



**Submission to the  
Inter-Departmental  
Committee:**

**Referendums on Family,  
Care and Equality**

**May 2023**

## 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 in relation to equality and anti-discrimination law, human 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.

We have 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). In our submission to that review, FLAC noted that improvements in the equality legislation were necessary, in part, because of the weaknesses in the Constitution's equality guarantee (Article 40.1).

FLAC is a member of the Irish Human Rights and Equality Commission (IHREC)'s Future of Equality Legislation Advisory Committee (FELAC). We are also 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 Inter-Departmental Committee, chaired by the Department of Children, Equality, Disability, Integration and Youth, which has been established to “*further examine and advance*” the recommendations of the Citizens’ Assembly on Gender Equality and the Special Joint Oireachtas Committee on Gender Equality (‘the JCGE’) in relation to constitutional reform.<sup>1</sup>

The three referendums proposed for November 2023 to amend the constitutional provisions concerning equality, the family and care represent a once in a lifetime opportunity to strengthen the greatly diminished equality guarantee in our Constitution and, more generally, for the promotion of equality, elimination of discrimination and the protection of human rights in Ireland.

FLAC very much welcomes this opportunity for the strengthening of the overarching equality architecture, which will also enhance Ireland’s equality legislation. We welcome without any reservation the proposal to remove the outdated and offensive language concerning the role of women in the home from the Constitution. This submission sets out:

- FLAC’s analysis of the wordings proposed by the JCGE (who considered the recommendations of the Citizens’ Assembly in two reports) - which we fear will not achieve their intended aim or their maximum potential by sufficiently strengthening the constitutional provisions in the areas of equality, the family (including protection for non-marital families) and care.
- The experience of Articles 40 and 41 to date and the limitations that those provisions (and how they have been interpreted by the courts) have placed on law and policy in Ireland.
- FLAC’s own proposals in relation to the wordings which should be put to referendum.
- Our view on the process by which the wordings put to referendum should be finalised, including the need for detailed legal analysis of the proposals and their potential impact, stakeholder engagement, and a clear statement of the intended consequences of the amendments put to referendum and how the wordings proposed achieve these effects.

FLAC’s analysis and recommendations are informed by our work as an independent law centre. In recent years, equality and discrimination matters have been a major feature of FLAC’s casework, including cases arising from our Roma Legal Clinic, Traveller Legal Service

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<sup>1</sup> FLAC made a detailed submission to the JCGE which should be read in conjunction with this document. See: FLAC (November 2022), [Submission to the Joint Committee on Gender Equality: Constitutional Change & Gender Equality](#).

and LGBTQI Legal Clinic. FLAC regularly represents clients in equality cases before tribunals such as the Workplace Relations Commission and in the courts.<sup>2</sup>

In our casework, FLAC has sought to rely on the Constitution and, in particular, the equality guarantee and the provisions concerning the family, in cases concerning discrimination, housing and homelessness, and social welfare (including in respect of non-marital families). As a result, we are keenly aware of the limitations of the current constitutional provisions, as well as how the provisions (and the manner in which they have been interpreted) have reduced the impact and potential of Ireland's equality and anti-discrimination legislation.

Past decisions of the courts clearly illustrate the fact that the constitutional protections provisions in relation to equality, the family and care are insufficient, out-dated and fail to support meaningful social rights. The following judgments are worth noting:

- In *O'Meara v Minister for Social Protection & Ors*<sup>3</sup>, a family (represented by FLAC) challenged their exclusion from the Widower's (Contributory) Pension Scheme. Mr O'Meara had applied for the payment (on behalf of himself and his three children) after the death of his long-term partner. The application was refused on the basis that the couple had not been married (as required by legislation). The High Court 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.
- In *Donnelly v Minister for Social Protection & Ors*, the Supreme Court examined a situation where a father was deemed ineligible for Domiciliary Care Allowance while his severely disabled child was resident in hospital for extended periods of time. The Court decided that the law which distinguishes between parents who care for children with severe disabilities at home and parents caring for such children while they are in hospital was not contrary to the equality guarantee.<sup>4</sup>
- In *Michael v Minister for Social Protection*<sup>5</sup>, the Supreme Court 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).

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<sup>2</sup> 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](#).

<sup>3</sup> [O'Meara v Minister for Social Protection & Ors](#) [2022] IEHC 552. The Supreme Court has since accepted a leap-frog appeal in that matter.

<sup>4</sup> [Donnelly v Minister for Social Protection & Ors](#) [2022] IESC 31

<sup>5</sup> [Michael v Minister for Social Protection](#) [2019] IESC 82.

