



Report on FLAC Consultation with Academics & Legal Practitioners
Wording for Amendments to Articles 40 and 41 of the Constitution
July 2023

Introduction

The three referendums proposed for November 2023 to amend the constitutional provisions concerning equality, family and care represent a significant opportunity for the promotion of equality and the protection of human rights in Ireland. FLAC welcomes this opportunity and is concerned with ensuring that its full potential is realised.

In addition to a submission to the Joint Oireachtas Committee on Gender Equality ('JCGE'), FLAC has made two submissions to the Inter-Departmental Referendums Committee in relation to the proposals for constitutional reform which emerged from the Citizens' Assembly on Gender Equality.

On 26 May 2023, FLAC held a workshop where leading legal practitioners and academics offered their views on the current proposals, as well as on FLAC's analysis of the wordings recommended by the JCGE and its own recommendations in relation to the wordings.

This report offers an overview of the matters raised at that workshop and FLAC's key findings and recommendations which emerged from it. Those findings and recommendations are also informed by written contributions provided in advance of the workshop.

Contents:

- 1. Aim of the Referendums**
- 2. Article 40.1 (The Equality Guarantee)**
- 3. Articles 41.1 & 41.3.1 (Family)**
- 4. Article 41.2 (Care)**
- 5. Conclusion & Recommendations.**

Appendix: List of Academics & Practitioners who engaged with FLAC.

1. Aim of the Referendums.

The workshop began with an introduction from veteran campaigner for progressive constitutional reform, Peter Ward SC.

Mr Ward stressed that the success of any referendum campaign depends on clarity as to what the constitutional amendment seeks to achieve and as much unanimity over the proposed wording as possible. It is incumbent on any “Yes” campaign to express why an amendment is necessary, what they are seeking to achieve and how the specific wording proposed will achieve those aims.

He observed that in previous contentious referendums (such as the second divorce referendum and the referendum to repeal the eighth amendment), steps were taken to ensure that the specific legal and policy implications of a “Yes” vote were clear to the electorate.

In this regard, he expressed surprise that there was such a strong emphasis on holding the referendums in November 2023 in circumstances where there were still concerns over the appropriate wordings. He questioned how work on how proposals were presented as part of a campaign could proceed in circumstances where the proposals (and their implications) remain unknown.

A successful campaign must have a clear goal that has been “stress-tested” and which can be presented to the public in a way that shows what it will achieve and that it will not have any adverse consequences.

Mr Ward highlighted that he was most concerned by the proposal to amend Article 40.1 (the equality guarantee). He noted that equality is a huge area and that, in the absence of a compelling rationale for the proposed amendment, a debate around what equality means and who will benefit from the proposed amendment may overshadow the substantive issues. Multiple attendees at the workshop subsequently referenced the risk that certain actors could seize on the use of the word “sex” in the wording proposed by the JCGE and seek to call the rights of trans people into question.

Mr Ward noted that any campaign will already have to grapple with complex questions around the meaning of “care” and the definition of “family” – and what the implications of amendments in those areas will be. As a result, there is a risk of confusion and one issue overwhelming the consideration of others. He also noted that any decision to reference gender equality alone would need a detailed justification and explanation as to how such an amendment would impact (beneficially or adversely) upon the positions of other protected groups.

2. Article 40.1 (The Equality Guarantee)

The academics and practitioners with whom FLAC engaged expressed significant concerns over the current proposal for amending Article 40.1 of the Constitution. A key theme which emerged was the lack of ambition with the wording proposed by the JCGE in its final report – and the failure of that wording to engage with the multiple significant problems with the current wording.

The risks associated with including only one ground (“sex”) in the proposed amended wording was also repeatedly highlighted, with specific concerns being raised in relation to the risk that the wording could be interpreted to mean that sex/gender enjoys a higher level of constitutional protection than other grounds. It was noted that, arguably, this is not in keeping with Ireland’s international obligations, for example, under the UN Convention on the Elimination of All Forms of Racial Discrimination or the UN Convention on the Rights of Persons with Disabilities. If certain grounds are going to be added to Article 40.1, as part of a non-exhaustive list, then there is a strong case that, at a minimum, these grounds should include those in respect of which there are dedicated UN human rights treaties that Ireland has ratified.

Further, it was noted that it is uncertain that a general reference to “principles of equality and non-discrimination” will result in any significant change to how courts interpret and apply Article 40.1. The proposed duty to have “due regard” to these principles might be read as an obligation upon the State to take into account equality and non-discrimination in its legislative functions. This suggests a focus on process rather than outcome. There are similarities to the duty found in section 42(1) of the Irish Human Rights and Equality Commission Act 2014. The latter has not, however, been the subject of any judicial interpretation. If the case-law confers a wide margin of discretion to the State regarding the significance of the principles of equality and non-discrimination, then this sentence might add little of substance to the existing equality guarantee.

