

# Fortieth Amendment of the Constitution (Care) Bill 2023

Bill No. 92 of 2023

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## Abstract

The purpose of this Bill is to delete the current wording of Article 41.2 Bunreacht na hÉireann in both the Irish and English text and insert a new Article 42B into the Constitution of Ireland that recognises family care.



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## Summary

The purpose of [An Bille um an Daicheadú Leasú ar an mBunreacht \(Cúram\), 2023, Fortieth Amendment of the Constitution \(Care\) Bill 2023](#) is to repeal Article 41.2 Bunreacht na hÉireann, Constitution of Ireland and insert a new Article 42B into the Constitution. The existing text, the proposed text and the recommendations of the Citizens' Assembly on Gender Equality and the Joint Oireachtas Committee on Gender Equality are set out in the Table below.

Article 41.2 of the Constitution of Ireland	Citizens' Assembly recommendation	JOC on Gender Equality proposed wording	General Scheme / Bill
<p>1° Go sonrach, admhaíonn an Stát go dtugann an <b>bhean</b> don <b>Stát, trína saol sa teaghlach</b>, cúnamh nach bhféadfaí leas an phobail a ghnóthú dá éagmais.</p> <p>1° In particular, the State recognises that by her <b>life within the home, woman gives to the State</b> a support without which the common good cannot be achieved.</p>	<p>Article 41.2 of the Constitution should be deleted and replaced with language that is <b>not gender specific</b> ...</p>	<p>1° The State recognises that <b>care within and outside the home</b> and <b>Family</b> gives to the State a support without which the common good cannot be achieved.</p>	<p>Proposal to <b>repeal Article 41.2</b> Bunreacht na hÉireann.</p> <p>Proposal to <b>insert Article 42B</b> into Bunreacht na hÉireann, the Constitution of Ireland, which states:</p> <p>Admhaíonn an Stát go dtugtar <b>taca</b> don <b>Chomhdhaonnacht</b>, ar taca é nach bhféadfaí leas an phobail a ghnóthú dá éagmais, de bhíthin <b>cúram</b> a bheith á thabhairt ag <b>daoine de theaghlach dá chéile</b> toisc na snaidhmeanna atá eatarthu, agus beidh an Stát ag <b>dréim le tacú leis an gcúram sin a thabhairt</b>.</p> <p>The State recognises that the <b>provision of care, by members of a family to one another</b> by reason of the bonds that exist among them, gives to <b>Society</b> a support without which the common good cannot be achieved, and <b>shall strive to support</b> such provision.</p>
<p>2° Uime sin, <b>féachfaidh an Stát</b> lena chur in áirithe nach mbeidh ar mháithreacha clainne, de dheasca uireasa, dul le saothar agus faillí a thabhairt dá chionn sin ina <b>ndualgais sa teaghlach</b>.</p> <p>2° The State <b>shall</b>, therefore, <b>endeavour to ensure</b> that <b>mothers</b> shall <b>not be obliged</b> by economic necessity <b>to engage in labour to the neglect of their duties in the home</b>.</p>	<p>Article 41.2 of the Constitution should be deleted and replaced with language that ... and <b>obliges the State to take reasonable measures to support care within the home and wider community</b>.</p>	<p>2° The State <b>shall</b>, therefore, <b>take reasonable measures to support care</b> within and outside the home and Family.</p>	

## Introduction

On 5 December 2023 the [General Scheme of the \[Fortieth\] Amendment of the Constitution Bill 2023 \[\(Care\)\]](#) was published alongside the General Scheme of the [Thirty-ninth] Amendment of the Constitution Bill 2023 [(The Family)]. Speaking at a press conference, Minister for Children, Equality, Disability, Integration and Youth, Roderic O’Gorman TD, stated:

“[Article 41.2] seeks to contain women in a very singular role, a role that’s completely divorced from the reality of women’s lives, women’s careers across our State today”.<sup>1</sup>

According to the Department, the Minister for Children, Equality, Disability, Integration and Youth, Roderic O’Gorman TD, wrote to the Joint Committee on Children, Equality, Disability, Integration and Youth seeking a waiver for pre-legislative scrutiny (PLS). The Government received the waiver on 6 December 2023 and the Bills were published on 8 December 2023. Therefore, there is no substantive difference between the text of the General Scheme and [Fortieth Amendment of the Constitution \(Care\) Bill 2023](#) (hereafter ‘the Bill’). The [Explanatory Memorandum](#) states the purpose of the Bill is to:

“... delete the current wording of Article 41.2 in both the Irish and English text and insert a new Article 42B into the Constitution that recognises family care.”

Certain recommendations of the Citizens’ Assembly related to other subsections of Article 41 of the Constitution are addressed in the [Thirty-Ninth Amendment of the Constitution \(Family\) Bill 2023](#). The L&RS has published a [Bill Briefing](#) and a Bill Digest on this Bill separately.