- In *Re Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996*<sup>6</sup> 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.
- In *Stokes v Christian Brothers High School*<sup>7</sup> a school-admission policy was challenged on the basis that it constituted indirect discrimination against a prospective student who was a member of the Traveller community. The case was unsuccessful and the Supreme Court stated that, in order to prove a case of indirect discrimination, statistical analysis is required to establish that a person belonging to a protected group is at a ‘particular disadvantage’ compared with others (whereas EU equality law does not include such a requirement).
- In *Equality Authority v Portmarnock Golf Club & Ors* the Supreme Court ruled that a male-only golf club could avail of an exception to the prohibition of discrimination because its principle purpose was to cater for the “needs” of men who play golf.<sup>8</sup>
- In *AB v Road Safety Authority*<sup>9</sup> the High Court decided (on the basis of a broad interpretation of an exception to the equality legislation) that the Road Safety Authority had not discriminated against a woman living in Direct Provision by refusing her application for a driver’s licence.
- In the recent case of *Heneghan v Ireland*<sup>10</sup> (in which FLAC represented the successful appellant) the Supreme Court stated that the exclusion of graduates of institutions other than NUI and TCD from voting in Seanad university elections was not contrary to the equality guarantee.

In addition to basing this submission on the judicial interpretation of the constitutional provisions to date (including the subordination of the equality guarantee to other constitutional rights such the right to private property and freedom of association), FLAC has also had regard to EU and international human rights and equality law and international best practice. We hope that the analysis and proposals in this submission inform the remainder of the process for finalising the wordings put to referendum – which we stress should include further detailed legal analysis and perspectives, and consultation with stakeholders and rights-holders.

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<sup>6</sup> *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321.

<sup>7</sup> [2015] IESC 13.

<sup>8</sup> [Equality Authority v Portmarnock Golf Club & Ors](#) [2009] IESC 73.

<sup>9</sup> [AB v Road Safety Authority](#) [2021] IEHC 217.

<sup>10</sup> In *Heneghan v Minister for Housing, Planning & Local Government & Ors* [2023] IESC 7 the Supreme Court considered the legal consequences of the seventh amendment to the Constitution - which they ultimately held to have “mandated” the expansion of the franchise in elections for Seanad university seats.

## Tables of Recommendations

### Article 40.1 (The Equality Guarantee)

Current Wording	Citizens' Assembly Recommendation	Joint Oireachtas Committee on Gender Equality Wordings	FLAC's Analysis	FLAC's Proposed Wording
<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><b><i>Interim Report Option 1</i></b></p> <p>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>	<p>FLAC is concerned that the wording proposed by the JCGE (in their Final Report):</p> <ul style="list-style-type: none"> <li>• does not mandate the State to legislate for the promotion of equality.</li> <li>• may not lower the current threshold for establishing that a piece of legislation is discriminatory (which is almost impossibly high).</li> <li>• does not remove the words “as human persons” which have limited the extent to which social and economic inequalities may be challenged.</li> <li>• Refers to only one ground of discrimination which could create a perceived hierarchy of grounds within constitutional equality law.</li> </ul> <p>FLAC proposes an alternative wording informed by the experience of the equality guarantee to date, EU and international human rights and equality law and international best practice.</p>	<p>1° The State recognises that, in a democratic society, the principles of equality and non-discrimination are fundamental to the common good.</p> <p>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.</p> <p>3° Discrimination includes direct discrimination, indirect discrimination and discrimination by association, 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.</p> <p>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.</p> <p>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.</p>
		<p><b><i>Interim Report Option 2</i></b></p> <p>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><b><i>Final Report Recommendation</i></b></p> <p>All citizens shall, as human persons without distinction as to sex, be held equal before the law.</p> <p>The State shall in its enactments have due regard to the principles of equality and non-discrimination.</p>		

## Article 41.1 (Family & Private Life)

Current Wording	Citizens' Assembly Recommendation	Joint Oireachtas Committee on Gender Equality Wordings	FLAC's Analysis & Recommendations
<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><b><i>Interim Report Option 1</i></b>            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><b><i>Interim Report Option 2</i></b>            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> <hr/> <p><b><i>Final Report Recommendation</i></b>            [No Change to Current Wording]</p>	<p>Further detailed legal analysis is required in order to ascertain how amending Article 41 of the Constitution can best enhance constitutional protection of private and family life – while also retaining existing protections. In this regard, it is worth observing that the addition of further constitutional provisions in relation to the rights of families does not necessarily require the amendment or deletion of Article 41.1.</p> <p>Whatever approach is adopted in relation to Article 41.1, FLAC is of the view that Article 41.3.1 should be amended to ensure that constitutional protections of privacy and family life (in whatever form) are enjoyed equally by non-marital families.</p>



## Article 41.2 (Care)

Current Wording	Citizens' Assembly Recommendation	Joint Oireachtas Committee on Gender Equality Wordings	FLAC's Analysis & Recommendations
<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><b><i>Interim Report Option 1</i></b>            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> <hr/> <p><b><i>Interim Report Option 2 (FLAC's preferred option)</i></b>            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> <hr/> <p><b><i>Interim Report Option 3</i></b>            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> <hr/> <p><b><i>Final Report Recommendation</i></b>            1° The State recognises that care within and outside the home and Family gives to the State 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 the home and Family.</p>	<p>The wording proposed by the JCGE (in their Final Report) to replace Article 41.2 is not explicitly concerned with rights. It also does not clearly set out the extent of the State's obligations to carers.</p> <p>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, through the amendment to the equality guarantee proposed by FLAC (which incorporates the reasonable accommodation provisions of Article 5(3) of the UNCRPD). 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 UNCRPD.</p> <p>FLAC believes that the JCGE's Interim Report Option 2 is preferable to the proposal included in their final report.</p>

