

Children's Rights Alliance Position on the 39th and 40th Referendums

March 2024



Introduction

- The Children’s Rights Alliance unites over 150 organisations working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services. We identify problems for children. We develop solutions. We educate and provide information and legal advice on children's rights.
- The 39th (family) and the 40th (care) referendums will take place on Friday 8 March 2024. The purpose of the 39th amendment is to respond to recommendations of the Citizens’ Assembly on Gender Equality, and the Joint Oireachtas Committee on Gender Equality which recommended that a referendum be held to amend Article 41 of the Constitution to broaden the protection afforded to families other than the marital family by expressly providing for ‘a wider concept of the Family’.¹ The purpose of the 40th amendment is to respond to recommendations from the Joint Oireachtas Committee on Gender Equality, and the Citizen’s Assembly on Gender Equality ‘to remove ‘women in the home’ reference in Article 41.2 of the Constitution and to replace it with language that is not gender specific, and which provides recognition of care.’²

¹ See ‘Explanatory Note’ on the General Scheme to the 39th amendment to the Constitution Bill 2023 accessed at <https://www.gov.ie/pdf/?file=https://assets.gov.ie/278316/399508f5-55fc-4e80-b943-20535eadacdf.pdf#page=null>.

² See ‘Explanatory Note’ on the General Scheme to the 40th amendment to the Constitution Bill 2023 accessed at: [d61a1179-d630-4ad7-95e3-5a2c7b373ec9.pdf \(www.gov.ie\)](https://www.gov.ie/pdf/?file=https://assets.gov.ie/278316/d61a1179-d630-4ad7-95e3-5a2c7b373ec9.pdf).

The Family Amendment

What is being proposed?

Article 41 of the Constitution provides that:

In Article 41.1.1° ‘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.’

In Article 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.’

The Constitution currently recognises the centrality of the family unit in society and protects the Family founded on marriage.

The amendment being put to the people contains two changes. The proposed changes involve the insertion of additional text to Article 41.1.1°, and the deletion of text in Article 41.3.1°. If passed, Article 41.1.1° will have additional text inserted, which is shown below in bold:

Article 41.1.1° ‘The State recognises the Family, **whether founded on marriage or on other durable relationships**, 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.’

The proposed change to Article 41.3.1° is to delete the text with a line through it, as shown below:

Article 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.’

According to the Electoral Commission, if the majority vote Yes then:

- The constitutional protection of the Family would be given to both the Family based on marriage and the Family founded on ‘other durable relationships’.
- The Family founded on marriage means the unit based on a marriage between two people without distinction as to their sex.
- The Family founded on other durable relationships means a Family based on different types of committed and continuing relationships other than marriage.
- So, different types of family units would have the same constitutional rights and protections.³

³ Electoral Commission ‘Referendums Explained’ <<https://www.electoralcommission.ie/referendums/referendum-information/what-are-you-being-asked-to-decide-on/#FamilyAmendment>> accessed 27 February 2024.

Why does the Constitution need to be changed?

The Irish Constitution places great importance on the family and defines it as ‘the natural, primary and fundamental unit group of society’ (Art. 41). However, approximately 510,000 (40 per cent) of children in this country are raised in non-marital families,⁴ and these children do not have the same right to protection under the Constitution as children in married families. The Constitutional Review Group 1996,⁵ and the recent Citizen’s Assembly on Gender Equality⁶ called for the definition of the family to be updated so that all children are represented within their Constitution.

What does the law currently say?

In the past, the Irish Courts have narrowly interpreted the constitutional family as only including marital families, and the article has been previously used by the Irish Courts to uphold discrimination against children born outside marriage.

In the case of *Murphy v Attorney General*, the court held that Article 41 prohibits the introduction of any laws that treat married families less favourably than other families.⁷ The Supreme Court has held in the case of *O’B. v S.*⁸ that Article 41 can be used to justify the introduction of laws that treat marital families more favourably than other families. In this particular case, it was held to be permissible to exclude children whose parents are not married to each other from certain succession rights. The position that families not based on marriage are unprotected under Article 41 has been affirmed by the court in 2010 with the case of *McD. v L.*⁹

While unmarried mothers have rights in relation to children under the Constitution, these do not flow from Article 41 but from Article 40.3, which provides a weaker constitutional protection in that they only need to be protected ‘as far as practicable’.¹⁰ In *G. v An Bord Uchtála*,¹¹ the Supreme Court established that while an unmarried mother was automatically the guardian of her child and has rights in relation to her children, their relationship did not amount to a ‘family’ within the terms of the Constitution.