If the Bill is passed by both Houses of the Oireachtas the proposals to repeal Article 41.2 and to insert a new Article (Airteagal 42B, Article 42B) into Bunreacht na hÉireann, Constitution of Ireland, will be put to the People in a referendum. According to a [Government press release](#) the referendum is scheduled to be held on 8 March 2024.

This *Digest* will look at the legal and policy context related to Article 41.2 of the Constitution of Ireland, including an appeal pending before the Supreme Court in relation to Carer’s Allowance, as well as the provisions of the Bill, particularly the proposed new Article [42B](#).

### Related Library and Research publications and resources:

- [Bill Briefing](#) on Fortieth Amendment of the Constitution (Care) Bill 2023 [internal only]
- Bill Briefing [internal only] and Bill Digest on Thirty-Ninth Amendment of the Constitution (Family) Bill 2023
- [Blog on Motion - Delivery of a Rights-Based Care Economy in Ireland](#), September 2023 [internal only]
- L&RS (2019) [Spotlight: Mind the care gap Exposing the health system’s vulnerability to the gap between family care provision and anticipated demand](#)
- L&RS (2018) [Note on Article 41.2 of the Constitution](#)

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<sup>1</sup> Jack Horgan-Jones, ‘[Referendums on women in the home and the concept of the family to be held next March](#)’, *Irish Times*, 5 December 2023.

## Critique and previous proposals to amend Article 41

### Critique of Article 41.2

Article 41 of the Constitution of Ireland (Bunreacht na hÉireann) relates to the Family. According to the leading constitutional law textbook, *Kelly*:

“These Articles [41 and 42] are among the most innovatory in the entire Constitution. ... The Articles are generally thought to have been inspired in part by papal encyclicals and by Catholic teaching ...”<sup>2</sup>

This textbook also states:

“Because of the conservative ideology underpinning Articles 41 and 42, aspects of these Articles are arguably under more strain than many other provisions of the Constitution, given the increasing secularisation and liberalisation of Irish society beginning in the 1960s.”<sup>3</sup>

Furthermore, *Kelly* describes Article 41.2, which is reproduced in full in Box 1 below, as “the single most dated provision of the Constitution”.<sup>4</sup> It should be noted that the precise meaning of this provision was contentious even at the time of drafting the Constitution. It has been argued that the papers from drafters of the Constitution, Éamon deValera and John Hearne in particular, indicate that the provision did not intend to either confine women to the home or to limit the rights of women.<sup>5</sup>

#### Box 1: Article 41.2 Bunreacht na hÉireann, Constitution of Ireland

**Article 41.2 Bunreacht na hÉireann, Constitution of Ireland** provides:

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.

Some of the critiques over the years are summarised in the 2018 L&RS [Note on Article 41.2 of the Constitution](#). Article 41.2 has also been the subject of much criticism of United Nations Treaty Monitoring Bodies, in particular suggesting that the provision perpetuated gender stereotypes.<sup>6</sup>

Similarly, in 2018, in its Policy Statement on Article 41.2, the Irish Human Rights and Equality Commission (IHREC) raised concerns about gender stereotyping and recommended the repeal and replacement of Article 41.2.<sup>7</sup>

<sup>2</sup> Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, [Kelly: The Irish Constitution](#), Bloomsbury Professional, 2018, (hereafter ‘Kelly’), para 7.7.01.

<sup>3</sup> *Kelly* para. 7.7.02.

<sup>4</sup> *Kelly* para. 7.7.119.

<sup>5</sup> All Party Oireachtas Committee on the Constitution, [Tenth Progress Report: The Family](#), 2006 p. 108.

<sup>6</sup> For example, ICCPR, CEDAW, ICESCR.

<sup>7</sup> IHREC, [Policy Statement on Article 41.2.](#), June 2018.

## Previous Proposals to amend Article 41.2

Given the criticism that Article 41 of the Constitution has faced, it may be of interest to note that Article 41 of the Constitution of Ireland has already been amended three times as set out in Table 1 below. The [Thirty-Ninth Amendment of the Constitution \(Family\) Bill](#) also proposes to amend Article 41 of the Constitution of Ireland.

**Table 1: Amendments to Article 41 (the Family) of the Constitution of Ireland**

Year	Article	Effect
1995	Article 41.3.2 <sup>o</sup>	Amended to replace a constitutional ban on the introduction of divorce
2015	Article 41.4	Inserted into the Constitution providing for same sex marriage
2018	Article 41.3	Amended to replace constitutional conditions for divorce and to allow for legislation to be enacted with regard to the dissolution of marriage and the recognition of foreign divorces.

Furthermore, Article 41.2 has been the subject of many proposals for reform as outlined below.

