

ICCL submission to the Inter-Departmental Committee on the Referendums on Family, Care and Gender Equality

MAY 2023

Introduction

1. We welcome the opportunity to take part in the Inter-Departmental Committee consultation on the Referendums on Family, Care and Gender Equality. Wording for constitutional change is currently being examined by the Committee to give effect to recommendations 1-3 of the Citizens' Assembly on Gender Equality. These read:

Recommendation 1: Article 40.1 of the Constitution should be amended to refer explicitly to gender equality and non-discrimination.

Recommendation 2: 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.

Recommendation 3: 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.

2. The Irish Council for Civil Liberties (ICCL) has made two submissions to the Joint Oireachtas Committee on Gender Equality, and we recognise the extensive work done to implement the Citizens' Assembly recommendations thus far.
3. In this submission, we outline our concern that the recommendations on new Constitutional wording put forward by the Committee on Article 40.1 will not provide the level of protection required to truly promote equality and combat discrimination in Ireland. Similarly, we are unconvinced that the proposed wording on Article 41.2 will provide for equal protections for private and family life for marital and non-marital families, and we consider the interlinkages between Article 40.1 and Articles 41.2 and 41.3 require further analysis to ensure full and equal protections for carers and for people with disabilities, in line with Ireland's regional and international human rights obligations.
4. This submission is endorsed by the Children's Rights Alliance.

Our concerns on the proposed wording

Article 40.1: existing provision	Article 40.1: Joint Committee on Gender Equality wording
<i>All citizens shall, as human persons, be held equal before the law.</i>	<i>All citizens shall, as human persons without distinction as to sex, be held equal before the law.</i>
<i>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.</i>	<i>The State shall in its enactments have due regard to the principles of equality and non-discrimination.</i>

5. The proposed wording does not reflect international and regional human rights standards¹ and will do little to address the restrictive interpretation by the Courts and underuse of the current equality provision to protect against discrimination and ensure equality for everyone in Ireland. The proposed wording retains the weak structure underpinning equality protection in the Constitution, which has proven deeply ineffective over the years. We note that several of these concerns have been already raised during the consultation process (see Committee Interim report²).
6. We recognise that the scope of the Citizens' Assembly work and recommendations were limited to gender equality and that the Committee's intent behind the proposed wording is to respond to the Citizens' Assembly recommendation in this regard. However, including "sex" as the only discrimination ground in the Constitution is problematic for a number of reasons. First, it does not take into account a modern understanding of discrimination, that can occur in a variety of ways, both indirect and direct. It also doesn't take into account the current understanding that all forms of discrimination can be experienced in an intersectional way. The proposed approach contains the risk of creating a hierarchy of grounds, either providing, or being seen to provide, a higher level of protection to some individuals in Ireland against discrimination than others.
7. While the purpose of this amendment is to strengthen the equality protection in the Constitution, this wording potentially restricts the scope of interpretation of the equality provision in the Constitution from a broad equality provision to a provision that may only

¹ See e.g., Article 14 European Convention on Human Rights, Article 21 Charter of Fundamental Rights of the European Union, Article 2 International Covenant on Civil and Political Rights, Article 2 International Covenant on Economic, Social and Cultural Rights, Article 5 Convention on the Rights of Persons with Disabilities.

² Joint Committee on Gender Equality, Interim report on Constitutional Change, July 2022.

protect on the basis of sex, should it be narrowly interpreted by the Courts. Additionally, this choice does not address existing jurisprudence on Article 40.1, which has on a case-by-case basis identified certain grounds as ‘invidious’, others as ‘less suspect’. It also omits numerous grounds for protection recognised under international and regional human rights law (e.g., sexual orientation).

8. When consulted on different options for wording – contained in the Committee interim report – ICCL initially expressed a preference for the inclusion of a non-exhaustive list of discrimination grounds outlined in international and regional human rights treaties ratified by Ireland (e.g., the European Convention on Human Rights, the EU Charter of Fundamental Rights and the UN International Covenant on Civil and Political Rights).
9. In addition to Ireland’s international obligations, if a list of protected grounds is considered, the discrimination grounds included in the national equality legislation should inform such considerations. However, we would highlight that Ireland’s equality legislation is currently under review. In particular, the Government is reviewing the scope of the current definitions of the existing equality grounds and considering whether new grounds – such as socio-economic status – should be included. We also consider that discrimination grounds contained in other relevant legislation should inform these discussions, including e.g., sex characteristics, included in the draft Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022³.
10. **Alternatively**, referencing “non-discrimination on any protected ground” without a non-exhaustive list may tackle the risk of actually, or being seen to, exclude non-listed grounds covered by existing law or grounds that may emerge in the future.
11. All forms of discrimination, whether direct and indirect, should be addressed in the constitutional provision, unlike in the proposed amendment. We also note that the reference to “enactments” is too narrow as the application, promotion and achievement of equality and non-discrimination should not be limited to legislative measures.
12. In addition, the suggested wording retains the use of the word “citizen”, despite the original inclusion of “persons” in the Interim report. This is a missed opportunity to align with international and regional human rights law⁴ and with jurisprudence from the Irish Supreme Court confirming that human rights protections must be afforded to all

³ *Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022, currently at stage 4.*

⁴ See e.g. Article 1 European Convention on Human Rights: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. This includes the prohibition of discrimination.

individuals in a State, with limited exceptions⁵. This clarification from the Courts should be reflected in the Constitution.