Unmarried fathers historically had no constitutional rights at all in relation to children.¹² In *The State (Nicolaou) v An Bord Uchtála*,¹³ Walsh J. considered it ‘abundantly clear that the father of an illegitimate child has no natural right to either the custody or society of his child’.¹⁴ Changes in legislation and the Children’s Referendum have partially addressed the issue, but not fully. For instance, Article 42A of the Constitution provides the same protection to children in married families and non-married families in circumstances where parents act ‘in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected.’ Before this change, it was believed that there was a higher bar for the State to reach before it could step in and protect children in married families.

⁴ Central Statistics Office, Census of Population 2022 Profile 3 - Households, Families and Childcare <<https://www.cso.ie/en/releasesandpublications/ep/p-cpp3/censusofpopulation2022profile3-householdsfamiliesandchildcare/families/>> accessed 20 February 2024.

⁵ Report of the Constitutional Review Group <<https://bit.ly/48N6VDj>> accessed 27 February 2024.

⁶ Citizen’s Assembly on Gender Equality <<https://bit.ly/48wDCV5>> accessed 27 February 2024.

⁷ [1982] IR 241

⁸ [1984] IR 316.

⁹ *McD v L* [2010] 2 IR 199

¹⁰ *G v An Bord Uchtála* [1980] IR 32

¹¹ [1980] IR 32

¹² *State (Nicolaou) v An Bord Uchtála* [1966] IR 567

¹³ [1966] IR 567.

¹⁴ [1966] IR 567.

The recent Supreme Court ruling in *O'Meara v Minister v Social Welfare*¹⁵ involved a father who was denied access to the widowers' pension because he was not married to his partner of 25 years. He had been self-employed with three children, so the denial of the pension caused the family huge hardship. In the case, the Supreme Court ruled that the denial of the widowers' pension amounted to invidious discrimination under the 'equality before the law' guarantee. This is extremely welcome as the Court rarely finds for litigants under the equality guarantee. The outcome of the case is that the State is not able to discriminate against children of unmarried couples when it comes to welfare regimes. However, the Court affirmed that the family in the Constitution under Article 41 still only protects married families.

Notwithstanding this case law, certain legal changes have occurred to provide better equality and recognition to non-marital families. For example, the Children and Family Relationships Act 2015 provides mechanisms for step-parents to be recognised as legal guardians, and for parents where a child is conceived through assisted human reproduction. However, in the absence of constitutional protection, it would still be open to a future Government to change the legislation.

Children's Rights Analysis

The UN Convention on the Rights of the Child

Parents and families are central to a child's life, and the rights of parents and children are inextricably linked. The UN Convention on the Rights of the Child (UNCRC) clearly highlights the important relationship between children's rights and those of their family and focuses on the substance of family relationships rather than the form. The UNCRC:

- Recognises the family as the 'fundamental group of society and the natural environment for the growth and wellbeing of...children' (Preamble).
- Acknowledges that parents have the 'primary responsibility' for their child's upbringing and development (Article 18).
- Affirms that the family itself requires protection and assistance to fulfil its responsibilities, and places a duty on States to support parents in rearing their children (Article 18).

Under the UNCRC, the term 'parent' is interpreted to mean genetic, birth, and psychological parent, the latter referring to a person who is not biologically related to the child but cares for the child for significant periods of their childhood,¹⁶ such as a step-parent. The UNCRC protects children against discrimination in a number of ways, including on the basis of parentage. Article 2 provides that:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the

¹⁵ [2024] IESC 1.

¹⁶ UNICEF (2007) Implementation handbook for the UN Convention on the Rights of the Child, Fully Revised third Edition, Geneva: United Nations Children's Fund, pp.104-5.

status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The Committee on the Rights of the Child has recognised that 'young children may suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values'.¹⁷ The Committee further sets out that States 'have a responsibility to monitor and combat discrimination in whatever forms it takes and wherever it occurs - within families, communities, schools or other institutions'.¹⁸

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) also prohibits discrimination on any ground including birth or other status.

European Convention on Human Rights

Family life is also protected in Article 8 of the European Convention on Human Rights (ECHR), which provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
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 wellbeing 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.