## Article 41.3.1 (The Family)

Current Wording	Citizens' Assembly Recommendation	Joint Oireachtas Committee on Gender Equality Wordings	FLAC's Analysis & Recommendations
<p>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>	<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><b><i>Interim Report Option 1 &amp; Final Report Recommendation</i></b>            The State pledges itself to guard with special care the Family, including but not limited to the marital family.</p> <hr/> <p><b><i>Interim Report Option 2</i></b>            [Deletion of the current wording of Art. 40.3.1 without replacement with new text]</p>	<p>The Interim Report of the JCGE suggested deleting Article 41.3.1 or replacing it with the following: "The State pledges itself to guard with special care the Family, including but not limited to the marital family". The Committee ultimately opted for the latter option in their final report.</p> <p>FLAC is concerned, however, that an explicit reference to the marital family may create the perception of a constitutional hierarchy or preference for the marital family. Further, the wording is not explicitly concerned with rights. The amendment of 41.3.1 to specifically encompass non-marital families is vital in circumstances where the Supreme Court has interpreted the current wording to mean that 'the family' recognised in Article 41 of the constitution "is the family which is based on a valid marriage in accordance with the law of the State".</p> <p>An alternative wording should be considered along the following lines: <b>"The State pledges to protect and promote the rights of all families, including marital and non-marital families."</b></p>

# Executive Summary

## Article 40.1 (The Equality Guarantee)

FLAC is concerned that the wording proposed by the JCGE (in their Final Report) to replace the current constitutional equality guarantee does not mandate the State to legislate for the promotion of equality, and may not lower the current threshold for establishing that a piece of legislation is discriminatory (which is almost impossibly high).

The recommendation of the JCGE that the words “as human persons” should be retained in Article 40.1 is problematic. These words have been interpreted by the courts to mean that the constitution is especially concerned with discrimination on the basis of “*matters that can be said to be intrinsic to the human sense of self*”. As a result, it is much more difficult to challenge economic and social discrimination and inequalities.

The JCGE also propose adding the phrase “without distinction as to sex” to the equality guarantee. Adding reference to only one ground would create the risk of a perceived hierarchy of grounds within constitutional equality law. It also inconsistent with the comments of the Chair of the Citizen’s Assembly who has stated that “*the recommendation of the Citizens’ Assembly is not referring to non-discrimination on the basis of gender alone*”.

FLAC recommends that any new equality guarantee should include a non-exhaustive list of ‘discriminatory grounds’ or ‘protected characteristics’, and this list should reflect the grounds protected under the equality legislation. Using both terms (as part of a non-exhaustive list of grounds) in any new iteration of Article 40.1 would ensure consistency with other legal instruments concerned with equality and effective protection against all forms of gendered discrimination.

FLAC proposes an alternative wording informed by the experience of the equality guarantee to date, EU and international human rights and equality law and international best practice:

### **ARTICLE 40**

**1. 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 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.**

**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.**

**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.**

### **Article 41.1 (Family & Private Life)**

In the JCGE's Interim Report, 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. FLAC noted in its submission to that Committee that both suggestions had the benefit of creating an explicit right to privacy in the Constitution (which is not currently the case).

The Final Report of the JCGE stated that: *"[Having] reflected further on the options presented in the Interim Report, the Committee was keen to ensure that the existing protections for the Family be retained. Thus, no recommendation is made to change the text of Article 41.1"*.

Further detailed legal analysis is required in order to ascertain how amending Article 41 of the Constitution can best enhance constitutional protection of private and family life – while also retaining existing protections. In this regard, it is worth observing that the addition of further constitutional provisions in relation to the rights of families does not necessarily require the amendment or deletion of Article 41.1.

Whatever approach is adopted in relation to Article 41.1, FLAC is of the view that Article 41.3.1 should be amended to ensure that constitutional protections of privacy and family life (in whatever form) are enjoyed equally by non-marital families. An amended Article 41.3.1 may also be an appropriate venue for articulating further the rights enjoyed by all families which are subject to constitutional protection – as well as the State's obligations in this regard.

### **Article 41.2 (Care)**

The wording proposed by the JGCE (in their Final Report) to replace Article 41.2 is not explicitly concerned with rights. It also does not clearly set out the extent of the State's obligations to carers.

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, through the amendment to the equality guarantee proposed by FLAC (which incorporates the reasonable accommodation provisions of Article 5(3) of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)). 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 UNCRPD.

FLAC believes that the second option proposed by the JGCE in their Interim Report is preferable to the proposal included in their final report:

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.**

### **Article 41.3.1 (The Family)**

The Interim Report of the JCGE suggested deleting Article 41.3.1 or replacing it with the following: “*The State pledges itself to guard with special care the Family, including but not limited to the marital family*”. The Committee ultimately opted for the latter option in their final report.

FLAC is concerned, however, that an explicit reference to the marital family may create the perception of a constitutional hierarchy or preference for the marital family. Further, the wording is not explicitly concerned with rights. The amendment of 41.3.1 to specifically encompass non-marital families is vital in circumstances where the Supreme Court has interpreted the current wording to mean that ‘the family’ recognised in Article 41 of the constitution “*is the family which is based on a valid marriage in accordance with the law of the State*”.

