU Equality Directives (and in doing so, comply with the Charter). However, its effectiveness in this regard, and more generally, has been limited by the courts’ restrictive approach to equality rights.

The High Court has expressly stated that “the Oireachtas is entitled to legislate positively to vindicate and promote the value of equality”³³ and the Supreme Court has recognised that legislation may be employed to give effect to the equality guarantee.³⁴ Ireland’s ‘Equality Acts’³⁵ operate chiefly on the basis of an ‘anti-discrimination’ approach to equality and are generally enforced on the basis of an ‘individual complaint’ model. The legislation does contain some provisions which aim to actively promote equality³⁶, but these are quite limited and, in some instances, have been constrained as a result of the courts’ restrictive approach to equality rights.

For example, both the Equal Status Acts 2000-2018 (the ‘ESA’) and the Employment Equality Acts 1998-2015 (the ‘EEA’) contain provisions in relation to reasonable

³³ *Equality Authority v Portmarnock Golf Club & Ors* [2005] IEHC 235.

³⁴ *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321 (SC).

³⁵ The Equal Status Acts 2000-2018 prohibit discrimination in the provision of goods and services, accommodation and education. They cover the nine grounds of gender, civil status, family status, age disability, sexual orientation, race, religion, and membership of the Traveller community. The Employment Equality Acts 1998-2015 prohibit discrimination in employment on the same nine grounds. In addition, the Equal Status Acts prohibit discrimination in the provision of accommodation services against people who are in receipt of rent supplement, housing assistance, or social welfare payments. Both Acts (subject to some exemptions) prohibit discrimination, including indirect discrimination and discrimination by association, sexual harassment and harassment, and victimisation. They also prohibit discriminatory advertising.

³⁶ Both Acts contain provisions which allow for positive action to promote equality or to cater for the special needs of persons. However, the manner in which the positive action provisions are drafted limits their significant potential. The Equality Authority (Ireland’s former National Equality Body) noted that, in some instances, it is unclear whether certain provisions allow positive action and, if they do, who they are aimed at, what actions they allow and what they aim to achieve.

Section 42 of the Irish Human Rights and Equality Act 2014 provides for the Public Sector Equality and Human Rights Duty. Under this legal obligation, all public bodies in Ireland have responsibility to have regard to the need to promote equality, prevent discrimination and protect the human rights of their employees, customers, service users and everyone affected by their policies and plans.

accommodation for people with disabilities.³⁷ However, these provisions differ between the ESA and the EEA – with the ESA imposing a very minimal obligation on service providers, schools and other educational establishments, and providers of accommodation to provide reasonable accommodation for people with disabilities. The obligation to provide reasonable accommodation under the ESA is only imposed where, without the accommodation, it would be impossible or unduly difficult for a person with disabilities to avail of the goods and services. The obligation is removed altogether when the provision of the accommodation would cost more than a nominal cost.

The obligation was limited in this way because the drafters of the legislation were anxious to ensure that the legislation was constitutional. These concerns arose from the decision of the Supreme Court in *In re Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996*³⁸ – where the 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.

The current extremely limited reasonable accommodation provisions in the ESA may represent a breach of the State's obligation under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) – which Ireland ratified in 2018.³⁹ The UN Committee on the Rights of Persons with Disabilities has recognised that reasonable accommodation is an essential part of the duty not to discriminate against people with disabilities.

³⁷ The Equal Status Acts require those selling goods or providing services to provide reasonable accommodation or special treatment or facilities where without these it would be impossible or unduly difficult for a person with disabilities to avail of the goods and services, unless this would cost more than a nominal cost. The Employment Equality Acts oblige employers to provide reasonable accommodation to enable a person with a disability: to have access to employment; to participate or advance in employment; to undertake training. This is unless the accommodation would impose a disproportionate burden on the employer.

³⁸ *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321 (SC).