Article 14 of the ECHR also prohibits discrimination, for example on grounds of birth, when ECHR rights are engaged.

In contrast to the Irish Constitutional definition of the family, the European Court of Human Rights has recognised the right to family life in cases where there are close personal ties between the parties, rather than looking at the format of the non-married family unit, or whether or not the parents of the child live together.¹⁹ The Court has also determined that Article 8 further extends its protection of family life²⁰ to relationships between children and grandparents,²¹ siblings,²² and also aunts and uncles.²³ Irish domestic legislation, the Children and Family Relationships Act 2015, reflects the importance of these relationships and allows for all of those named categories to apply for custody of the child.²⁴

¹⁷ UN Committee on the Rights of the Child, General Comment No. 7 on implementing child rights in early childhood CRC/C/GC/7/Rev.1 20 September 2006.

¹⁸ UN Committee on the Rights of the Child, *General Comment No. 7 on implementing child rights in early childhood* CRC/C/GC/7/Rev.1 20 September 2006.

¹⁹ *Johnston v Ireland* (1986) 8 E.H.R.R. 214 and *Keegan v Ireland* (1994) 18 E.H.R.R. 342. Article 8 of the ECHR guarantees respect for private and family life, home and correspondence. The general principle applied by the European Court of Human Rights in deciding if family life exists for the purpose of art.8 is whether there are close personal ties between the parties. The family based on marriage comes within art.8, and the court has also recognised family life in the context of a cohabiting heterosexual couple with children in *Johnston*. Cohabitation is not necessary though and in *Keegan* family life was found where the couple were not living together.

²⁰ As noted by Kilkelly, "Child Law and the ECHR: Issues of Family Life, Adoption and Contact" in Kilkelly, *ECHR and Irish Law*, 2nd edn (Bristol: Jordans, 2009) at 135.

²¹ *Marckx v Belgium* (1979-1980) 2 E.H.R.R. 330.

²² *Boughanemi v France* (1996) 22 E.H.R.R. 228.

²³ *Boyle v United Kingdom* Comm. Rep. 9 February 1993.

²⁴ Children and Family Relationships Act 2015, s.57.

Case Law

In the case of *Keegan v Ireland*,²⁵ the European Court of Human Rights (ECtHR) found that the definition of family under Article 8 is not confined solely to marriage-based relationships, and that it can encompass other 'de facto' relationships based on family ties.²⁶ This position was further accepted within the ECtHR by which they acknowledged traditional families could coexist with what it has called the 'de facto' family. In this instance, the Court was referring to the relationship between a man, his partner, and her child, born as a result of artificial insemination, being recognised as such.²⁷ The distinction between traditional and de facto families has been further outlined by the ECtHR in the recognition of a cohabiting same-sex couple without children 'living in a stable de facto partnership.'²⁸

The ECtHR has acknowledged that family can exist in situations where individuals cohabit without being legally married, recognising the importance of considering the actual personal ties and the consistency of the relationship over time.²⁹ It highlighted that for a relationship to qualify as a 'de facto' family, there should be consistency and stability in the relationship, and there should be close personal ties between the individuals involved.³⁰

The European Convention on Human Rights Act 2003 (ECHR Act) gave further legal effect to the European Convention on Human Rights into Irish Law. As such, section 3(1) requires every organ of the State to perform its functions in a manner compatible with the State's obligations under the Convention provisions. This means that the Irish courts are required to consider a person's rights under the ECHR when giving decisions, and that the Government needs to make sure that its own policies and practices are in line with the Convention. The ECHR Act does not provide any new rights in Irish law. However, under section 5, the courts can issue a declaration of incompatibility where no other legal remedy is adequate or available. The legal effect of the ECHR Act is that while the Government and Irish courts are obliged to take account of children's rights to family life under the ECHR, the remedy available is weaker than if it were a constitutional provision.

What will the amendment do?

Widening the definition of the family in the Constitution to include children in non-marital families will be powerful symbolically and represents an important step in recognising the importance of family life. It is unacceptable today that when children look to the Constitution, their family is not formally recognised. While in the case *O'Meara v Minister v Social Welfare* the Supreme Court held that children in non-marital families should be treated equally, it still affirmed that they do not belong in the definition of the family under Article 41 of the Constitution.³¹

In terms of the legal effect, the amendment is unlikely to be significant due to the recent family law reform which has recently taken place.³² However, expanding the definition of the family to include children in non-marital families legally copper-fastens the recent reforms, and provides an additional safety net should a future Government wish to take retrograde steps in important areas such as access, custody, and guardianship; areas which did not arise in the Supreme Court judgment in *O'Meara*. It is likely that the amendment would make it more difficult for the State to justify discrimination against non-marital families (perhaps, for example, for non-biological, social parents

²⁵ *Keegan v Ireland* App No. 16969/90 (ECHR, 26 May 1994)

²⁶ *Keegan v Ireland* App No. 16969/90 (ECHR, 26 May 1994) para 53.

