

Submission by the Citizens Information Board to the Department of Children, Equality, Disability, Integration and Youth on Amending the Constitution

Introduction

The Citizens Information Board (CIB) welcomes the opportunity to respond to the public consultation by the Department of Children, Equality, Disability, Integration and Youth on amending Articles 40 and 41 of the Constitution.

CIB appreciates the recommendations of the Citizens Assembly to amend the Constitution and, particularly, the recommendation to replace Article 41.2 with wording that is not gender specific, that recognises the societal value of care in both the home and in the wider community and obliges the State to take reasonable measures to support carers. The Government's intention to hold a Constitutional Referendum in November of this year (2023) on these matters is welcome in the context of the need to raise the status of care provision (both paid and unpaid) in society generally as well as in policy and political discourse.

Why Constitutional reform is important

The report of the Citizen's Assembly demonstrates not only the immense contribution of carers across Ireland, but also the gendered nature of care. While there have been some advances in recent years, there have not been adequate measures to rebalance the gendered nature of care, or for care work by both women and men to be better recognised, valued and supported.

The proposed reforms would not only be an opportunity to remove an outdated reference to a woman's place in the home, but is also a means of introducing long-overdue recognition of the contribution to both the public good and social cohesion provided by family carers, both men and women. The fact that the bulk of caring in the family is carried out by women needs to be located in a gender equality context. The rewording of Article 41.2 provides an opportunity to define in the Constitution the obvious fact that caring is gender-neutral and is a shared State-family responsibility. As a society, we must not only properly value and remunerate the work of people who provide care, but we must recognise the rights of those who need support, including disabled people, older people with care needs, and those experiencing illness. (It is recognised that many disabled people do not need care *per se* but rather an accessible environment and, for some, personal assistance).

Constitutional reform has the potential to better reflect the values and ambitions of modern Ireland thus ensuring our Constitution respects and reflects the diversity of the people and families that make

up the fabric of Irish society and make Ireland a better, more caring, inclusive and gender-equal place for people to live, provide care and receive care. Providing a more equal and caring society that supports the work of families would be a significant step forward for the cause of equality generally that will benefit not only carers but care recipients as well.

The referendum(s) will also create a necessary opportunity for both Irish society and Government to take stock of the values that underpin our Constitution, laws and policies – in particular, gender equality and the vital contribution that family carers make to the fabric of Irish society.

Principles that should underpin the reforms

CIB believes that the following general principles should be applied in developing new wordings in the relevant articles:

- ✓ Enshrine explicit constitutional recognition of the value of unpaid care provided by both women and men in the home and in the wider community and of the range of caring relationships and family types;
- ✓ Oblige the State to support those providing unpaid care and to acknowledge a person’s right to balance care with paid employment;
- ✓ Recognition of care provided outside of the home and unpaid care work in the community more broadly, all of which are of significant benefit to society as a whole;
- ✓ Create and improve employment supports and work-life balance policies for caring households;
- ✓ Recognition of the significant caring that takes place across the life-cycle;
- ✓ Provision for full-time family carers to have enforceable rights;

Three constitutional amendments recommended by the Citizens Assembly

For purposes of clarity, the table below sets out current provisions in Bunreacht na hEireann, the new wording proposed and some observations on each by CIB.

Current Wording	Proposed Wording	CIB observations
<p>Art. 40.1 All citizens shall, as human persons, be held equal before the law. 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>Art. 40.1 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.</p>	<p>The reasons for using the term ‘sex’ here rather than ‘gender’ need to be fully explained. This will be important in order to, as far as possible, avoid the focus in pre-referendum discussions drifting into opposing views about gender identity and related matters.</p>
<p>Art 41.2 1° In particular, the State recognises that by her life within the home, woman gives to the</p>	<p>Art 41.2 1° The State recognises that care within and outside the home and Family gives to the</p>	<p>Consideration should be given to including ‘community’ in the proposed change to Art. 41.2 (1).</p>

State a support without which the common good cannot be achieved. 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.	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 wording for Art. 41.2 (2) should require the State to acknowledge the right of all people who provide unpaid care in the home to a decent standard of living and adequate supports.
Art 41.3 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.	Art 41.3 1° The State pledges itself to guard with special care the Family, including but not limited to the marital family.	It is suggested that the words 'all family types' be included here.

A constitutional provision for carers to have enforceable rights would leave it up to the courts to decide whether the Government is doing enough to comply with the new Article 41.2 or if new measures, such as legislation or higher welfare payments to support carers would be required to fulfil its obligations. This approach would be critically important from a carers' rights perspective.