³⁹ Article 5(3) of the UNCRPD requires States Parties to take all appropriate steps to ensure that reasonable accommodation is provided to disabled people. The provision of reasonable accommodation seeks to promote equality and to eliminate discrimination, and is defined in Article 2 of the UNCRPD as follows: "Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

Further, the courts' interpretation of the equality legislation has limited the extent to which the equality legislation may be used to combat systemic and structural forms of discrimination. A key example of this arises from the Supreme Court's interpretation of 'indirect discrimination' in *Stokes v Christian Brothers High School*⁴⁰. The prohibition of indirect discrimination (practices and policies which have a disproportionate negative impact on members of protected groups and which cannot be objectively justified) is a key tool for combatting structural and systemic forms of discrimination. The *Stokes* case related to a school-admission policy which was challenged on the basis that it constituted indirect discrimination against a perspective student who was a member of the Traveller community. The Supreme Court stated that, in order to prove a case of indirect discrimination, statistical analysis is required in order to establish that a person belonging to a protected group is at a 'particular disadvantage' compared with others. This raises the bar for proving indirect discrimination extremely (often impossibly) high - particularly in circumstances where there is a dearth of publicly available statistical information relating to the treatment of persons on the grounds protected under the Equality Acts. It also represents an interpretation of the Equality Acts which is inconsistent with EU law.⁴¹

The courts have also adopted worryingly expansive interpretations of certain exceptions to the prohibition of discrimination contained in the equality legislation. This is particularly concerning in circumstances where the legislation already contains an expansive and confusing patchwork of exceptions and exemptions.

For example, section 8 ESA contains specific provisions in relation to what should be considered a 'discriminating club'. However, these provisions are subject to exceptions in section 9 ESA, including an exception for clubs whose "*principal purpose is to cater only for the needs of persons of a particular gender*". This exception was considered by the Supreme Court in *Equality Authority v Portmarnock Golf Club & Ors*. In his majority judgment, Hardiman J ruled that a male-only golf club could avail of this

⁴⁰ [2015] IESC13

⁴¹ According to Cousins, there is no similar requirement under EU law: "EU law clearly envisages that statistics are not the only way in which a case of disproportionate impact can be made out... EU law emphasises that statistical evidence is just one means of proof and highlights the importance of not compromising the achievement of the objective pursued by EU equality law and thus depriving it of its effectiveness". See: Mel Cousins (2015), [Education and the Equal Status Acts- Stokes -v- Christian Brothers High School Clonmel](#), Dublin University Law Journal.

exception because its principle purpose was to cater for the “needs” of men who play golf.⁴² The Supreme Court’s majority interpretation of section 9 ESA suggests that the legislation permits discrimination against certain protected groups by clubs.⁴³

The High Court has also recently adopted an extraordinarily broad definition of one of the most significant exemptions to the ESA. Section 14(1)(a) of the ESA creates a blanket exemption for discriminatory laws and their effects.⁴⁴ In practical terms, this means that any legislation (or the provision of any legislation) which discriminates on one of the nine grounds or which has a disproportionately negative impact on certain groups falls outside the scope of the ESA and cannot be challenged under the equality legislation.⁴⁵

In *AB v Road Safety Authority*⁴⁶, the High Court decided that the Road Safety Authority had not discriminated against a woman living in Direct Provision by refusing her application for a driver’s licence. The RSA had imposed an administrative requirement for her to provide evidence of her “residency entitlement” in Ireland. The Court decided that section 14 of the ESA applied in the case even though the statutory instrument from which the policy was derived did not create an absolute requirement. This interpretation of section 14 of the ESA has enlarged the scope of the exemption to a worrying extent, and implies that any policy or guidance adopted by a public body which is derived from a piece of legislation is exempt from challenge.

The combined effect of section 14(1) of the ESA (as interpreted), along with other exceptions to the ESA⁴⁷, has been to limit or obscure the extent to which the prohibition

⁴² *Equality Authority v Portmarnock Golf Club & Ors* [2009] IESC 73. In her [dissenting judgment](#), Ms Justice Denham accepted the argument made by the Equality Authority to the effect that “there should be a logical connection between the objects of the club and the gender” in order for the exception to apply.

⁴³ FLAC’s submission to the Review of the Equality Acts notes that this interpretation can hardly have been the intention of the legislator in introducing those provisions of the Equal Status Acts, and may be contrary to the EU Equality Directives.

⁴⁴ Section 14(1) of the Equal Status Acts provides: “Nothing in this Act shall be construed as prohibiting—(a) the taking of any action that is required by or under— (i) any enactment or order of a court...”

