

RCNI and Safe Ireland Observations to the Joint Oireachtas Committee on Gender Equality on Proposed Draft Constitutional Amendments to Articles 40 and 41

Date: 7 November 2022

Introduction –

Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

Safe Ireland

Safe Ireland (SI) is a national development and co-ordination body working to eradicate Coercive Control (CC) and Domestic Violence (DV). We have four distinct functions: investigating the causes and effects of CC/DV; delivering frontline refuge and support services; developing guidelines for domestic violence best practice; and influencing national strategic policy. This is achieved through a network of affiliate independent frontline DV services; local communities; professionals; public bodies; academic institutions; philanthropists; and corporate partners.

There are thirty-nine DV services across Ireland affiliated as members to Safe Ireland. Each deliver various combinations of services to women and children including national and local crisis helpline and referral supports, one-to-one emotional and practical support, information, advocacy, Garda and court accompaniment, therapeutic supports, housing, and welfare advice. Twenty of these services operate staffed refuges.

Our core strategic focus is to change culture, transform systemic responses to sex, gender, and sexuality-based violence in communities across Ireland, and to progress towards creating a Safe Ireland for women, for young people, and for children.

Introduction – These Observations

RCNI and Safe Ireland are glad to have the opportunity to give its views on the various options for changes to the wording of Articles 40.1 and Article 41 of our Constitution¹ set out in the Interim Report on Constitutional Change of the Joint Oireachtas Committee on Gender Equality². The options are all related to the three recommendations on Articles 40.1 and Article 41 put forward by the Citizens' Assembly on Gender Equality in its own Report³ which were prioritised for detailed examination by the Committee. In these Observations, RCNI and SI set out preferred options under each one of the headings in the Interim Report, in same order, and also provides a brief rationale for its view under each option.

The three general recommendations made by the Citizens' Assembly in relation to Articles 40.1 and Article 41 of the Irish Constitution in their own Report are:

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

RCNI agrees in principle with each one of these general Recommendations.

RCNI's **preferred** options from those set out in the Interim Report to give expression to each of these Recommendations, are indicated below under each one of them and the relevant texts, both the current text and the suggested options for change.

1. Article 40.1 of the Constitution should be amended to refer explicitly to sex, gender and sexuality equality and non-discrimination.

Current Text of Article 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.

Suggested Option 1 to replace this Text:

- All persons shall, without distinction of **sex or gender**, be held equal before the law.
- The State in its enactments shall have due regard to the principles of equality and non-discrimination.

¹ The Irish Constitution full text is available online via this web-page (see link bottom of page): [gov.ie - Constitution of Ireland \(www.gov.ie\)](http://www.gov.ie)

² Accessible online via this web-link: [Interim Report on Amendments to the Constitution \(oireachtas.ie\)](http://oireachtas.ie)

³ Accessible online via this web-link: [report-of-the-citizens-assembly-on-gender-equality.pdf \(citizensassembly.ie\)](http://citizensassembly.ie)

Suggested Option 2 to replace this Text:

- All persons shall be held equal before the law without discrimination on any ground such as gender, race, colour, national, ethnic or social origin, association with a national minority, sexual orientation, language, religion or belief, political or any other opinion, property, birth, disability, age, or other status.

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RCNI's preferred Option is Option 1 above. It is short, easy to understand and wide in its application. It also includes reference to both sex and gender, which are not the same. In our view, it could be improved only by the inclusion in its first limb of "sexuality" after "gender" and the removal of the word "and" before "gender, thus:

"All persons shall, without distinction of sex, gender, or sexuality be held equal before the law".

This is because sex, gender and sexuality are all distinct from each other and all have been associated with unlawful discrimination. They are the core axis of family formation, of power and control. They are, further, reflective of emergent personal and social identities, expressions and intimate relationships. They structure household roles, expectations and life-experience itself in fundamental ways. The concepts and realities of sex, gender and sexuality therefore need clear distinction, rather than conflation, to enable clarity in the provision of rights, responsibilities and protections under the law.

Option 2, despite its long open list of grounds on which there should be no discrimination – is still narrower in scope than Option 1. It does not allow for any reasonable or lawful discrimination as the more subtle and nuanced wording of the second limb of Option 1 does, and its catch-all phrase "or other status" is one which might give rise to legal arguments as to what might or might not be described as another status. Sex is also absent. In our view, the simpler and wider formulation of the second limb of Option 1 is to be preferred.

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 the marital family.

Current Text of 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.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

Suggested Option 1 to replace this Text:

1° Everyone has the right to respect for their private and family life, their home and their 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 well-being 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.

Suggested Option 2 to replace this Text:

1° Everyone has the right to respect for their private and family life, their home and their 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, 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.”

