

# LAW SOCIETY SUBMISSION

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**CITIZEN'S ASSEMBLY ON GENDER EQUALITY - RECOMMENDATIONS**

**JOINT COMMITTEE ON GENDER EQUALITY**

**FEBRUARY 2022**

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## ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

## 1. Article 40.1 of the Constitution

### **Should be amended to refer explicitly to gender equality and non-discrimination**

The Society agrees that Article 40.1 should be amended to refer explicitly to gender equality and non-discrimination.

#### *General issues with the operation of Article 40.1 in practice*

The constitutional guarantee of equality in Article 40.1 ranks first among the fundamental rights protected under the Constitution and is “a vital and essential component of the constitutional order”.<sup>1</sup> Yet, there remains significant uncertainty about the principles governing its application. This uncertainty is not merely an academic concern; it affects the extent to which Article 40.1 is effective in practice, in ensuring equality before the law and in combating discrimination under the law, particularly in relation to gender equality.

In *Donnelly v Minister for Social Protection*,<sup>2</sup> the Court of Appeal referred to the judgment in *Brennan & Others v. Attorney General* in which Barrington J. described the concept of equality before the law as one of the most difficult and elusive in the Constitution.<sup>3</sup> Murray J. continued:

*“This is, in part, a product of the broad and diffuse range of circumstances in which the provision may be engaged and the varying legal responses required by different types of legal classification. The degree of scrutiny demanded by distinct categories of differential treatment imposed by law, the allocation of the burden of proof in specific types of cases and the extent of the deference afforded to legislative judgment in a variety of contexts fall to be rationalised and accommodated within a tightly packed constitutional mandate framed by two qualifications: ‘citizens shall, as human persons, be equal before the law’. That direction is followed by what has been described as ‘the proviso’: ‘[t]his 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’.”<sup>4</sup>*

While the terms of Article 40.1 provide the essential starting point for the interpretation and application of that provision, those terms provide limited guidance on many of the complex issues to which the Article gives rise. It is clear from the text of the Article that the guarantee of equality before the law in the first paragraph of the provision is not absolute.

The second paragraph of the provision makes it clear that this guarantee does not mean that the State cannot have “*due regard to differences of capacity, physical and moral, and of social function*” in its legislation.

While the test for determining whether an interference with the guarantee of equality can be justified has been formulated in different terms over time, it is settled case-law that, at a minimum, a legislative classification which distinguishes between comparable persons or classes of persons must have a legitimate purpose, must be relevant to that purpose and must not be unfair, unjust or unreasonable.<sup>5</sup>

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<sup>1</sup> *Murphy v. Ireland & Others* [2014] 1 IR 198, 227 (per O’Donnell J)

<sup>2</sup> [2021] IECA 155

<sup>3</sup> [2021] IECA 155, §30 (referring to *Brennan & Others v. Attorney General* [1983] ILRM 449, 479).

<sup>4</sup> *ibid*

<sup>5</sup> Re Article 26 and the Employment Equality Bill 1996

The wording of Article 40.1 appears to envisage that the equality obligation applies primarily to the State rather than to private, non-State actors. Jurisprudence on the question of whether the guarantee of equality contained in Article 40.1 is capable of “horizontal application” is not well developed.<sup>6</sup>

#### *Limitations of Article 40.1 in the Context of Gender Equality and Non Discrimination*

Article 40.1 does not explicitly embody the principle of equality of men and women and does not contain an explicit prohibition against discrimination on the basis of sex.

The Society notes that gender equality is a fundamental democratic principle, and recognised as such in a range of constitutions, treaties and legal texts. By identifying gender equality as a specific right in the Constitution, the document would recognise equality of the sexes as a basic principle of law and policy.

The principle of equality has been given greater effectiveness in Irish law through the enactment of the Employment Equality Act 1998 and the Equal Status Act 2000. However, these Acts prohibit discrimination within certain spheres, including employment, vocational training, advertising, collective agreements, and the provision of goods and services to which the public generally have access.

An amendment to the wording of Article 40.1 in the manner proposed would give a constitutional basis to policies effecting the equal visibility, participation and empowerment of both women and men in all aspects of public and private life. It would also bring the Constitution closer to the founding values espoused in legislative provisions including those which derive from international frameworks and standards such as Article 23 of the European Charter of Fundamental Rights and Freedoms and Article 14 of the European Convention on Human Rights.

#### *Proposed amendments to Article 40.1:*

The Society supports the adoption of the following wording (which was recommended by a majority of the Review Group on the Constitution<sup>7</sup>):

*"No person shall be unfairly discriminated against, directly or indirectly, on any ground such as sex, gender, race, age, disability, sexual orientation, socio-economic, colour, language, culture, religion, political or other opinion, national, social or ethnic origin, membership of the travelling community, property, birth or other status".*

#### **Law Society Recommendations**

- Article 40.1 of the Constitution should be amended to refer explicitly to gender equality and non-discrimination.
- The Society supports the adoption of the above wording (as recommended by a majority of the Review Group on the Constitution).