**Table 2: Previous proposals to amendment Article 41.2 of the Constitution of Ireland**

Year	Proposer	Proposal
1993	Second Commission on the Status of Women	Recommended the deletion of Article 41.2.2
1996	Constitution Review Group	Recommended deleting Article 41.2 and replacing it with: 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.
1997	First Progress Report of the All-Party Oireachtas Committee on the Constitution	Recommended deleting Article 41.2 and replacing it with: The State recognises that 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.
2006	Tenth Progress Report of the All-Party Oireachtas Committee on the Constitution	Recommended amending Article 41.2.1 to and 41.2.2 to read: The State recognises that by reason of family life within the home, a parent gives to the State a support without which the common good cannot be achieved The State shall, therefore, endeavour to ensure that both parents shall not be obliged by economic necessity to work outside the home to the neglect of their parental duties.



Year	Proposer	Proposal
<b>2016</b>	Government Task Force	<p>The first option suggested amending Article 41.2 as follows:</p> <p>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.</p> <p>The second option proposed by the Task Force contained two proposals. Firstly, amending Article 41.2 as follows:</p> <p>The State recognises that home and family life gives to society a support without which the common good cannot be achieved.</p> <p>Secondly, the Task Force suggested inserting the following provision into Article 45 of the Constitution:</p> <p>The State shall endeavour to ensure that persons caring for others in the home and in the wider community receive support in recognition of the contribution they make to society.</p>
<b>2018</b>	<a href="#">Ministerial announcement</a>	Delete Article 41.2

## Citizens' Assembly on Gender Equality

The Citizens' Assembly on Gender Equality was established by Oireachtas resolution in July 2019. The resolution asked the Assembly to "prioritise the proposals, which may include policy, legislative or constitutional change, having regard to the legal requirements and the costs versus the potential impact". An introductory, inaugural meeting took place on 25 January 2020 and the first full meeting took place in person from 15-16 February 2020. Following postponement of meetings due to the Covid-19 pandemic, the Assembly resumed online with a pilot session on 4 July followed by a further seven online meetings between October 2020 and April 2021.

On [16 January 2021](#), the Assembly met online to discuss care, in particular the following aspects of the Oireachtas resolution:

- Recognise the importance of early years parental care and seek to facilitate greater work-life balance.
- Examine the social responsibility of care and women and men's coresponsibility for care, especially within the family.

On [13 February 2021](#), the Assembly met to consider Article 41 of the Constitution, including whether Article 41.2 should be deleted and/or replaced.

The Assembly issued a public call for submissions which opened on 29 January 2020 and closed on 6 March 2020. A total of 246 submissions were received - 66 from organisations and 180 from individuals and all were published on the Citizens' Assembly [website](#). An independent researcher, Dr. Pauline Cullen of Maynooth University, was engaged to analyse and summarise the submissions and brief the members of the Assembly on same during the meetings.



In February 2021, the Citizens' Assembly discussed the questions to be put on the ballot paper. In advance of the final ballot, the returning officer advised that it would be preferable to develop a closed question (either Yes or No) "to ensure a conclusive outcome and to ensure that those who might wish to retain Article 41.2 would, if their preferred option was not supported, subsequently have the option to choose between 'delete' or 'delete and replace'".<sup>8</sup>

On the final ballot paper, Members voted on three questions related to Article 41.2 of the Constitution of Ireland and issued a recommendation which is set out in Box 2 below. The results of the voting may be summarised as follows:

1. 94.4% voted in favour of amending Article 41.2 and 5.6% voted against.
2. 84.3% voted in favour of delete and replace and 15.7% voted to delete.
3. When voting on the wording of a replacement provision, 80.9% voted in favour of a stronger obligation on the State and 19.1% voted against stronger wording.

### Box 2: Recommendation 3 of the Citizens' Assembly on Gender Equality

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.

Source: [Report of the Citizens' Assembly on Gender Equality](#), p. 53.

Just as the Assembly was beginning, the country entered a series of COVID-19 lockdowns. In-person schooling, childcare, disability day and respite services were all unavailable for periods. The Assembly's other care-related recommendations crossed a range of areas, such as pay and conditions for care workers and welfare payments, pension entitlements and access to respite for unpaid carers.<sup>9</sup>

#### Open Letter to the Oireachtas from the Citizens' Assembly on Gender Equality

*"Even pre Covid-19, it was clear that we need to transform our models of care to ensure that our society values every person, and provides high quality care for all who need support at every life stage. Post the pandemic, it is even more urgent to commit to well designed, publicly funded pay and career structures for carers whose invaluable work in the home and wider community contribute so much to the common good of our society."*

Source: The Citizens' Assembly (June 2021) [Report of the Citizens' Assembly on Gender Equality](#), p.9.

According to a media report, the broader gender equality provision recommended by the Citizen's Assembly will not be progressed because "the legal advice was that it could "weaken" the "all-encompassing commitment to equality within the constitution at present""<sup>10</sup>.