⁴⁵ By way of example of this exemption’s effect, social welfare law was amended to provide lower rates of Jobseeker’s Allowance for people under 25. This policy would have been in breach of the Equal Status Acts save for the fact that, because it was brought about by way of legislation, it is covered by the exemption in section 14(1)(a).

⁴⁶ *AB v Road Safety Authority* [2021] IEHC 217.

⁴⁷ The definition of “services” in section 5 of the ESA is broad enough to include services provided by public bodies like healthcare and social welfare. However, the definition does not explicitly extend to the performance of the general functions of public bodies, which are not regarded as constituting services within

on discrimination applies to ‘State activity’ in important areas such as housing, social welfare, taxation, policing, immigration, asylum and healthcare. Marginalised and disadvantaged groups (including those protected by the equality legislation) experience inequality and discrimination in these areas and in access to public services generally. Challenging discrimination in these areas is vital in order to ensure full equality in practice and the realisation of the most basic human rights. However, the exemptions seriously undermine attempts to challenge discrimination in these areas under the equality legislation. They also raise serious questions about the legislation’s compliance with International Human Rights instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁴⁸ and Ireland’s implementation of the EU Equality Directives.⁴⁹

In analysing the effectiveness of Irish equality law, Ó Cinnéide comments:

“The political choice has been taken to confine the scope of anti-discrimination legislation, which reflects uncertainty and scepticism about how much further the equality principle can or should be pushed through state action. Combined with the ‘process’ approach to the equality guarantee taken at present by the Supreme Court, this means that the equality principle in Irish law in general takes the form of a combination of ‘formal equality’ and ‘anti-discrimination’ approaches...”⁵⁰

the meaning of the Acts. The effect of the limited definition of “services” is most prominent in areas such as immigration, citizenship and taxation, as well as in relation to bodies like An Garda Síochána and the Irish Prison Service.

Section 14(1)(aa) ESA creates a very broad exemption for certain actions “taken by a public authority in relation to a non-national”. It appears to give public authorities some discretion to discriminate against migrants and asylum seekers on the basis of their nationality. In a recent article, Murphy and Fennelly note that this exemption appears to have been inserted in order “to ensure that asylum and immigration applications, and the non-statutory direct provision system for international protection applicants, would not be open to challenge under the Equal Status Act”. See: David Fennelly and Clíodhna Murphy (2021), *Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive*, Netherlands Quarterly of Human Rights (1/21).

⁴⁸ See: David Fennelly and Clíodhna Murphy (2021), *Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive*, Netherlands Quarterly of Human Rights (1/21).

⁴⁹ For example, the equality legislation gives effect to EU Directive 2000/43/EC (the Racial Equality Directive) in Irish law. However, the scope of that directive (set out in Article 3) specifically includes: social protection, including social security and healthcare; social advantages, and; access to and supply of goods and services which are available to the public, including housing.

⁵⁰ Colm Ó Cinnéide, [‘Aspirations Unfulfilled: The Equality Right in Irish law’](#) (2006) IHRLR 41.

The above discussion of the equality legislation notes just some of the significant ongoing issues with its effectiveness.⁵¹

The Department of Children, Equality, Disability, Integration and Youth is currently undertaking the first comprehensive review of Ireland's equality legislation since its introduction over twenty years ago. FLAC believes that the current review must bring about major amendments to the legislation which address these issues. These reforms must ensure that the legislation is clear, accessible and fully compliant with EU and international law, and that the equality framework is capable of identifying and responding to new and emerging forms of discrimination (including increased economic inequality and discrimination in the digital sphere). The next generation of equality legislation must address the weaknesses in the individual enforcement model and be capable of promoting substantive equality and combatting structural discrimination, disadvantage and social exclusion. Measures such as positive action, public and private positive duties and reasonable accommodation obligations (for people with disabilities and across all grounds) are each vital in this regard.⁵² These measures should be clearly permitted (and indeed mandated) by the Constitution and any amendment to Article 40.1 should address the barriers to such measures being introduced arising from the current wording and its interpretation.

⁵¹ Additionally, there are only limited remedies available under the legislation, including strict compensation limits which apply regardless of the severity of the discrimination, harassment or sexual harassment complained of.