An alternative wording should be considered along the following lines: “**The State pledges to protect and promote the rights of all families, including marital and non-marital families.**”

### **Interaction between Constitutional Amendments**

In addition to our individual analysis of the proposed amendments, FLAC emphasises that consideration must be given to how these amendments may interact. In particular, it must be stressed that the welcome addition of constitutional protection for all families and for carers

would be of far greater benefit in circumstances where Article 40.1 of the Constitution is explicitly concerned with the prevention of discrimination against such groups and the introduction of legislation to ensure that they enjoy full equality in practice. All rights (including, for example, the proposed constitutional right to housing) should be enjoyed equally and without discrimination and the Constitution should be concerned with ensuring this.

## The Process

Seeking to amend the text which provides for the fundamental law of the State is an inherently complex task. In addition, Articles 40 and 41 of the Constitution engage multiple complex areas of law. Any amendments to these provisions should only emerge from an open process informed by detailed legal analysis and the experience of the existing provisions of the Constitution to date (including their impact on carers, people with disabilities, non-marital families and other rights-holders). The rationale and intended effects of any amendment must be clearly articulated and, indeed, should form the basis of the process for formulating any proposed amendments to the text of the Constitution.

Given the proposed timeline, it does not seem to be envisioned that the Inter-Departmental Committee will engage in any processes of stakeholder, expert or public consultation beyond the current extremely short consultation process. No terms of reference in relation to that Committee's work have been published. It is also unclear as to whether the potential amendments proposed by the Inter-Departmental Committee (or the rationale for the wordings recommended) will be published.

The wordings for amendments to Articles 40 and 41 of the Constitution proposed by the JCGE fall short in a number of areas. The shortcomings in those proposals, and the process by which they were arrived at, must now be addressed in the process for finalising the amendments which are ultimately put to referendum.

At the very least, this should involve:

- Open and transparent public, expert and stakeholder consultation in relation to the prospect of amending Articles 40 and 41.
- The publication of a report setting out the wordings proposed by the Inter-Departmental Committee, alongside a detailed rationale for each amendment, with the opportunity for public, stakeholder and expert feedback on that report prior to the introduction of Referendum Bills to the Oireachtas.

More generally, in advance of any referendum(s) the Government should clearly articulate the intended effects and rationale for the wordings chosen i.e. how the wordings will remove constraints on the introduction of certain measures via legislation and their implications for the rights of carers and non-marital families.

## 1. Article 40.1 (The Equality Guarantee)

FLAC's submission to the JCGE set out a comprehensive analysis of Article 40.1.<sup>11</sup> FLAC noted that as a result of the current wording (and how it has been interpreted by the courts), *"Irish constitutional law has rarely been beneficial for disadvantaged groups whether homosexuals, non-Irish nationals, members of the Traveller community, or people with disabilities"*.<sup>12</sup>

The current wording has also constrained the ability of the Oireachtas to give effect to Ireland's international human rights obligations concerning equality through legislation. The Court's extremely restrictive approach to equality has (in a number of ways) limited the extent to which the equality legislation may be used to combat systemic and structural forms of discrimination. It has also meant that national equality contains only minimal provisions relating to reasonable accommodation for people with disabilities.

In light of this analysis, FLAC submitted to the JCGE that any 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.

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<sup>11</sup> FLAC (November 2022), [Submission to the Joint Committee on Gender Equality: Constitutional Change & Gender Equality](#), section 1.

<sup>12</sup> Colm Ó Cinnéide, '[Aspirations Unfulfilled: The Equality Right in Irish law](#)' (2006) IHRLR 41.

It was further noted that, in amending the Constitution to meet these objectives, particular regard should be had to European equality law, including the Charter of Fundamental Rights of the European Union 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. A similar approach is taken in section 15 of the Canadian Charter of Rights and Freedoms.

The Interim Report of the JCGE contained two suggested options for amending the constitutional text in light of the recommendation of the Citizens’ Assembly that “Article 40.1 of the Constitution should be amended to refer explicitly to gender equality and non-discrimination”.

In its submission, FLAC noted that “neither [suggested option] 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.” As a result, FLAC set out its own wording for a new ‘equality guarantee’ (an amended version of that wording is included above).

The wording proposed in the JCGE’s final report, however, is largely based on the first option in its Interim Report:

“All citizens shall, as human persons without distinction as to sex, be held equal before the law.

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

The only substantive differences between this wording and the first suggestion in the Interim Report is the removal of the words “or gender” after “sex”, and the inclusion of the words “as human persons” (as is the case in the current constitutional text). These changes give rise to a number of concerns (in addition to those set out in FLAC’s submission to the JCGE):

***‘as human persons’***

The recommendation of the JCGE that the words “as human persons” should be retained in Article 40.1 is highly problematic. The authors of the definitive text on the Constitution state that the courts’ interpretation of this phrase has “*virtually emasculated the guarantee of*



equality”.<sup>13</sup> Those authors refer to the fact that the Report of the Constitution Review Group recommended “*the deletion of the phrase ‘as human persons’, [as well as] the explicit extension of the guarantee to non-citizens and, by a majority, a general re-wording of the article...*”.<sup>14</sup>

In their 1996 Report, the Constitutional Review Group provided the following rationale for their recommendation that the phrase “as human persons” should be removed from Article 40.1:

“The courts have cited the phrase ‘as human persons’ as a reason for affording a narrow interpretation to the material scope of the guarantee of equality before the law. Thus it has been said that the guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow (*Quinn’s Supermarket v Attorney General* [1972] IR 1), and that it relates to the essential attributes of citizens as persons, those features which make them human beings, and has nothing to do with their trading activities or with the conditions on which they are employed (*Murtagh Properties Ltd v Cleary* [1972] IR 330).