²⁷ See *X, Y & Z v The United Kingdom* App No. 21830/93 (ECHR, 22 April 1997)

²⁸ *Schalk and Kopf v Austria* App No. 30141/04 (ECHR, 24 June 2010) para 91.

²⁹ *C.E. And Others v. France* App No. 29775/18 & 29693/19 (ECHR, 24 March 2022) para 49.

³⁰ *C.E. And Others v. France* App No. 29775/18 & 29693/19 (ECHR, 24 March 2022) para 49.

³¹ [2024] IESC 1.

³² Children and Family Relationships Act 2015 and ECHR Act 2003.

of children, who currently do not enjoy constitutional rights).³³ Lastly, elevating a wider definition of family life to the Constitution will potentially provide greater remedies to an individual child or family member should their rights not be respected. For instance, they could potentially seek a declaration of invalidity, compensation, injunction, or damages, including exemplary damages. Changing the definition of the family would allow for all families to have access to the same levels of relief under the Constitution. At the same time, it is important to note that when the courts exercise judicial power, they do so very cautiously. There is a presumption that laws and actions taken by the Government are constitutional unless proven otherwise,³⁴ a high bar to prove and the courts are often deferential to Government.

It is notable that if the amendment passes, the Constitution will still provide for protection of the institution of marriage. It does not give 'durable relationships' a status similar to marriage. In deciding cases the courts will have to read the two provisions together, however, the wording of the provision means that the Government or Oireachtas will still be able to privilege the married family if it can legally justify it. In the case of *O'Meara* the Supreme Court was clear:

As already set out, in the primary clause the State pledges itself to guard with special care the institution of Marriage, and to protect it against attack. The State, therefore, must not discriminate against or disadvantage married couples by treating them less favourably than other unit groups of society. The corollary is not, however, an obligation or a right to discriminate against non-marital families.³⁵

If the amendment is passed, the concept of the 'Family' under the Constitution will be expanded from the marital family to encompass families based on other kinds of 'durable relationships'. The 'inalienable and imprescriptible rights' mentioned in Article 41.1.1^o will, therefore, be afforded to both families based on marriage, and families based on "other durable relationships". The amendment would not equate 'durable relationships' with marriage and it would not be possible for an individual to claim tax, succession or social welfare entitlements simply on the basis that they are in a durable relationship.³⁶ While the term 'durable relationships' is somewhat unfamiliar in human rights law,³⁷ the long-established principles of interpretation provide that ordinary words must be given their ordinary meanings and technical words their technical meanings, unless absurdity would result.³⁸ Further, it would appear to the Children's Rights Alliance that the Government, in using the term 'durable relationships', is seeking to adopt a similar definition as the European Court of Human Rights of what constitutes a family.³⁹ Should the amendment be carried by the public, legislators will need put in place legislation that defines 'durable relationships' to give effect to the stated intention behind the amendment.

Children's Rights Alliance Position

The Children's Rights Alliance supports a Yes Vote in the Constitutional amendment on the Family. A Yes Vote will send a message to children in non-marital families and society as a whole that their families are equal and should be valued. It will also provide better protection legally to children in non-marital families. The wording chosen by the Irish Government in the Family Amendment moves

³³ Dr Brian Barry et al, Letters to the Editor, Irish Times, 2 March 2024.

³⁴ Hogan and White, JM Kelly, *The Irish Constitution* (4th edn) (Tottel 2003) 871 -872.

³⁵ [2024] IESC 1.

³⁶ Dr Brian Barry et al, Letters to the Editor, Irish Times, 2 March 2024.

³⁷ However it is a term recognised in European Law.

³⁸ Law Reform Commission Consultation Paper on Statutory Drafting And Interpretation: Plain Language and The Law <<https://bit.ly/3UQsiA8>> accessed 27 February 2024.