<sup>8</sup> The Citizens' Assembly, [Report of the Citizens' Assembly on Gender Equality](#), June 2021, p 56.

<sup>9</sup> See the full list of recommendations in The Citizens' Assembly, [Report of the Citizens' Assembly on Gender Equality](#), June 2021,

<sup>10</sup> Jack Horgan-Jones, '[Referendums on women in the home and the concept of the family to be held next March](#)', *Irish Times*, 5 December 2023.

## Joint Oireachtas Committee on Gender Equality

The Joint Committee on Gender Equality was established to consider the recommendations of the Citizens' Assembly and Gender Equality and it agreed to prioritise consideration of proposed changes to Articles 40.1 and 41 of the Constitution.<sup>11</sup>

In its final report the Joint Committee recommended the following amendment to Article 41.2 of the Constitution.

### Box 3: Recommendation of the Joint Oireachtas Committee on Gender Equality

1° The State recognises that care within and outside the home and Family gives to the 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 [Joint Committee on Gender Equality](#) also made substantial policy and legislative recommendations on care related to care services, leave entitlements, social protection, and working conditions.<sup>12</sup>

## Government consultation on Referendums on Family, Care and Gender Equality

On 8 March 2023, the Taoiseach, Leo Varadkar, and Minister for Children, Equality, Disability, Integration and Youth, Roderic O'Gorman, announced the Government's intention to hold one or more referendums to respond to the recommendations of the Citizens' Assembly on Gender Equality and the Special Joint Oireachtas Committee on Gender Equality.<sup>13</sup>

According to a press release, an Inter-Departmental Committee, chaired by the Department of Children, Equality, Disability, Integration and Youth, was established to further examine, and advance these recommendations, and to support the Government in the development of policy proposals.<sup>14</sup>

On 25 April 2023 the Inter-Departmental Committee invited submissions on the issue from interested parties. The deadline for submissions closed on 19 May 2023. At the time of writing, a report of the consultation was not published.

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<sup>11</sup> Houses of the Oireachtas Joint Committee on Gender Equality, [Unfinished Democracy: Achieving Gender Equality](#), December 2022, , p. 37.

<sup>12</sup> Houses of the Oireachtas Joint Committee on Gender Equality, [Unfinished Democracy: Achieving Gender Equality](#), December 2022.

<sup>13</sup> Department of Children, Equality, Disability, Integration and Youth, [Referendums on Family, Care and Gender Equality – request for submissions](#) (last accessed 12 December 2023).

<sup>14</sup> Department of Children, Equality, Disability, Integration and Youth, [Referendums on Family, Care and Gender Equality – request for submissions](#) (last accessed 12 December 2023).

## Constitutional law context: Interpretation of Article 41.2

Reviewing the case law on Article 41.2 the leading constitutional law textbook, *Kelly*, notes “that until recently, [Article 41.2] had received relatively little attention from the judiciary”.<sup>15</sup> Arguments relating to the interpretation of Article 41.2 have arisen in cases concerning issues such as the defence of discriminatory legislation<sup>16</sup>; social security<sup>17</sup>; share in the marital home (diverging views)<sup>18</sup>; alimony or maintenance applications<sup>19</sup> and deportation.<sup>20</sup>

In many of these decisions there has been some judicial commentary or observation on Article 41.2 (known as *obiter dictum*). However, these remarks have not created a binding legal precedent. Nevertheless, it is worth restating some of this more recent commentary to obtain an insight into judicial thinking in respect of this provision.

For example, in *Sinnott v Ireland* [2001] IESC 63 Ms Justice Denham (as she then was), in a dissenting judgment, stated Article 41.2 was “not to be construed as representing a norm of a society long changed utterly’ but rather was to be construed ‘in the Ireland of the Celtic Tiger”.<sup>21</sup> Furthermore, Denham J stated:

‘Article 41.2 does not assign women to a domestic role. Article 41.2 recognises the significant role played by wives and mothers in the home. This recognition and acknowledgement does not exclude women and mothers from other roles and activities. It is a recognition of the work performed by women in the home. The work is recognised because it has immense benefit for society. This recognition must be construed harmoniously with other Articles of the Constitution when a combination of Articles fall to be analysed.’<sup>22</sup>

In addition, in *DT v CT* [2002] IESC 68 Mr Justice Murray, interpreting the Constitution as a ‘contemporary document’, recognised that ‘the duties and obligations of spouses are mutual and, ... [the Constitution] implicitly recognises similarly the value of a man’s contribution in the home as a parent’.

In June 2023, judicial review proceedings were brought to the High Court in relation to a decision of the Social Welfare Appeals Office with regard to a mother’s entitlement to Carer’s Allowance. This case is currently on appeal to the Supreme Court and awaiting hearing at the time of writing. Since arguments related to Article 41.2 were advanced in the High Court and will be considered by the Supreme Court, this case and matters arising from it, will be considered in more detail in the following section.