This interpretation of human personality has been criticised and the Review Group is of the view that a textual amendment is desirable to secure a broader interpretation of the guarantee of equality. The phrase ‘as human persons’ is not found in constitutional guarantees of equality before the law in other jurisdictions or in international instruments to which Ireland is a party.”<sup>15</sup>

The impact of the words “as human persons” on the courts’ approach to equality law is still evident. For example, in the recent Supreme Court decision in *Donnelly v Minister for Social Protection & Ors*, O’Malley J, in outlining the principles of constitutional equality law, stated that:

“Where the discrimination is based upon matters that can be said to be intrinsic to the human sense of self, or where it particularly affects members of a group that is vulnerable to prejudice and stereotyping, the court will assess the legislation with particularly close scrutiny. Conversely, where there is no such impact, a lesser level of examination is required.”<sup>16</sup>

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<sup>13</sup> Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (2019, Bloomsbury Professional, 5<sup>th</sup> Edn.) at para. 7.2.48.

<sup>14</sup> *ibid* at para. 7.2.155

<sup>15</sup> [Report of the Constitutional Review Group](#) (1996) at pp.197-8.

<sup>16</sup> *Donnelly v Minister for Social Protection & Ors* [2022] IESC 31 at para. 188(v).

### ***‘without distinction as to sex’***

In its submission to the JCGE, FLAC recommended that any new equality guarantee should include a non-exhaustive list of ‘discriminatory grounds’ or ‘protected characteristics’, and that this list should “*reflect the grounds protected under the equality legislation*”. It was submitted that making explicit reference to only one ground “*may create a perceived hierarchy within constitutional equality law*”.<sup>17</sup>

It is worth adding that the Constitutional Review Group also favoured the approach recommended by FLAC. They stated that “[*if*] a separate express guarantee of equality between the sexes were included this might suggest that the general guarantee was not intended to be all-embracing and weaken its impact”.<sup>18</sup> They also recommended that there should be “*an express prohibition of direct and indirect discrimination on specified grounds*” and included a non-exhaustive list of ground in their proposed wording for Article 40.1.<sup>19</sup>

The Final Report of the JCGE notes that the phrase “without distinction as to sex” (as opposed to “sex or gender” as suggested in the Interim Report) is “*consistent with language already used elsewhere in the Constitution*”. FLAC would highlight, however, that the word “gender” is used in national and EU equality law. Using both terms (as part of a non-exhaustive list of grounds) in any new iteration of Article 40.1 would ensure consistency with other legal instruments concerned with equality and effective protection against all forms of gendered discrimination.

## **2. Article 41.1 (Family & Private Life)**

In the JCGE’s Interim Report, 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. FLAC noted in its submission to that Committee that both suggestions had the benefit of creating an explicit right to privacy in the Constitution (which is

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<sup>17</sup> Indeed, page 9 of the Joint Oireachtas Committee’s 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”.

<sup>18</sup> [Report of the Constitutional Review Group](#) (1996) at p.206.

<sup>19</sup> *ibid* at pp.203-5.

not currently the case<sup>20</sup>). Suggested Option 2 was FLAC’s preferred option as it did not provide for rights to be curtailed for reasons of economic necessity.

The Final Report of the JCGE stated that: “[Having] reflected further on the options presented in the Interim Report, the Committee was keen to ensure that the existing protections for the Family be retained. Thus, no recommendation is made to change the text of Article 41.1”. They also state that “feedback from stakeholders and others caused the Committee to conclude that it would not be appropriate to insert language from another human rights instrument into the Constitution, particularly as Article 8 is already frequently cited in the Irish courts and thus explicit recognition of the need for protection for ‘private and family life’ is already provided for elsewhere”.

Further detailed legal analysis is required in order to ascertain how amending Article 41 of the Constitution can best enhance constitutional protection of private and family life – while also retaining existing protections. In this regard, it is worth observing that the addition of further constitutional provisions in relation to the rights of families does not necessarily require the amendment or deletion of Article 41.1.

Whatever approach is adopted in relation to Article 41.1, FLAC is of the view that Article 41.3.1 should be amended to ensure that constitutional protections of privacy and family life (in whatever form) are enjoyed equally by non-marital families. An amended Article 41.3.1 may also be an appropriate venue for articulating further the rights enjoyed by all families which are subject to constitutional protection – as well as the State’s obligations in this regard.

### **3. Article 41.2 (Care)**

The Interim Report of the JCGE included three options for replacing Article 41.2. FLAC noted in its submission to the Committee that each option removed outdated and offensive language from the Constitution (in relation to the role of women in the home). FLAC endorsed Suggested Option 2 (albeit with some minor comments) on the basis that it provided the most clarity in relation to the nature and extent of the State’s obligations to carers by stating: “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”.