The significant protections against gender discrimination under national and EU law were also highlighted – and the necessity for a specific reference to gender equality in the Constitution was questioned. In particular, it was noted that holding a referendum on the amendment proposed by the JCGE could delay or shut down attempts at broader (and much needed) reform of Article 40.1.

It was highlighted by multiple speakers that Article 40.1 was not subject to detailed consideration by the Citizens’ Assembly – and was treated as something of an afterthought. Similarly, the reports of the JCGE demonstrate very little engagement with the (already quite limited) expert legal consultation which they undertook.

FLAC's proposed wording received positive feedback but, ultimately, a consensus emerged that the area required far more consideration before an agreed wording could be arrived at. It was noted that the current Review of the Equality Acts could shed further light on the matters which needed to be addressed in amending the equality guarantee – and that seeking to amend it now may be premature.

3. Articles 41.1 & 41.3.1 (Family)

There was general agreement amongst attendees of the workshop that the amendments proposed by the JCGE to Articles 41.1 and 41.3.1 would achieve the aim of removing the barrier to non-marital families enjoying the protection of Article 41.

In fact, it was noted that this aim could be achieved by simply removing the words “on which the Family is founded” from Article 41.3.1. That approach would have the added benefits of:

- Retaining the protection of the institution of marriage (and avoiding any implication that the proposed amendment would attack or devalue that institution).
- Avoiding making a specific reference to the marital family (as is the case in the wording proposed by the JCGE) and any resulting perception of a constitutional preference for the marital family. Similarly, a reference to the marital family could also imply that the Constitution is concerned with the nuclear family alone, rather than also being concerned with extended family units/households.

It was highlighted that retaining the text of Article 41.1 would have the benefit of retaining the positive case law which has flowed from the judicial interpretation of that provision – including in *Re JJ* and *Gorry*.

However, some concerns were expressed in relation to the fact that the approaches discussed above would leave it to the judiciary to define “family” – and to allow for differentiation between the treatment of marital and non-marital families. These concerns are shared by FLAC. It was queried whether there is to be a role for legislation in ensuring equal treatment for non-marital families - and whether the Constitution should mandate this.

4. Article 41.2 (Care)

The workshop concluded with a discussion of the proposal to replace Article 41.2 with a gender-neutral recognition of care.

There was consensus that the current wording is out-dated and has never availed carers (of any gender) in asserting that their constitutional rights have been breached. However, there was less agreement as to whether (or as to what degree) the wording proposed by the JCGE would give rise to enforceable rights for carers.

Some highlighted that a provision giving rise to stronger rights for carers may not be politically feasible, and that the amendment proposed by the JCGE was an improvement on the current wording.

By contrast, it was also highlighted that the proposed amendment risks elevating a perception of people with disabilities as “objects of care” (rather than rights-holders and autonomous individuals) to constitutional status. The view was expressed that the rights of persons with disabilities was inextricably linked with the position of carers, and the absence of recognition of the rights of persons with disabilities could further reinforce stereotypes about caring roles within families.

5. Conclusion & Recommendations

A thread that ran through the discussions outlined above was the potential interaction between the amendments proposed. It was highlighted that concerns in relation to the rights of carers, non-marital families and people with disabilities could (at least partially) be addressed through the amendment of Article 40.1. However, the wording proposed by the JCGE for amending Article 40.1 is nowhere near sufficient for that purpose.

In FLAC’s view, a number of conclusions and recommendations emerge on foot of the consultation discussed above (in addition to the analysis and recommendations included in FLAC’s submissions to the Inter-Departmental Committee Committee):

1. It is vital that any wording(s) which emerges from the Inter-Departmental Committee or from the Cabinet are accompanied by a detailed explanation of the rationale for the amendments and what they seeks to achieve.
2. The detailed legal analysis accompanying any proposed amendments should be informed by further consultation with relevant legal and constitutional experts, as well as stakeholders and rights-holders.
3. The current proposal to amend Article 40.1 is deeply flawed and merits significant reconsideration. The wording proposed by the JCGE raises several issues of concern and may undermine the effectiveness (and prospects of success at referendum) of the other amendments proposed.
4. The outstanding work to be done to finalise the wordings should dictate the timing of the referendums – not the other way around.

Appendix

Attendees at the FLAC Wording Workshop:

- Professor Patricia Brazil (TCD)
- Professor Laura Cahillane (UL)
- Professor Tom Hickey (DCU)
- Professor Fergus Ryan (MU)
- Colin Smith BL
- Alan D.P. Brady BL
- Peter Ward SC
- Eilis Barry (FLAC Chief Executive & Adjunct Professor at UCC School of Law)
- Sinéad Lucey (FLAC Managing Solicitor)

Other Practitioners & Academics who engaged with FLAC:

- Professor Mark Bell (TCD)
- Professor Gerry Whyte (TCD)