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<sup>15</sup> Kelly, para. 7.7.119.

<sup>16</sup> *de Búrca v Attorney General* [1976] IR 38, (1977) 111 ILTR 37; *O’G v Attorney General* [1985] ILRM 61.

<sup>17</sup> *Dennehy v Minister for Social Welfare* (26 July 1984); *Lowth v Minister for Social Welfare* HC [1998] 4 IR 321, [1994] 1 ILRM 378, [1994] ELR 119.

<sup>18</sup> *Sinnott v Ireland* [2001] 2 IR 545 at 665; *L v L* [1989] ILRM 528.

<sup>19</sup> *L v L* [1992] 2 IR 77 at 108, [1992] ILRM 115 at 121.

<sup>20</sup> *B (a minor) v Minister for Justice, Equality and Law Reform* [2010] IEHC 296.

<sup>21</sup> [2001] IESC 63.

<sup>22</sup> [2001] IESC 63.

## Carer's allowance decision under appeal to Supreme Court

In *B.M. and another v Chief Appeals Officer and Others* [2023] IEHC 359 the applicant argued that the Minister for Social Protection is obliged to make regulations under the [Social Welfare \(Consolidation\) Act 2005](#) which would provide access to Carer's Allowance to a wide category of individuals, when considering the language of Article 41.2. In relation to the arguments advanced under Article 41.2, Ms Justice Hyland stated:

Even accepting for present purposes that the provision of a carer's allowance vindicates the life of the woman within the home by making it possible to stay at home and care for a child with a disability, Article 41 cannot be treated as dictating the level at which the State must provide a carer's allowance and cannot be used to mandate the adoption of regulations otherwise within the discretion of the Minister to ensure the increase (to an unspecified level and in respect of an unidentified group of persons) of the level of carer's allowance. To so find would represent a trespass into the executive function of the State by the Court. Moreover, given that there can be no certainty about whether the first applicant would benefit from any regulations, it is difficult for her to argue that their absence constitutes a breach of Article 41.2.<sup>23</sup>

This ruling has been appealed and will be heard by the Supreme Court. On 31 October 2023, the Supreme Court issued a determination in this case granting leave for the appeal to be heard in the Supreme Court, bypassing the Court of Appeal as provided for in Article 35.5.4° of the Constitution. Considering this request, it was acknowledged that "Article 41.2 has not been the subject of extensive consideration by this or other courts."<sup>24</sup> Furthermore, it was acknowledged that Article 41.2 has:

"... never been considered or examined in the context of the provision of public funds to parents who are obliged to care on a full-time basis for severely disabled children."<sup>25</sup>

It was also recognised in the determination of the Supreme Court that the application raises issues regarding the separation of powers,<sup>26</sup> which will be considered in more detail later in this *Digest*.

The Supreme Court granted leave for the following two questions to be sent forward for hearing:

First, is the Minister under any obligation under the terms of s. 186(1) and/or s. 186(2) of the 2005 Act to make regulations of the kind which would dispense with the means-tested calculation of carer's payment, whether in whole or in part?

Second, to that extent (if at all) does Article 41.2 of the Constitution have any bearing on these proceedings? Was Hyland J. correct to state (at paragraph 71) that Article 41.2 cannot be regarded as dictating the level at which the State must provide a carer's allowance or otherwise mandating the making of regulations by the Minister under s. 186(1) of the 2005 Act.<sup>27</sup>

At the time of writing a remote case management hearing was [scheduled](#) for 18 December 2023.

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<sup>23</sup> *B.M. and another v Chief Appeals Officer and Others* [2023] IEHC 359, para 71.

<sup>24</sup> *B.M. and another v Chief Appeals Officer and Others* [2023] IESCDT 000131, para. 14.

<sup>25</sup> *B.M. and another v Chief Appeals Officer and Others* [2023] IESCDT 000131, para. 14.

<sup>26</sup> *B.M. and another v Chief Appeals Officer and Others* [2023] IESCDT 000131, para. 13.

<sup>27</sup> *B.M. and another v Chief Appeals Officer and Others* [2023] IESCDT 000131, para. 17-18.

## Care policy context in Ireland and internationally<sup>28</sup>

This section draws out policy issues related to care in the Irish and international context, including the gendered nature of care and care services supported/provided by the state.