However, the wording proposed by the JCGE in their Final Report is largely based on Suggested Option 3 in the Interim Report:

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<sup>20</sup> The courts have recognised that the personal rights under Article 40.3.1 of the constitution give rise to an ‘implied’ or ‘unenumerated’ right to privacy. See, for example: *McGee v The Attorney General* [1973] IR 284.

“1° The State recognises that care within and outside the home and Family gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, take reasonable measures to support care within and outside the home and Family.”

The JCGE states that the word “care” is used in its proposed wording “*to encompass consideration of the rights both of those being cared for, and those providing care*”. In FLAC’s view, this is a dubious contention. By contrast to the wording in the Interim Report endorsed by FLAC, the wording proposed is not explicitly concerned with rights.

Further (and as highlighted by FLAC in its submission to the JCGE), 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, through the amendment to the equality guarantee proposed by FLAC (which incorporates the reasonable accommodation provisions of Article 5(3) of the UNCRPD<sup>21</sup>). 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 UNCRPD.

#### 4. Article 41.3.1 (The Family)

The Interim Report of the JCGE suggested deleting Article 41.3.1 or replacing it with the following: “*The State pledges itself to guard with special care the Family, including but not limited to the marital family*”.

The Committee ultimately opted for the latter option in their final report. This approach was favoured by FLAC in its submission to the JCGE – while noting that “*the extent of the State’s obligations arising under this suggested wording could benefit from further detail/development*”. On reflection, however, a further concern arises that an explicit reference to the marital family may create the perception of a constitutional hierarchy or preference for the marital family. Further, the wording is not explicitly concerned with rights.

The amendment of Article 41.3.1 to specifically encompass non-marital families is vital in circumstances where the Supreme Court has interpreted the current wording to mean that “*the family’ recognised in Article 41 of the constitution is the family which is based on a valid marriage in accordance with the law of the State*”.<sup>22</sup>

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<sup>21</sup> Article 5(3) of the United Nations Convention on the Rights of Persons with Disabilities provides: “In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided”.

<sup>22</sup> *O’B v. S* [1984] 1 IR 316 (SC).

In the recent case of *In O’Meara v Minister for Social Protection & Ors*<sup>23</sup>, the High Court stated that: “*given the special place of marriage in the Constitution (per Article 41.3.1) the ‘starting point’ is that it is not contrary to Article 40.1 [the equality guarantee] for the State to treat married and non-married persons differently*”.<sup>24</sup>

An alternative wording should be considered along the following lines: “*The State pledges to protect and promote the rights of all families, including marital and non-marital families.*”

## 5. Interaction between Constitutional Amendments

In addition to our individual analysis of the proposed amendments, FLAC emphasises that consideration must be given to how these amendments may interact. In particular, it must be stressed that the welcome addition of constitutional protection for all families and for carers would be of far greater benefit in circumstances where Article 40.1 of the Constitution is explicitly concerned with the prevention of discrimination against such groups and the introduction of legislation to ensure that they enjoy full equality in practice. All rights (including, for example, the proposed constitutional right to housing) should be enjoyed equally and without discrimination and the Constitution should be concerned with ensuring this.

## 6. Process

### 6.1. Drafting Constitutional Amendments

FLAC’s submission to the JCGE emphasised that “*changes in the constitutional text may have significant practical and symbolic effects*” and that “*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*”<sup>25</sup>. As a result, it was observed that any process for formulating recommendations for constitutional change should have regard to the impact of the existing wording on law and policy in the State and the potential impact in this regard of any new wording introduced:

“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

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<sup>23</sup> *O’Meara v Minister for Social Protection & Ors* [2022] IEHC 552. The Supreme Court has since accepted a leap-frog appeal in that matter.

<sup>24</sup> *ibid* at para. 55.

<sup>25</sup> FLAC (November 2022), [Submission to the Joint Committee on Gender Equality: Constitutional Change & Gender Equality](#), pp. iv-v.

manifests in the ambition of legislation and policy and in terms of the ability of the Oireachtas to implement specific policies...

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... 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.”<sup>26</sup>

This analysis is drawn from the experience of previous referendums and amendments to the Constitution, and their impact (including the Supreme Court’s decisions in relation to the effects of particular amendments) which illustrates the need for clarity in terms of wording and what is sought to be achieved:

In the recent case of *Heneghan v Ireland*<sup>27</sup> (in which FLAC represented the successful appellant), the Supreme Court considered the legal consequences of the seventh amendment to the Constitution - which they ultimately held to have “*mandated*” the expansion of the franchise in elections for Seanad university seats. The Court noted that the legal issues which arose in the case (concerning the proper interpretation of Article 18.4 of the Constitution) largely stemmed from the fact that: “[*At*] every level the drafting of [*the seventh*] amendment was hapless, incoherent and confused. In legal terms it was the equivalent of the attempted cleaning of an old master by a careless restoration artist who then proceeded to leave an ink-stain on a Rembrandt”.<sup>28</sup> As result, it was left to the Court to “*confront fundamental issues around how it should interpret an opaque constitutional provision of this kind and, in particular, as to how it should negotiate the relationship between the literal meaning of words used in that provision, other constitutional Articles, principles of equality said by the applicant to inhere in the democratic process, and evidence of what is said to have been the understanding of the People at the time of the adoption of a constitutional Article as to the meaning and effect of that provision*”.<sup>29</sup>