Number of amendments to be proposed

While CIB does not have a clear view on the number of Constitutional amendments that should be proposed, there is a plausible argument for proposing only two amendments, i.e., Art 41.2 and Art. 41.3. The proposed change to Article 40.1 does not substantively change what is there already and there is a danger that any proposed change would focus debate and create public conflict around complex issues and views on gender identity.

While it is very likely that the majority of citizens would support a strong recognition of carers and care work in the Constitution, the referendum may raise some contentious issues, for example, potential exchequer costs, how a change in the Constitution might be interpreted by the courts; the issue of gender identity or a perception of an undermining of the role of women in the home which is currently protected by the Constitution. (It should be noted that existing Constitutional Protection has rarely resulted in legal protection for women in the home). Great care will, therefore, be required in the run-up to the referendum that the discussion does not get bogged down in these matters to the detriment of the core changes required, viz., constitutional recognition for gender-neutral family caring, recognition for all family types and, enforceable rights for unpaid carers.

The broader context for Constitutional reform

It is highly likely that a significant minority of people in Ireland still hold traditional views about gender-based roles and responsibilities.¹ Clearly, gender inequality continues to be a marked feature of home

¹ Safe Ireland, 2019, 'Gender Matters in Ireland', <https://www.safeireland.ie/policy-publication/#dfliip-df-7296/1/>

and family life in Ireland and the issue of perceived and actual roles of women in the home needs to be proactively addressed. Women continue to have a disproportionate share of caring responsibilities generally. Women spend twice as much time as men on caring and housework.² The CIB submission to the Citizens' Assembly on Gender Equality³ emphasised the role that education and awareness raising, starting from an early age, can play in combatting negative gender stereotypes and norms. The Submission called for further measures to promote positive gender stereotypes, to create family friendly working environments, to promote participation by all genders in occupationally segregated areas.

The CIB submission also highlighted some anomalies in social welfare provisions that impact on carers. For example, Carer's Benefit is not available for the second time for a person a carer had cared for previously, even though the carer has sufficient PRSI contributions.

There needs to be a much stronger focus on measures to reconfigure the gendered nature of care work, and to create the conditions to encourage men to take on more such work both in the home and in paid work roles. The vital contribution to society of families in a caring role needs to be explicitly acknowledged while removing the clear gender bias currently contained in the Constitution.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires States to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation' and to take all appropriate measures to eliminate prejudices and practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Commenting on these obligations, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has stated: "Inherent to the principle of equality between men and women, or gender equality, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices".⁴ This, it is suggested, is a core rationale for constitutional change.

The definition of care examined by the Citizens Assembly and the Oireachtas Committee relates to all forms of professional and unpaid care – childcare, eldercare, homecare and informal care. Hence the Citizens Assembly includes numerous recommendations in relation to the pay and working conditions of professional carers as well as improving income and respite support for family carers. This is a key consideration which needs to be addressed in parallel with constitutional reform.

In addition to constitutional change, the Citizens Assembly Report set out comprehensive recommendations on a range of other gender equality measures; on childcare, care and social protection; on measures to address Domestic, Sexual and Gender Based Violence (DSGBV); on the role

² ESRI and IRHEC, 2019, 'Caring and Unpaid Work in Ireland', [Caring and unpaid work \(esri.ie\)](https://www.esri.ie)

³ Citizens Information Board Submission to Citizens Assembly, https://www.citizensinformationboard.ie/downloads/social_policy/submissions2020/citizens_assembly_gender_equality_2020_questionnaire.pdf

⁴ CEDAW (2010) General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, para 22, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>

that education can play in challenging gendered norms and stereotypes; on the impact of pay and workplace conditions on gender equality; on how to achieve gender equality in leadership, politics and public life; and on how the gender equality principle can be protected through law and policy.

A joint ESRI and IHREC 2019 report⁵ identified a need for changes in social and employment policies that support carers, facilitate the combination of care and employment and encourage greater male participation in care. It also highlighted the need to address the clear connection between caring responsibility and gender inequality in the labour market and states (p.xiii) that without greater equality in terms of unpaid work, greater gender equality in the labour market is unlikely to be achieved.

Supporting full-time carers

CIB has over the years regularly called for stronger supports for full-time family carers. For example, CIB's submission to the Citizens' Assembly on Gender Equality⁶ proposed adequate income supports for full-time carers, including pension solutions, more flexible work options and, very importantly, the need for a different approach to means-testing for Carer's Allowance. CIB has also previously called for changes in organisational culture to normalise part-time working by men. Irrespective of what Constitutional reform is implemented, these remain critical matters.