RCNI and SI view is that **Option 1** is preferable to Option 2. This is because it includes “the economic well-being of the country” as a potential basis by a public authority for the (lawful and necessary) interference with the exercise of the right of an individual to respect for their private and family life, their home and their correspondence. It should be legitimate to consider the enormous cost to the public good and therefore, to the common good, of wide-spread family coercive control and violence where/if there is no lawful and necessary interference with privacy and family rights in order to prevent domestic, sexual or gender-based and other interpersonal violence within the family.

RCNI also agrees with the reframing of Article 41.1 so as to bring it into close alignment with Article 8 of the European Convention on Human Rights. After all, we are bound to have regard to the Convention in our interpretation of our own national laws.

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.

Current Text of 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.

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.

Suggested Option 1 to replace this Text:

1° In particular, the State recognises the right to respect for private and family life.

2° The State shall, therefore, meet its obligation to take reasonable measures to support care within and outside of the home.

Suggested Option 2 to replace this Text:

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.

2° The State therefore recognises that all persons have the right to affordable, dignified care appropriate to need and shall guarantee this right and the right to a decent standard of living for all carers through its laws, policies and the prioritisation of resources.

Suggested Option 3 to replace this Text:

1° The State recognises that care in the home, family and community gives society a support without which the common good cannot be achieved.

2° The State shall, therefore, take reasonable measures to support care within and outside of the home.

RCNI and Safe Ireland would prefer **Option 3** above to the other two provided.

- The first limb of Option 1 in essence repeats the text of the first limb of the proposed Article 41.1 so it is unnecessary. It is also in our view deficient in that it makes no mention of the common good. This is included in the first limb of Option 2.
- The second limb of Option 2 may be entirely unworkable, as it would be a huge burden on the State to “guarantee the right of everyone to affordable, dignified care appropriate to need”. Further, it would not only be a huge burden on the State to guarantee “the right to a decent standard of living for all carers through its laws, policies and the prioritisation of resources”, it may even be impossible, as not everything which determines whether an individual has a decent standard of living is within the control of the State.
- RCNI and Safe Ireland are concerned that including the second limb of Option 2 could even have the unintended consequence of discriminating against others who are not carers or cared for, if the disproportionately high burden of guaranteeing both affordable care to everyone and a decent standard of living for all carers means that there is not enough money to provide a reasonable level of State services to other groups who need them.
- With regard to Option 3, our understanding from the Interim Report is that the Citizens’ Assembly were reassured that the phrase “reasonable measures” in its second limb is one on which they could expect to rely as the basis for a Court order directing the State to take some action, if there were ever a Court challenge taken against the State on the basis that these measures were not reasonable in a particular case. They were also advised that the phrase in the current text, “endeavour to ensure” had not ever been the basis for a Court order directing the State to do anything to prevent women from having to work outside the home. However, its existence has been used as an argument to exclude married women from the workplace.
- However, RCNI and Safe Ireland’s view is that it is appropriate to include the concept of the common good in this Article 41.2, as Option 2 does in its first limb.
- Option 3 includes both mention of the common good in its first limb and a simple but practicable formulation in its second limb, through its inclusion of the phrase “reasonable measures”. Accordingly, that is the one which we would prefer.

Recommendations for Article 41.3 and Article 41.4

Current Text of Articles 41.3 and 41.4:

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.

3.2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that

- i there is no reasonable prospect of a reconciliation between the spouses,
- ii such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- iii any further conditions prescribed by law are complied with.

3.3° Provision may be made by law for the recognition under the law of the State of a dissolution of marriage granted under the civil law of another state.

4. Marriage may be contracted in accordance with law by two persons without distinction as to their sex, gender or sexuality.

Suggested Option 1 to replace this Text at 41.3.1 only:

41.3.1: The State pledges itself to guard with special care family life, including but not limited to the marital family.

[no change to 41.3.2, 41.3.3, or 41.4]

Suggested Option 2 to replace this Text:

3.1° Marriage may be contracted in accordance with law by two persons without distinction as to their sex.

3.2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that

- i there is no reasonable prospect of a reconciliation between the spouses,
- ii such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- iii any further conditions prescribed by law are complied with.

3.3° Provision may be made by law for the recognition under the law of the State of a dissolution of marriage granted under the civil law of another state.

RCNI and Safe Ireland's view is that **Option 1** is preferable to Option 2. This is because it focuses only on the prominence given to marriage as if a marital family were the only possibility, in the original, and replaces that emphasis on the importance of marriage with an emphasis on the importance of



the family, whether marital or non-marital. Option 2 continues the focus on marriage rather than on the family in its suggested Article 14.3.1 especially, making no mention of families as such.

Please do not hesitate to get in touch with us if you have any queries about our preferences and thank you once more for seeking our views on all the suggested Options.

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