In the earlier case of *Re JJ*<sup>30</sup>, the Supreme Court considered the effect of the insertion of Article 42A of the Constitution and held that they could not “*ignore the fact of amendment*” in their considerations.<sup>31</sup> As a result, the Court “*expressly rejected the analysis of the authors of*

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<sup>26</sup> *ibid.*

<sup>27</sup> *Heneghan v Minister for Housing, Planning & Local Government & Ors* [2023] IESC 7.

<sup>28</sup> *ibid* at para. 4 of the judgment of Hogan J.

<sup>29</sup> *ibid* at para. 3 of the judgment of Murray J.

<sup>30</sup> *In the Matter of JJ* [2021] IESC 1.

<sup>31</sup> *ibid* at para. 134 of the majority judgment.

Kelly: The Irish Constitution *that the removal of the reference to ‘physical or moral’ failure has not altered the position established under the pre-existing case law as to the threshold for state intervention*”.<sup>32</sup>

Beyond the findings of the Supreme Court in *Re JJ*, Article 42A has been subject to criticism for its failure to deliver on the promise of “Children’s Rights”. Doyle and Kenny note that the amendment “*largely preserves the constitutional status quo*” and argue that “[*in*] *this referendum... the emptiness of the slogan [‘Yes for Children’] was mirrored by the emptiness of the referendum proposal itself*”.<sup>33</sup> Notably, those authors submit that the proposal for the insertion of Article 42A was based on a “*false diagnosis of a constitutional malaise*” i.e. a misunderstanding of the legal and practical necessity for such an amendment.

O’Mahony agrees that the impact of Article 42A has “[*fallen*] *below expectations*”.<sup>34</sup> His analysis highlights issues with the process which gave rise to the wording for Article 42A which ultimately went to referendum: “*There was no call for submissions; no public hearings or debates; and no report explaining the rationale behind the wording. The new wording was not even officially published...*”. Similarly, he describes the process through which that wording was finalised as follows:

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

It should also be highlighted that the wording of an amendment (and the rationale for same) may also have a significant effect on the likelihood that it will be accepted by the people. In his personal submission to the Housing Commission’s Referendum Sub-Committee, Peter Ward SC contends that “*it is essential to any successful campaign to amend the Constitution that there is absolute clarity about what it is that is sought to be achieved*”.<sup>35</sup>

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<sup>32</sup> Finn Keyes, *Children’s Rights and End of Life Decision-Making: In the matter of JJ* [2021] Irish Judicial Studies Journal Vol 5(1).

<sup>33</sup> Oran Doyle and David Kenny, ‘Constitutional Change and Interest Group Politics: Ireland’s Children’s Rights Referendum’ in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart Publishing 2017).

<sup>34</sup> Conor O’Mahony, ‘Falling short of expectations: the 2012 children amendment, from drafting to referendum’ (2016) 31(2) Irish Political Studies, 252-281.

<sup>35</sup> Peter Ward SC is a practising barrister and former chairperson of FLAC. He was national spokesperson for the Right to Remarry Campaign in the Divorce Referendum of 1995. He was a national spokesperson in opposition to the proposed abortion amendment in 2002. He was a member of the Strategic Advisory

## 6.2. The Current Process

The Citizens' Assembly on Gender Equality was established in July 2019 to “*consider gender equality and make recommendations to the Oireachtas to advance gender equality...*”.<sup>36</sup>

In June 2021, the Assembly published its report<sup>37</sup> containing 45 recommendations, including three recommendations for constitutional reform:

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.

In late 2021, a Joint Oireachtas Committee on Gender Equality was established to consider the recommendations of the Assembly.

The JCGE 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 JCGE 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*”.<sup>38</sup> The Interim Report also noted that the JCGE would “[*seek*] the views of interested stakeholders, citizens, and members of the public on these options”.

In December 2022, the JCGE published a final report setting out its proposed wording for amendments to Articles 40 and 41, and recommending “*that a constitutional referendum be held in 2023 to give effect to the Citizens' Assembly recommendations on constitutional change*”.<sup>39</sup>

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Committee of the campaign in favour of the Marriage Equality Referendum in 2015 and a member of the Strategic Advisory Committee of the Campaign to Repeal the Eight Amendment of the Constitution in 2018.

<sup>36</sup> See: [Terms of Reference](#) for the Citizens' Assembly on Gender Equality.

<sup>37</sup> The Citizens' Assembly (June 2021), [Report of the Citizens' Assembly on Gender Equality](#).

<sup>38</sup> Joint Committee on Gender Equality (July 2022), [Interim Report on Constitutional Change](#).

<sup>39</sup> Joint Committee on Gender Equality (December 2022), [Final report: Unfinished Democracy - Achieving Gender Equality](#).