Care incorporates unpaid (informal) care and paid (formal) provision and is particularly associated with caring for children, older people and people with other support needs due to illness or disability. Access to care and the quality of care provided present challenges for all societies. Today in Ireland there continues to be a reliance on informal family care, including for older people and people with disabilities.<sup>29</sup>

Internationally, deficits in care have increasingly emerged since the 1970's as women entered paid employment in greater numbers without a significant transformation in the gendered division of unpaid care. Simultaneously, globalisation and austerity have impacted public care services across the globe.<sup>30</sup> Many people reliant on care services have experienced reductions in the volume and quality of care received. There has also been an increasing reliance on low paid, often migrant, care workers.<sup>31</sup> Research has documented the difficulties family carers in Ireland experience, such as accessing services and financial pressures.<sup>32</sup> As outlined in a 2019 [L&RS Spotlight on family care](#), demand for care at home is likely to increase dramatically, due to a rising ageing population and other factors, yet the future supply of family carers may be limited by demographic factors, including increased labour force participation by women. In 2020, the COVID-19 pandemic accentuated society's reliance on informal care provided in families and communities and the formal paid care of frontline health and social care workers.<sup>33</sup> Recent Irish media coverage has also documented care worker shortages and care service gaps.<sup>34</sup>

The need to support caring and care work and improve provision for care receivers is increasingly acknowledged internationally. At EU level, the 2022 [European Care Strategy](#) aims to ensure high-

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<sup>28</sup>This section relies on a previous L&RS Blog post '[Motion - Delivery of a Rights-Based Care Economy in Ireland](#)', 26 September 2023.

<sup>29</sup>Hanly, P. and Sheerin, C. '[Valuing Informal Care in Ireland: Beyond the Traditional Production Boundary](#)' *The Economic and Social Review* vol.48(3), 2017, pp.337-364; Hughes, Z. and O'Sullivan, L. '[Defining and profiling family carers: reflections from Ireland](#)', *International Journal of Care and Caring* vol. 1(3), 2017, pp. 421-27; Oireachtas Library & Research Service (2019) [Spotlight: Mind the care gap – exposing the health system's vulnerability to the gap between family care provision and anticipated demand](#) (Accessed 13 December 2023)

<sup>30</sup>De Henau, J. and Himmelweit, S. '[A Care-Led Recovery From Covid-19: Investing in High-Quality Care to Stimulate And Rebalance the Economy](#)', *Feminist Economics* vol. 27(1-2), 2021, pp.453-469; Power, A. and Hall, E. '[Placing care in times of austerity](#)', *Social & Cultural Geography* vol. 19(3), 2018, pp.303-313; Williams, F. '[Care: Intersections of scales, inequalities and crises](#)', *Current Sociology* vol. 66(4), 2018, pp.547-561; Williams, F. [Migration and Care: Themes, Concepts and Challenges](#), *Social Policy & Society* vol. 9(3), 2010, pp.385–396.

<sup>31</sup>Cullen, P. '[The discursive politics of marketization in home care policy implementation in Ireland](#)' *Policy and Society* vol.38(4), 2019, pp. 606–625.

<sup>32</sup>See for example: Family Carers Ireland, [The State of Caring 2022](#), June 2022 (Accessed 11 December 2023) reporting on an online survey of almost 1,500 current family carers.

<sup>33</sup>Fine, M., and Tronto, J. '[Care goes viral: care theory and research confront the global COVID-19 pandemic](#)', *International Journal of Care and Caring* vol. 4(3), 2020, pp. 301-309; Daly, M. '[COVID-19, Social Policy and Care: A Complex Set of Processes and Outcomes](#)', *Frontiers in Sociology* vol. 6 2022, pp.1-8.

<sup>34</sup>For example, see: Liz Dunphy, '[Staff and families fight to keep Cork creche open](#)', *Irish Examiner*, 29 August 2023; Eilish O'Regan, '[Staff shortage led to loss of nearly three million HSE home care hours last year](#)', *Irish Independent*, 30 August 2023.



quality affordable and accessible care services and improve the situation of formal and informal care providers. The Strategy focuses on actions for early childhood education and care; long-term care; and fair working conditions and training for care staff.<sup>35</sup>

## Emerging perspectives on care

Two of the policy lenses applied to care policy internationally are the ethics of care and the care economy.

The ethics of care has been used to highlight the value of care for the functioning of society; to underline the structures necessary to sustain good care (such as good conditions for paid and unpaid carers and high-quality care services for care receivers); and has drawn out the inequalities in current care arrangements (including of gender and race).<sup>36</sup>

During and since the COVID-19 pandemic, the concept of the 'care economy' has gained increased policy traction.<sup>37</sup> The care economy emerged in feminist economics and is often used to refer to all the labour which supports caregiving, including unpaid care work by families and communities and paid jobs in the care sector.<sup>38</sup> International organisations/fora, including the [International Labour Organisation](#), [UN Women](#), and the [World Economic Forum](#), have examined the importance of the care economy.