<sup>6</sup> Mullally S., *Gender Proofing and the European Structural Funds: Outline Guidelines*, (Government Publications, 1999)

<sup>7</sup> [Wayback Machine \(archive.org\)](#) - see also [Report of the Task Force on Implementation of the Recommendations of the Second Report of the Convention on the Constitution \(justice.ie\)](#) on majority recommendations

## 2. Article 41 of the Constitution

### **Should be amended so that it would protect family life, with the protection afforded to the family not limited to marital family**

The Society agrees that Article 41 should be amended and significantly broadened.

Article 41 protects the rights of the family based on marriage and contains a number of provisions which impose duties on the State. Article 41.1 recognises the family as the '*natural primary and fundamental unit group of Society*'. Article 41.3.1 obliges the State to '*guard with special care the institution of Marriage, on which the Family is founded*' and the Supreme Court has interpreted the references to the family in Article 41 as the family founded on marriage.<sup>8</sup>

As noted by the Superior Courts in significant decisions which include *Gorry v Minister for Justice*<sup>9</sup>, this constitutional imperative is of real practical significance for those who fall within the purview of Article 41.1, particularly in the context of immigration law.

Nevertheless, in more recent cases, a wider interpretation of the types of familial relationships protected by Article 41.1 has been contemplated by the Superior Courts examples of which include *RX, QMA & CX v Minister for Justice, Equality and Law Reform*<sup>10</sup> and the decision of Mr Justice O'Donnell in the above mentioned *Gorry*<sup>11</sup> case. However, relevant comments in both cases were ultimately *obiter*.

Following a 2015 referendum to amend Article 41, the constitutional definition of the family has been expanded to include married same-sex couples.<sup>12</sup> Legislation and public policy also recognise a much broader range of family relationships, for example, through the introduction of automatic guardianship rights to unmarried fathers in certain circumstances<sup>13</sup> and provision for cohabiting couples and one parent families in the social welfare code.

Despite positive pronouncements by the Superior Courts and positive legislative and policy developments, the definition of family within the Constitution (in particular that contained in Article 41.3.1) is based on a narrow understanding of the family that prioritises married families and fails to recognise and protect the diverse range of family forms that exist in modern Ireland.

It expressly denies protection to, and has been used to discriminate against, unmarried parents and their children, LGBTQI parents, non-biological parents and those non-nuclear

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<sup>8</sup> *State (Nicolaou) v An Bord Uchtála* [1996] IR 567. This narrow judicial interpretation has been the subject of much litigation and debate.

<sup>9</sup> [2020] IESC 55

<sup>10</sup> *RX, QMA & CX v Minister for Justice, Equality and Law Reform* [2010] IEHC 446. Mr Justice Hogan stated: 'The fact that marriage was (and, of course, is) regarded as the bedrock of the family contemplated by the Constitution does not mean that other close relatives could not, at least under certain circumstances, come within the scope of Article 41'

<sup>11</sup> *ibid*

<sup>12</sup> Article 41.4 provides that 'marriage may be contracted in accordance with law by two persons without distinction as to their sex'. Previously, the High Court defined marriage as between a man and a woman in *Zappone & Gilligan v. Revenue Commissioners & Ors* [2006] IEHC 404. See also: [IHREC \(2015\) Policy Statement on Access to Civil Marriage](#)

<sup>13</sup> Section 6 of the Guardianship of Infants Act 1964, as amended by the Children and Family Relationships Act 2015. For an overview of the amendments see: O'Toole and Mahon (2016) 'Guardianship and the family' *Bar Review*, 21(4). See further: Bergin-Cross (2015) 'The Evolution of the Definition of Marriage and the Family under the Irish Constitution', *Irish Journal of Family Law*, 15(2)

families which exist in society. Failure to recognise diverse family forms means that the care work of many people is unrecognised and devalued. While the rights of 'de facto families'<sup>14</sup> are protected by the European Convention on Human Rights, it is submitted that there can be real and practical consequences for those who cannot avail of Article 41, as is abundantly clear from decisions such as *Gorry*.

#### **Law Society Recommendations**

- That Article 41.1 is expressly amended to ensure that the recognition of a particular family unit is not contingent on the narrow protection contained in Article 41.3.1 i.e. limited to married couples.
- The amendment should expressly recognise the broader concept of family life recognised in international human rights law and should be understood to include a wide range of family relationships and situations where family members do not live in the same home.
- The amendment should guarantee all individuals respect for their family life, subject to an express statement of the circumstances in which State intervention is permissible, modelled on Article 8(2) of the ECHR.
- The amendment should recognise the right for all persons to marry in accordance with the law and found a family, in line with Article 9 of the EU Charter of Fundamental Rights, rather than afford preferential status as is currently the case.