³⁹ Minister Roderic O'Gorman T.D., Amendment of the Constitution (The Family) Bill 2023: Second Stage, Seanad Debates, 22 January 2024.

the definition of the family in the Irish Constitution away from a rigid formulation towards a more flexible, realistic, and practical approach. It does not define the family as such, as the Government has chosen wording that can be interpreted over time. However, the intention behind the amendment is to protect children in all family types, in particular, children in non-marital families. If the Irish people approve the amendment, there will be a need for Government to carry out an audit of existing law and policy to identify any remaining gaps in protecting the rights of children in non-marital families. The Government will also need to introduce additional legislation to give effect to the new constitutional standard of durable relationships in Irish law.

The Care Amendment

What is being proposed?

The Care Amendment proposes to delete the current Articles 41.2.1° and 41.2.2°, and insert a new Article 42B. These articles currently read:

Article 41.2.1° ‘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.’

Article 41.2.2° ‘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.’

In this amendment, there is one vote for two proposed changes. The proposed changes involve deleting Article 41.2.1° and Article 41.2.2°, and inserting a new Article 42B, as shown below:

‘The State recognises that the provision of care, by members of a family to one another by reason of the bonds that exist among them, gives to Society a support without which the common good cannot be achieved, and shall strive to support such provision.’

According to the Electoral Commission, the new ‘42B would, firstly, recognise the importance to the common good of the care provided by family members to each other. Secondly, it would provide that the State would ‘strive to support’ the provision of such care within families.’

Why does the Constitution need to be changed?

The wording of Article 41.2 has been found to represent a gender stereotype because it only reflects one aspect of a woman’s life.⁴⁰ ‘A gender stereotype is a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women’.⁴¹ Article 41.2 has been criticised because it only reflects women’s role in the home and does not recognise the role of men and other people in providing care.⁴²

⁴⁰ UN Committee on the Elimination of Discrimination against Women, “Concluding comments: Ireland” CEDAW/C/IRL/CO/4-5 para 24-25 Irish Human Rights and Equality Commission, 2018, “Article 41.2 of the Constitution of Ireland” 5.

The Commission for the Status of Women, “Report to Government, January 1993” 535.

The Constitutional Review Group, 1996, “Report of the Constitution Review Group” 701.

The Constitutional Convention on Women “Second Report of the Convention on the Constitution” 40.

All-Party Oireachtas Committee on the Constitution, “1st Progress Report” 227.

All-Party Oireachtas Committee on the Constitution, “Tenth Progress Report (The Family)” 108.

Irish Human Rights Commission, “Submission to the UN Human Rights Committee on the Examination of Ireland’s Third Periodic Report on the ICCPR” para 180

⁴¹ Office of the High Commissioner for Human Rights ‘Gender Stereotyping as a Human Rights Violation’ <[M01_S09_Cusack.pdf \(un.org\)](#)> accessed 27 February 2024.

⁴² UN Committee on the Elimination of Discrimination against Women, “Concluding comments: Ireland” CEDAW/C/IRL/CO/4-5 para 24-25 Irish Human Rights and Equality Commission, 2018, “Article 41.2 of the Constitution of Ireland” 5.

The Commission for the Status of Women, “Report to Government, January 1993” 535.

The Constitutional Review Group, 1996, “Report of the Constitution Review Group” 701.

The Constitutional Convention on Women “Second Report of the Convention on the Constitution” 40.

All-Party Oireachtas Committee on the Constitution, “1st Progress Report” 227.

All-Party Oireachtas Committee on the Constitution, “Tenth Progress Report (The Family)” 108.

The current Constitutional provision has not delivered any substantive rights or remedies for women working in the home. The most important case in this area is *L. v. L.*⁴³ In this case, Judge Barr in the High Court accepted that Article 41.2 obliged the courts to have regard to work done as a home maker in calculating a wife's share in the matrimonial home. However, this was rejected on appeal by the Supreme Court who held that it was a matter for the Oireachtas to set out any legal principles for determining shares in the matrimonial home.⁴⁴

Children's Rights Analysis

The UNCRC does not contain express obligations concerning gender stereotyping. Rather, the treaty deals more with the stereotyping of children and their dependent status on adults. However, the UNCRC does acknowledge family care in Article 18, stating that 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child'.⁴⁵ This puts an emphasis on both men and women having a role in the home.

The UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) deals with gender stereotyping in Article 5. It requires States Parties to take 'all appropriate measures' to 'modify the social and cultural patterns of conduct of men and women' in an effort to eliminate practices that 'are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'

CEDAW recommends that States Parties 'develop and implement effective measures [...] to address and eradicate the stereotypes, prejudices, customs and practices set out in Article 5 of the Convention, which condone or promote gender-based violence against women and underpin the structural inequality of women with men'.⁴⁶

Gender stereotypes and their prevalence in society affect children and their development. In many instances 'expected gender roles are learned from birth and re-intensified through childhood and adolescence'.⁴⁷ Children, in their most formative years, easily latch on to this labelling process that is presented to them. Examples of this include how 'children learn to 'do gender' in accordance with gender norms,' like how 'girls are more likely to be...given toys to encourage caregiving'.⁴⁸ This points to the idea that women are caregivers by nature, leading to the stereotype that they should remain in the home;

'Harmful stereotypes about women's role in the home and a man's role as 'the breadwinner' perpetuates discriminatory gender norms around housework and childcare. This impacts potential of parenting roles and can impact career and life choices and children's development. Harmful stereotypes around parenting roles can

Irish Human Rights Commission, "Submission to the UN Human Rights Committee on the Examination of Ireland's Third Periodic Report on the ICCPR" para 180

⁴³ [1989] ILRM 528 (High Court) and [1992] ILRM 115 (Supreme Court).

⁴⁴ [1989] ILRM 528 (High Court) and [1992] ILRM 115 (Supreme Court).

⁴⁵ UN Committee on the Rights of the Child, Article 18 (1).

⁴⁶ UN Convention on the Elimination of All Forms of Discrimination against Women, "General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19" CEDAW/C/GC/35 para 30(b).

⁴⁷ UNICEF, "Dismantling stereotypes to drive equality" <<https://bit.ly/3wxgVTY>> accessed 27 February 2024, 3.

⁴⁸ Ibid.

mean father-child bonding is limited and children are deprived of positive role models for shared family responsibilities'.⁴⁹

Gender stereotyping impacts on all children, male and female. Societies worldwide see varying levels of gender norms that affect boys and girls alike. Stereotypes can impact 'confidence and aspirations, health and opportunities', all of which are concerns of international governing bodies.⁵⁰ Young girls may shy away from educational opportunities, while young boys may be afraid to be seen 'as being caring, emotional and nurturing, as these are characterised as 'feminine''.⁵¹ Beyond the UN, the European Union also has guidelines for states to follow in terms of the elimination of harmful gender stereotyping. In 1992, the Council of European Communities recommended that all Member States should not only 'encourage initiatives [on] the sharing of occupational, family and upbringing responsibilities arising from the care of children between women in men,' but that they also 'should promote and encourage, with due respect for freedom of the individual, increased participation by men, in order to achieve a more equal sharing of parental responsibilities between men and women and to enable women to have a more effective role in the labour market'.⁵²

Similarly, in 1996, a recommendation of the Committee of Ministers to Member States on Reconciling Work and Family Life recognised that it is 'women who most often continue to bear the principal burden of family responsibilities, [that] discrimination against women in the labour market is encouraged by insufficient sharing of family responsibilities, [and both] women and men have an increasing desire and willingness to share their family responsibilities more equally'.⁵³ However, because of the 'numerous obstacles, especially social and cultural, [that] stand in the way of a more equal sharing between women and men of their family responsibilities,' it recommended that states 'take action, within the framework of a general policy promoting equal opportunities and equal treatment, to enable women and men, without discrimination, to better reconcile their working and family lives'.⁵⁴

What will the amendment do?

The new Article 42B, if passed, the Constitution will contain a gender-neutral provision recognising care. It follows the same approach as Article 41.2 in only recognising care in the family, but with a slightly stronger obligation on the Government to support care, as clarified by the Electoral Commission who has confirmed that 'endeavour to ensure that mothers' means 'try' whereas the new wording 'strive to support such provision' means 'try very hard'.⁵⁵

The proposal in the 40th Amendment does not confer a general right to a tangible care benefit for family members providing care within families, nor does it reduce the responsibilities of the State, operating through the Government and the Oireachtas, concerning the provision of care supports.⁵⁶ In terms of the legal effect of the provision, it places a moral and political obligation on the Government to support care in the family. It is also likely to be used as an aid to judicial interpretation in the understanding of other constitutional provisions, as it is well established that

⁴⁹ Ibid 2.