Both the ethics of care and the care economy perspectives acknowledge wider circles of care beyond the family (e.g., community networks of care, the formal care sector, etc.). During the pandemic, UN Women (2021) issued [Beyond Covid-19: A Feminist Plan For Sustainability And Social Justice](#) to address three interlocking crises for gender equality and the survival of the planet: care, jobs, and climate. Identifying that the pandemic placed an "already fragile care economy in crisis mode"<sup>39</sup>, UN Women argue that "Public investments in the care economy should be a key pillar of economic recovery".<sup>40</sup> Their plan makes the case for three shifts in care and care policy:

- Recognise the contribution of care work to economic development, social cohesion and human capabilities and factor care into economic and social policymaking.
- Society collectively assumes the cost of care work, through funding of public services, time-saving infrastructure, and social protection. Care workers have good conditions.

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<sup>35</sup> For details of progress on the strategy one year since adoption see: European Commission, [European care strategy - One year after the adoption](#) (Accessed 11 December 2023).

<sup>36</sup> For a discussion of the ethics of care see, for example: Marian Barnes, *Care in Everyday Life – an ethic of care in practice*. Bristol: The Policy Press, 2012; Bourgault, S. and Robinson, F. 'Care ethics thinks the political', *International Journal of Care and Caring* vol.4(1), 2020, pp. 3–9; Fischer, C. 'Re-visioning Ireland: Lessons from feminist care ethics', *Studies: An Irish Quarterly Review*, vol. 100(397)2011, pp.63–72.

<sup>37</sup> See for example: De Henau, J. and Himmelweit, S. 'A Care-Led Recovery From Covid-19: Investing in High-Quality Care to Stimulate And Rebalance the Economy' *Feminist Economics* vol. 27(1-2), 2021, pp.453-469; Heintz, J., Staab, S. and Turquet, L. 'Don't Let Another Crisis Go to Waste: The COVID-19 Pandemic and the Imperative for a Paradigm shift' *Feminist Economics* vol. 27(1-2), 2021, pp.470-485.

<sup>38</sup> UN Women, [What is the Care Economy?](#) (Accessed 11 December 2023).

<sup>39</sup> UN Women, [Beyond Covid-19: A Feminist Plan For Sustainability And Social Justice](#) (Accessed 11 December 2023), p.9.

<sup>40</sup> UN Women, [Beyond Covid-19: A Feminist Plan For Sustainability And Social Justice - Key Messages](#) (Accessed 11 December 2023).

- Policymakers engage with those most impacted by care gaps, including care providers and care receivers.<sup>41</sup>

In Ireland, the Irish Human Rights and Equality Commission's (IHREC) 2023 [Policy Statement on Care](#) draws on some of these wider policy perspectives, combined with equality and human-rights analysis. Reflecting the complexity of caregiving and the multiplicity of people receiving care, IHREC made a range of recommendations for care in Ireland related to: gender equality; intersectionality; a life cycle approach to care services; community-based and public services; decent work and income adequacy for care workers and carers; early childhood education and care; and adult social care and community support.

It is also important to note that some groups, such as activists within the social model of disability perspective, have challenged the focus on care and family caregiving in particular, instead seeking a policy emphasis on rights to choice, empowerment and independence.<sup>42</sup>

## Care in Ireland

Care in Ireland continues to be gendered, with women tending to provide greater proportions of unpaid care and to be concentrated in paid care sectors, such as social care.

Focusing on unpaid, informal care, research published in 2019 by the ESRI and IHREC – [Caring and unpaid work in Ireland](#) – reported the time spent in Ireland on caring and housework combined as the third highest in the EU, and that on average women spent double the time of men on caring and more than twice as much time on housework.<sup>43</sup>

In [Census 2022](#), just over 299,000 people – 6% of the population – identified as unpaid carers (providing regular unpaid personal help/support to a family member, neighbour or friend with a long-term illness, health issue, or issue related to old age, or disability).<sup>44</sup> Between 2016 and 2022, the number of people providing regular unpaid care increased by over 50%. In 2022, women provided a greater proportion of unpaid care – 61% (181,592) of carers were female and 39% were male. In general, male carers tended to provide fewer hours of unpaid help than female carers.

Describing Ireland's care context, Ursula Barry, Emeritus Associate Professor, Gender Studies, School of Social Policy, Social Work and Social Justice, UCD has outlined that: "Ireland heavily relies on the private marketplace and informal family and community networks to access care. While the State in Ireland funds a significant amount of formal child and long-term care, it is delivered mainly by private-for-profit services" (p1-2).<sup>45</sup> For example, Ireland's social care system has a complex mix of public and private delivery and financing.<sup>46</sup> Some people will qualify for

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<sup>41</sup> For details see: UN Women, [Beyond Covid-19: A Feminist Plan For Sustainability And Social Justice - Key Messages](#) (Accessed 11 December 2023), p.39.