Further, the grounds protected under the legislation do not reflect the experience of discrimination in 2022. There is no protection against discrimination on the basis of socio-economic status or criminal convictions. The existing gender ground does not explicitly or adequately cover trans, non-binary and intersex people, and some carers and families are excluded from the existing civil and family status grounds.

There has also been a significant decline in the number of discrimination complaints to the WRC in recent years, despite a rise in reported incidents of discrimination by other metrics.

⁵² Each of these matters are discussed in detail in FLAC's submission to the review – as well as topics which are particularly relevant to promoting gender equality (including enhancing the legislation's provisions in relation to equal pay, harassment and sexual harassment, indirect discrimination, and explicitly prohibiting intersectional discrimination and discrimination on the basis of gender identity, gender expression and sex characteristics). See: FLAC (2021), *Submission to the Review of the Equality Acts* (publication and launch forthcoming).

1.4. The Future of the Equality Guarantee

In light of the above analysis, any proposed amendment to Article 40.1 must provide for/address the following:

- The Constitution should recognise the fundamental role of equality in a democratic society and equality should not be subordinate to other constitutional norms and values.
- The equality guarantee must be explicitly concerned with both direct and indirect discrimination.
- The Constitution should articulate a substantive conception of equality which imposes both positive and negative obligations on the State. The Constitution (and thus the courts) should be explicitly concerned with full equality in practice, and equality of participation and outcome for individuals and groups.
- The Constitution must require the Superior Courts to apply a higher standard of review to legislation than merely ensuring ‘formal’ or ‘process’-based equality in the manner in which laws are drafted and applied. 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 require the introduction of robust equality legislation (with an emphasis on positive action and positive duties), rather than limiting the scope and effectiveness of such legislation.

In amending the Constitution to meet these objectives, particular regard should be had to European equality law, including the Charter and the Equality Directives. Incorporating elements of those instruments into the Constitution would ensure cohesion between the two primary sources of equality law in this jurisdiction.

Finally, regard should also be had to the experience of constitutional equality guarantees in other jurisdictions. For example, a multifaceted conception of equality is evident in section 9 of the Constitution of the Republic of South Africa – which recognises “the right to equal protection and benefit of the law” – and which is explicitly concerned with legislative measures for the promotion of equality and elimination of discrimination:

“1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

A similar approach is taken in section 15 of the Canadian Charter of Rights and Freedoms:

“Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

1.5. The Interim Report Proposals

The Interim Report contains two suggested options for amending the constitutional text in light of that recommendation of the Citizens' Assembly that "Article 40.1 of the Constitution should be amended to refer explicitly to gender equality and non-discrimination":

"Suggested Option 1

All persons shall, without distinction of sex or gender, be held equal before the law.

The State in its enactments shall have due regard to the principles of equality and non-discrimination.

Suggested Option 2

All persons shall be held equal before the law without discrimination on any ground such as gender, race, colour, national, ethnic or social origin, association with a national minority, sexual orientation, language, religion or belief, political or any other opinion, property, birth, disability, age, or other status."

While both options contain useful elements and wording, neither explicitly mandates the State to legislate for the promotion of equality and elimination of discrimination. Further, they do not address the continued downgrading of equality in the current constitutional order.

Both options make reference to specific 'discriminatory grounds' or 'protected characteristics'. However, the inclusion of only "sex or gender" in the first option may create a perceived hierarchy within constitutional equality law. The more expansive list of grounds in the second option appears to be based on Article 14 of the European Convention on Human Rights (with certain additions). This could be improved by tailoring the list to better reflect the grounds protected under the equality legislation.⁵³

⁵³ Indeed the Committee seems to have specifically considered the interaction between the equality legislation and the Constitution: "At the private meeting of 24th February, discussion took place about the inter-connection and interaction between the Constitution and existing Equality legislation, which includes "Family Status" as a protected ground. Consideration was given to the extent to which meaningful protection for all families could be afforded through both legislation and the Constitution". See: Joint Committee on Gender Equality (July 2022), [Interim Report on Constitutional Change](#), p.13.

Having considered the recommendations of the Citizens' Assembly and the Committee's Interim Report, and in light of the analysis above, FLAC believes that the following wording should be adopted by the Committee as their proposed replacement for Article 40.1 of the Constitution:

“1° The State recognises that, in a democratic society, the principles of equality and non-discrimination are fundamental to the common good.