### **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.**

The Society agrees that the text of Article 41.2 should be deleted and replaced with an alternative form of language.

#### *Problems with Article 41.2*

Article 41.2 is problematic in a number of ways.

The Society is of the view that Article 41.2 is outdated and does not encompass the variety and diversity of experiences which women have – as employees, as carers and as employers – in modern Ireland.

We share the observations of the Joint Oireachtas on Justice and Equality arising from its work on the *General Scheme of the 38th Amendment of the Constitution (Role of Women) Bill* when it noted that:

*“There was universal consensus amongst both witnesses and Members of the Committee that Article 41.2 of the Constitution as currently drafted is sexist and paternalistic, and has no place in the Ireland of the 21st century.”*

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<sup>14</sup> Article 8 jurisprudence - see for example *Kroon v Netherlands 18535/91 (1994) ECHR* and *Paradiso and Campanelli v Italy 25358/12 (January 2017)*

Article 41.2 does not recognise the work which men currently do as carers, nor does it recognise that men have duties and responsibilities to be carers. Similarly, it fails to recognise the range of different types of care, including care in the community as well as with family members and friends.

It includes a definition of family which does not reflect the reality of families in Ireland, nor the diversity of family life. It presumes a male breadwinner and a two parent household where a 'woman' stays at home. It does not take into account the reality of lone parents, LGBTQI families, or blended families.

The Society accepts that, in practice, Article 41.2 has been little more than symbolic. Its placement in the Constitution could have led to recognition of the value of the contribution women make through unpaid care work in our society. However, in practice, it has faced minimal judicial scrutiny and has had little or no impact on the positive formulation of social policy or improving the position of women. Instead of supporting the home or family, it has diminished women and again, faced minimal judicial scrutiny when the opportunity arose for the Superior Courts to conduct a textual analysis.<sup>15</sup>

#### *Amending Article 41.2 and potential wording*

The Society submits that, as part of considering any amended wording it is important to expressly recognise the value and importance of unpaid care work carried out in Ireland. Such work is often invisible and undervalued as our society places increasing emphasis on the role of paid employment to the exclusion of other forms of work, which is carried out by both men and women. The society recognises that the precise wording of any amendment can be put in a variety of ways.

##### *i. Proposed Wording of Textual Amendment Option 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."<sup>16</sup>*

This suggested amendment provides for the recognition of care in a broad and inclusive way. It notes the valuable work which is done by thousands of carers in a gender neutral way and extends the definition of care to include those who provide care in the home, outside the home and in the community.

This form of wording represents a strong symbolic commitment and covers the broadest possible subset of vulnerable carers (which include lone parents, people with disabilities and those providing unpaid care).

##### *ii. Proposed Wording of Textual Amendment Option 2:*

*"The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home as may be determined by law."*

Consideration should be given to linking the proposed amendment to Article 41.2 with proposals relating to Article 45 regarding the Economic, Social and Cultural (ESC) Rights proposed in the [Eighth Report of the Convention on the Constitution](#).

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<sup>15</sup>See for example *BL v ML (1992)*

<sup>16</sup><http://bit.ly/nwci-constitution>

That Report notes that 59% of the Convention opted to insert a provision that ‘the State would progressively realise ESC rights, subject to maximum available resources, and that this duty would be cognisable by the Courts’.

Option 4 of that Report (at page 6) queried ‘In the event that the Convention wishes to make recommendations on the issue now, are there specific additional rights that should be enumerated in the Constitution?’ 90% opted to add in rights specific to people with disabilities.

In 2018, Ireland ratified the UN Convention on the Rights of Persons with Disabilities, Article 19 of which provides for the right to independent living in the community. Disabled people should be enabled to live at home with their families. The State, in order to protect family life, should provide the supports, including personal assistance services, which are necessary to enable disabled people to live at home.

The “Proposed Wording of Textual Amendment Option 2” (above) not only provides for the broad and inclusive recognition of carers, it also provides a strong textual basis for the justiciable rights of carers in the appropriate circumstances. This would fortify arguments for the provision of supports which would enable cared for people to remain in the family home, where that is consistent with their will and preferences.

#### **Law Society Recommendations**

- That “*Proposed Wording of Textual Amendment Option One*”, or similar variations of same, should not be adopted as it ultimately offers nothing by way of a binding legal protection to these groups of people.
- That “*Proposed Wording of Textual Amendment Option 2*”, or similar variations of same, should be considered on the basis that it provides a broad and inclusive recognition of carers and a strong textual basis for the justiciable rights of carers in appropriate circumstances.

#### **Conclusion**

We hope that the Committee will find these recommendations to be useful and will be glad to engage further on any of the matters raised.

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