In March 2023, the Government announced its intention “*to hold one or more referendums on this issue [gender equality]*” in November 2023.<sup>40</sup> The Minister for Children, Equality, Disability, Integration and Youth stated that his Department would “[*convene*] an *inter-departmental committee to develop policy recommendations for consideration by Government, with a view to agreement by Government of wording for the proposed referenda*”. In relation to the process to be followed, the Press Release issued by the Department of the Taoiseach stated:

“The timeframe envisaged for this work is as follows:

- establishment and convening of the inter-departmental group in March
- development of policy recommendations for consideration by Government and agreement by Government of wording for the proposed referenda, to be concluded by mid-May
- the general scheme of the Referendum Bill(s), and any consequential legislation to be published by end June, along with preparation for briefing of the Electoral Commission
- it is anticipated that the parliamentary process may take approximately five weeks, with enactment of the Referendum Bill(s) concluded by end September, after which the referendum campaign would commence
- the referendum(s) would be held in November 2023”

### 6.3. Analysis of the Current Process

A number of concerns arise in relation to the current process for formulating amendments to Articles 40 and 41:

- First, the recommendations of the Citizens’ Assembly are general in nature, and only articulate high level objectives for any potential constitutional amendments.
- Second, an examination of the reports of the JCGE suggest that it engaged in a limited amount of stakeholder and expert consultation. Beyond the contention that the amendments proposed would have an important symbolic effect, the reports of the JCGE do not clearly (or in any great detail) articulate the intended effects of the wordings proposed. Similarly, the reports of the JCGE do not engage in detail with practical and legal difficulties arising from the existing provisions of Articles 40 and 41 (and how these would be addressed by the amendments proposed).

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<sup>40</sup> Department of the Taoiseach (8 March 2023), [Press Release: Taoiseach and Minister O’Gorman announce holding of referendum on gender equality](#).

- Third, given the proposed timeline, it does not seem to be envisioned that the Inter-Departmental Committee will engage in any processes of stakeholder, expert or public consultation beyond the current extremely short consultation process. No terms of reference in relation to that Committee's work have been published. It is also unclear as to whether the potential amendments proposed by the Inter-Departmental Committee (or the rationale for the wordings recommended) will be published.

Seeking to amend the text which provides for the fundamental law of the State is an inherently complex task. In addition, Articles 40 and 41 of the Constitution engage multiple complex areas of law. Any amendments to these provisions should only emerge from an open process informed by detailed legal analysis and the experience of the existing provisions of the Constitution to date. The rationale and intended effects of any amendment must be clearly articulated and, indeed, should form the basis of the process for formulating any proposed amendments to the text of the Constitution.

There is no apparent rationale for the disparity between the ongoing process for formulating wording for multiple significant amendments to Articles 40 and 41, and the far more structured and participatory process also currently taking place for the purpose of generating the wording for a constitutional right to housing. The latter process has involved the formation of an expert Committee which held a major conference on the topic and engaged in public and stakeholder consultation.

The past decade has seen a number of referendums with extremely positive implications for peoples' lives and rights in Ireland. Several more referendums are now envisioned or proposed (including in relation to housing, public ownership of water services, bio-diversity, and voting rights). It is therefore worth questioning whether the process of constitutional reform should proceed in an *ad hoc* and piecemeal fashion - where amendments to the Constitution are emerging from disparate processes with varying degrees of transparency and participation. By contrast, the 1990s saw the completion and publication of a thorough expert review of the Constitution.<sup>41</sup> Subsequently, the Constitution as a whole was considered by several Oireachtas Committees who published reports on their findings.<sup>42</sup>

At the very least, the current approach gives rise to risks of unintended consequences and an increasingly incoherent and inconsistent Constitution. A further consequence is the extremely limited consideration and public debate which has taken place to date around whether more

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<sup>41</sup> See: [Report of the Constitutional Review Group](#) (1996).

<sup>42</sup> See: [Website of the All-Party Oireachtas Committee on the Constitution](#).

drastic constitutional reform is necessary (i.e. the adoption of a new secular Constitution with express protection of socio-economic rights).

The wordings for amendments to Articles 40 and 41 of the Constitution proposed by the JCGE fall short in a number of areas. This is perhaps unsurprising given the scope and variety of matters which fell to be considered by that Committee in a short period of time. The shortcomings in those proposals, and the process by which they were arrived at, must now be addressed in the process for finalising the amendments which are ultimately put to referendum.

At the very least, this should involve:

- Open and transparent public, expert and stakeholder consultation in relation to the prospect of amending Articles 40 and 41.
- The publication of a report setting out the wordings proposed by the Inter-Departmental Committee, alongside a detailed rationale for each amendment, with the opportunity for public, stakeholder and expert feedback on that report prior to the introduction of Referendum Bills to the Oireachtas.

More generally, in advance of any referendum(s) the Government should clearly articulate the intended effects and rationale for the wording chosen (i.e. how the wordings remove constraints on the introduction of certain measures via legislation and their implications for the rights of carers and non-marital families).

FLAC are eager to engage in the process of preparing for these important referendums and believes that the voices of civil society and rights-holders are essential to their success. We hope that the matters raised above will inform the approach adopted by the Inter-Departmental Committee, the Department and the Government in the weeks and months to come.