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

3° Discrimination includes direct discrimination, indirect discrimination and discrimination by association, on the ground of 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.

4° With a view to ensuring full equality in practice, the Oireachtas may take legislative and other measures to promote equality and to prevent and compensate for discrimination, disadvantage and social exclusion.”

2. Observations on Other Proposed Amendments

Chapter 2 of the Interim Report contains a series of suggested amendments to Article 41 of the Constitution based on the recommendations of the Citizens' Assembly:

2.1. Article 41.2 (Carers)

Article	Current Wording	Citizens' Assembly Recommendation	Interim Report Implementation Options
41.2	<p>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.</p> <p>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.</p>	<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>Suggested Option 1 1° In particular, the State recognises the right to respect for private and family life.</p> <p>2° The State shall, therefore, meet its obligation to take reasonable measures to support care within and outside of the home.</p>
			<p>Suggested Option 2 1° The State recognises that care provided by the home, family and community gives society a support without which the common good cannot be achieved.</p> <p>2° The State therefore recognises that all persons have the right to affordable, dignified care appropriate to need and shall guarantee this right and the right to a decent standard of living for all carers through its laws, policies and the prioritisation of resources.</p>
			<p>Suggested Option 3 1° The State recognises that care in the home, family and community gives society a support without which the common good cannot be achieved.</p> <p>2° The State shall, therefore, take reasonable measures to support care within and outside of the home.</p>

Based on the principles outlined in the introduction to this submission, Suggested Option 2 is FLAC's preferred option for amending Article 41.2. In addition to removing outdated and offensive language from the Constitution, the proposed wording recognises the value of all forms of care and its contribution to the common good. It also provides the most clarity in relation to the nature and extent of the State's

obligations. However, the use of the language “by the home” may require clarification (for example by amending the text to read “...in the home, by family...”). Similarly, Sub-article 2 may benefit from distinguishing between (and further developing) the concepts “dignified care” and “care appropriate to need”.

The proposed amendment would make the absence of any explicit reference to the rights of persons with disabilities from the Constitution all the more noticeable. This could be addressed, in part, by the proposed amendment to the equality guarantee included in this submission. However, it should also give rise to further consideration of how the Constitution should protect and promote the rights of people with disabilities, including those provided for in the UNCRPD.

2.2. Article 41.1 (Family & Private Life)

Article	Current Wording	Citizens’ Assembly Recommendation	Interim Report Implementation Options
41.1	<p>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>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>Suggested Option 1 1° Everyone has the right to respect for their private and family life, their home and their correspondence.</p> <p>2° There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.</p> <hr/> <p>Suggested Option 2 1° Everyone has the right to respect for their private and family life, their home and their correspondence.</p> <p>2° There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.</p>

Both suggested options for replacing Article 41.1 of the Constitution propose importing the text of Article 8 of the European Convention on Human Rights into the Constitution. This has the benefit of creating an explicit right to privacy in the Constitution. Suggested Option 2 is FLAC’s preferred option as it does not provide for rights to be curtailed for reasons of economic necessity.

However, FLAC would advise caution around including the words “their home” in the proposed amendment. The Constitution already provides for strong protection of the home in Article 40.5 (concerning the inviolability of the dwelling) and the manner in which these two provisions would interact is unclear.

2.3. Article 41.3.1 (The Family)

Article	Current Wording	Citizens’ Assembly Recommendation	Interim Report Implementation Options
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.	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.	Suggested Option 1 The State pledges itself to guard with special care the family, including but not limited to the marital family.
			Suggested Option 2 [Deletion of the current wording of Art. 40.3.1 without replacement with new text]

FLAC’s preferred option in respect of Article 41.3.1 is Suggested Option 1 – which provides for a positive obligation on the State in relation to families and removes the privileged position afforded to the marital family in the constitutional order⁵⁴. However, the extent of the State’s obligations arising under this suggested wording could benefit from further detail/development.

⁵⁴ See discussion above of [O’Meara v Minister for Social Protection & Ors](#) and: FLAC (2022), Press Release: [“Oireachtas must address lack of recognition for bereaved members of Cohabiting Couples and their families”](#).