⁵⁰ Ibid 3.

⁵¹ Ibid.

⁵² Council of European Communities, "92/241/EEC: Council recommendation of 31 March 1992 on child care".

⁵³ Council of Europe Committee of Ministers, "Recommendation No. R (96) 5 of The Committee of Ministers to Member States on Reconciling Work and Family Life".

⁵⁴ Ibid.

⁵⁵ RTE News, Electoral Commission chair answers referendum questions <<https://www.rte.ie/news/2024/0226/1434436-referendum-questions/>> accessed 28 February 2024.

⁵⁶ Electoral Commission, Referendum FAQ <<https://www.electoralcommission.ie/referendums/faqs/>> accessed 28 February 2024.

the Constitution should be read as a whole.⁵⁷ Ms Justice Baker, chair of the Electoral Commission has stated that what it could mean that in cases before the Courts, the State might have to justify were it not to make proper provision for care and financial or other support or recognition for care.⁵⁸ However, it is unlikely to solely result in the granting of relief owing to the use of the wording ‘strive to support’ in the proposed amendment.⁵⁹ If a person were seeking to have a right to care supports enforced under the provision, it would be unlikely to succeed as the Irish Courts are reluctant to direct the Government in matters of policy and involving public funds owing to the separation of powers doctrine.⁶⁰

Children’s Rights Alliance Position

The Children’s Rights Alliance supports a YES vote on the Constitutional Amendment on Care and welcomes the use of gender neutral and inclusive language in the amendment. Since the publication of the referendum wording there has been considerable concern about the limitations of the provision, particularly due to its inability to address inequalities. Together with the Article 40.1 (the Family) and Article 41.2 (Women in the Home), it has been argued that Article 40.1 (the Equality Guarantee) in the Irish Constitution also needs to be reformed. This is because Article 40.1 (the Equality Guarantee) has had a limited effect in addressing discrimination and inequalities in Ireland.

Article 40.1 states that ‘All citizens shall, as human person, 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.’ Article 40.1 only recognises that people are formally equal, neglecting to recognise that the actual conditions of people’s lives are unequal in reality. It does not commit the State to addressing disadvantage. The Constitution Review Group (1996) recommended amending Article 40.1 to capture a broader range of discrimination (the unequal treatment of people). Indeed, it is also notable that in international terms, Irish constitutional jurisprudence on the equality guarantee is ‘remarkably underdeveloped’.⁶¹

The Irish Constitution was passed by plebiscite by the Irish people in 1937, before the emergence of international human rights law which provides better equality and non-discrimination provisions. Children with disabilities in Ireland experience considerable inequality and are often unable to participate fully in Irish society, and this has been well documented by the Ombudsman for Children. The Children’s Rights Alliance believes that the rights of children with disabilities could be addressed under the equality guarantee, which should be revised to align it with international human rights standards, including those set out under the UN Convention on the Rights of Persons with Disabilities. Positive measures are required under such conventions to address situations of actual disadvantage in all conditions of people’s lives, including those concerning inadequate care infrastructure.

The Irish Government is carrying out a review of the Employment Equality and Equality Acts. The Children’s Rights Alliance believes that this review should be expanded to include Article 40.1 in the

⁵⁷ Hogan and White, JM Kelly, *The Irish Constitution* (4th edn) (Tottel 2003) 8.

⁵⁸ Ms Justice Baker, *Morning Ireland* 26 February 2024.

⁵⁹ Houses of the Oireachtas, Library and Research Services, *Fortieth Amendment of the Constitution (Care) Bill 2023* <<https://bit.ly/48xKZfb>> accessed 27 February 2024.

⁶⁰ Houses of the Oireachtas, Library and Research Services, *Fortieth Amendment of the Constitution (Care) Bill 2023* <<https://bit.ly/48xKZfb>> accessed 27 February 2024.

⁶¹ Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, Kelly: *The Irish Constitution* 5th edn (Bloomsbury 2018) 1562. See also Oran Doyle, *Constitutional Equality Law* (Thomson Roundhall 2004) 7.

Irish Constitution. The Children's Rights Alliance also believes that a national dialogue is needed on the equality guarantee that needs to reach all aspects of the island of Ireland. Lastly, Ireland ratified the UN Committee on the Rights of Persons with Disabilities in 2018, the State has not yet adopted the Optional Protocol which should be done as a matter of priority.