Childcare provision and women's participation in the labour force

Access to childcare plays a considerable role in enabling women to take part in the labour force. There is no legal right to childcare in Ireland, unlike many other European countries. Childcare provision is not considered an essential public service and relies largely on the private sector, and investment in childcare in Ireland is lower than the EU average.⁷ This deficit will continue to undermine people's ability to combine caring with employment irrespective of constitutional change.

Constitutional reform as a first step

Constitutional reform is an important and necessary starting point. The proposed referendum is a significant first step in reordering the gender imbalance that still exists in many aspects of our society. However, measures to support the balancing of work with providing care in the home must be part of a suite of measures by which Government supports family care, including those who choose to care full time. Those who do leave the workforce to care must be supported to re-enter it through appropriate reactivation initiatives when their caring role comes to an end, and offered adequate social protection in order to ensure that they do not fall into poverty through caring. To date, activation policies have not fully catered for women with child care responsibilities.

While including gender-neutral provisions in the Constitution will be a necessary first step, strong public policy leadership will be required to fully redefine what a family is in Irish contemporary society

⁵ ESRI and IRHEC, 2019, 'Caring and Unpaid Work in Ireland', [Caring and unpaid work \(esri.ie\)](https://www.esri.ie)

⁶ https://www.citizensinformationboard.ie/downloads/social_policy/submissions2020/citizens_assembly_gender_equality_2020_questionnaire.pdf

⁷ Houses of the Oireachtas, 2019, 'Childcare in Ireland: An Analysis of Market Dynamics, Public Programmes and Accessibility', Parliamentary Budget Office Report No. 70 of 2019, <https://www.data.oireachtas.ie/>

and in order to move from aspiration over many years to reality. The stronger valuing of unpaid care may not be a guaranteed outcome of constitutional reform.

Implementing existing legislation

CIB is of the view that the focus in public and policy discourse on the need for constitutional reform should not in any way detract from the need to proactively implement current policies as well as introducing reforms allowable under current constitutional and legislative provisions. While some new legislative provisions may be required in the context of the proposed constitutional reforms, equally important is the need to fully implement existing legislation, in particular, the Work Life Balance and Miscellaneous Provisions Act 2023, the Assisted Decision-making (Capacity) Acts 2015 and 2022, the Disability Act 2005, the Carers Leave Act 2001, the EPSEN Act 2004. The long-promised statutory home support scheme also needs to be instigated and implemented. While at present, there is no statutory entitlement to receive formal homecare or home support in Ireland, it is noted that the Department of Health is developing a new statutory scheme for home support services in line with Programme for Government and Sláintecare commitments. The effectiveness of such a scheme will relate to some extent to the status given to care provided in the home in a reformed Constitution.

Also important is the full implementation of Article 19 (b) of the UN Convention on the Rights of Persons with Disabilities which stipulates that disabled people should have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community. Clearly, stronger Constitutional recognition for carers will only be effective to the extent that there is an in-home support infrastructure in place for people to enable them to live in the community.

Since the majority of care in the community is provided by family and friends, it is imperative that the Commission on Care, as committed to in the Programme for Government is established. Its Terms of Reference should include an examination of the role and contribution of family carers and how these can be enhanced.

Concluding points

CIB is fully supportive of the replacement of Art 41.2 with wording that recognises the societal value of care provided in the home by both women and men. Constitutional change as proposed should also serve to focus attention on the rights of people being cared for, in particular, to receive care in accordance with assessed needs.

There will be a clear need to publish enabling legislation to show people what this would mean in practice, as was the case in the marriage equality, Repeal the 8th Amendment and rights of children referenda.

Setting out a tight timeline for a referendum as proposed by Government has potential pitfalls. The processes by which the wordings put to referendum will be agreed will be critically important as will the need for a clear statement of the laws and policies which will be introduced on foot of any amendment being accepted by the people.

One of the most important points for consideration is how we can protect family carers from any negative debate or scrutiny during the referendum campaign, and what damage might be done in the unlikely event that the referendum on Article 41.2 was unsuccessful.

It is clear that there will be practical challenges associated with constitutional rewording, not least of which is the need to balance a meaningful recognition of care work against the possible implications for exchequer funding that may arise to protect any rights afforded to unpaid carers in the Constitution.

As well as rendering Article 41.2 gender neutral, further questions arise as to how care work generally is to be recognised and supported. There is a very wide range of caring relationships in practice, some of which involve care work beyond the family home. This suggests that there is a need to include within Article 41.2 a positive obligation on the State to provide a reasonable level of support to all those providing care in the community.