13. These considerations go to the heart of the scope of the equality protections afforded to everyone in Ireland by the Constitution and should be addressed in robust consultations with legal and constitutional experts.

Suggested Wording on Article 40.1

14. It is clear that the Committee aimed at ensuring that only those changes necessary to give effect to the Citizens’ Assembly recommendations would be proposed for Article 40.1. However, providing for a full and meaningful equality provision requires complex and interlinking consideration. Putting this provision to the people of Ireland in a referendum represents a once in a generation opportunity to get the wording right and goes well beyond the limited scope of the Assembly and Committee work on gender equality. Agreeing on wording which is in line with international and regional human rights law and best practice in equality protections requires in-depth analysis and widespread societal consultation. ICCL has worked with some stakeholders on the below proposal, which at the very least demonstrates the complex considerations that need to be taken into account in order to effectively amend Article 40.1.

Article 40.1: existing provision	Article 40.1: Committee wording	Article 40.1: our alternative wording (option a: grounds are listed in a non-exhaustive way)	Article 40.1: our alternative wording (option b: grounds are not listed)
<i>All citizens shall, as human persons, be held equal before the law.</i> <i>This shall not be held to mean that the State shall not in its enactments have due regard</i>	<i>All citizens shall, as human persons without distinction as to sex, be held equal before the law.</i> <i>The State shall in its enactments have due regard to the principles of equality and</i>	<i>All persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. The state may not discriminate directly or indirectly against anyone on one or more grounds, including but not limited to race, colour, ethnic or social origin, genetic</i>	<i>All persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. The state may not discriminate directly or indirectly against anyone on one or more grounds.</i>

⁵ See *NHV v Minister for Justice and Equality*.

<i>to differences of capacity, physical and moral, and of social function.</i>	<i>non-discrimination.</i>	<i>features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation, gender, civil status, family status, membership of the Traveller community and sex characteristics.</i> <i>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.</i>	<i>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.</i>
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15. The rationale for our alternative wording is the following: the first clause above is based on Article 5 of the UN Convention on the Rights of Persons with Disabilities, section 15 of the Canadian Charter and section 9 of the South African Constitution. The grounds included in the non-exhaustive list (option a) are drawn from Article 21 of the EU Charter of Fundamental Rights and national legislation (Equal Status Acts - under review – and draft hate crime legislation). The second clause is based on section 9 of the South African constitution, viewed by most human rights experts as a model constitution when it comes to rights protections, and reflects international human rights principles.
16. We note the suggested wording from FLAC in their submission to the inter-departmental group and we see merit in their suggestion too. We include our suggested wording above to demonstrate the complexity of analysis required to ensure that we get the proposed wording right before we go to a referendum.

Article 41.2 and Article 41.3

17. ICCL considers that the proposals from the Oireachtas Committee on Gender Equality on Article 41.2 and 41.3 are a step in the right direction. However, we would again urge

the Government to ensure that any wording to amend these provisions has been subjected to robust consultations with legal and constitutional experts.

18. The proposal to amend Article 41.2 must fully respect, protect and fulfill the right to private and family life for both marital and non-marital families on an equal basis. The wording of Article 40.1 will be relevant here too and the potential interplay between these provisions must be explored.
19. The proposal to amend Article 41.3 must similarly ensure full and equal protections for both carers and the people that are cared for, including people with disabilities, and any interplay between the equality provision and this provision must be fully analysed.

Conclusion and Recommendations

20. Changing the equality provision in the Constitution requires in-depth analysis and widespread consultation that has not yet been undertaken. The proposed wording suggested by the Joint Committee on Gender Equality for the amendment of Article 40.1 is concerning and risks having unintended consequences, potentially narrowing the equality provision in the Constitution, rather than strengthening it. To ensure that the opportunity to properly strengthen the equality provision in the Constitution is not lost and that new wording on Articles 41.2 and Article 41.3 is fully complementary of new wording in Article 40.1, we recommend that before any wording is put to the people of Ireland, an in depth consultation process with legal and constitutional experts is undertaken to give proper consideration to how to amend these provisions to reflect best practice internationally and regional and international obligations on equality and non-discrimination.
21. We hope that the concerns raised in this submission are taken into consideration. ICCL remains available for further engagement and to provide further information. We are also available to meet with the Inter-departmental Committee.

About ICCL

The **Irish Council for Civil Liberties (ICCL)** is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped decriminalise homosexuality and legalise divorce and contraception. We drove police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights. ICCL is the chairing organisation of the Coalition Against Hate Crime Ireland (CAHC).