<sup>42</sup> See, for example: Kelly, C. 'Building Bridges with Accessible Care: Disability Studies, Feminist Care Scholarship, and Beyond' *Hypatia* vol. 28(4), 2013, pp. 784-800; Kröger, T. 'Care research and disability studies: Nothing in common?' *Critical Social Policy* vol. 29(3), 2009, pp.398- 420; Morris, J. 'Us' and 'them'? Feminist research, community care and disability' *Critical Social Policy* vol. 11(33), 1991, pp.22-39.

<sup>43</sup> Russell, H., Grotti, R., McGinnity, F. and Privalko, I., ESRI and The Irish Human Rights and Equality Commission (2019) [Caring and unpaid work in Ireland](#), 09 July 2019(Accessed 2 August 2023).

<sup>44</sup> CSO, [Census 2022 Profile 4 - Disability, Health and Carers](#) (Accessed 13 December 2023).

<sup>45</sup> Barry, U. Emeritus Associate Professor, Gender Studies, School of Social Policy, Social Work and Social Justice, UCD, [The Care Economy, Covid-19 Recovery and Gender Equality – A Summary Report](#), (Accessed 13 December 2023).

<sup>46</sup> Connolly, S. 'Improving access to healthcare in Ireland: an implementation failure' *Health Economics, Policy and Law*, 2023, pp.1–11.



homecare free at the point of use, while others pay privately for services. Social care services are often delineated by age, with different services and entitlements available for adults under/over 65 years of age. Ireland's disability services have tended to focus on care in the home and in congregated settings, rather than on the provision of personal assistance (PA) services to support independent living.<sup>47</sup>

## The COVID-19 pandemic and care in Ireland

The global COVID-19 pandemic brought significant care deficits into focus. In Ireland, lockdowns highlighted the ongoing gendered nature of care, exposed gaps in care provision, and revealed an increasing reliance on a migrant care workforce and on privatised care services.<sup>48</sup> For example:

- The [final report](#) (2020) of the Oireachtas Special Committee on Covid-19 Response made a suite of recommendations on Ireland's pandemic response, including that a review should be undertaken into the impact of privatisation of Ireland's nursing homes (see Recommendation 2).<sup>49</sup>
- Family Carers Ireland's (2020) [Caring during COVID](#) report documented an online survey of 1,300 family carers. Many carers outlined their worries about becoming ill and being unable to continue caring, as well as their fears that normal care services would not resume.
- An online survey of more than 1,400 women during the May 2020 lockdown by the National Women's Council, [Women's Experience of Caring During COVID-19](#), showed the pandemic was aggravating existing gender inequalities in the sharing of care.

## Women in the workplace and care

Given the gendered nature of care, women's engagement in unpaid care in the home or community closely intersect with women's participation in paid employment.

While men increasingly engage in care, the steep growth in the proportion of women in the labour force has reduced the availability of informal care in the home.<sup>50, 51, 52</sup> Conversely, when in the workforce many women adapt their paid work patterns, through part-time working or use of

<sup>47</sup> Carroll, E., and McCoy, S. 'Personal assistance services in Ireland: A capability approach to understanding the lived experience of disabled people', *Disabilities* vol. 2, 2022, pp. 694-714; Department of Health [Disability Capacity Review to 2032: A Review of Disability Social Care Demand and Capacity Requirements up to 2032](#), 2021 (Accessed 13 December 2023); ILMI, [Achieving a right to personal assistance in Ireland](#), 2019 (Accessed 12 December 2023).

<sup>48</sup> Cullen, P. and Murphy, M., 'The pandemic pushed Ireland's care sector to breaking point – now activists are demanding action' [Essays on Equality – global and intersectional perspectives on the pandemic](#) (Shepard, R. Cook, R. and Murkin, G. eds). London: The Global Institute for Women's Leadership and Kings College London, pp. 60–63; Cullen, P. and Murphy, M. 'Responses to the COVID-19 crisis in Ireland: From feminized to feminist' *Gender, Work & Organization* vol. 28(S2), 2021, pp. 348–365; Hick, R. and Murphy, M. 'Common shock, different paths? Comparing social policy responses to COVID-19 in the UK and Ireland' *Soc Pol Adm.* vol. 55, 2020, pp. 312-325.

<sup>49</sup> Special Committee on Covid-19 Response, [Final Report: Special Committee on Covid-19 Response](#), October 2020, p. 13.

<sup>50</sup> Hanly, P. and Sheerin, C. 'Valuing Informal Care in Ireland: Beyond the Traditional Production Boundary' *The Economic and Social Review* vol. 48(3), 2017, pp. 337-364.

<sup>51</sup> On men's caring see, for example, Hanlon, N. *Masculinities, Care and Equality: Identity and Nurture in Men's Lives*. London: Palgrave Macmillan, 2012.

<sup>52</sup> On gender norms re unpaid care in Ireland see: Government of Ireland, [Gender norms in Ireland](#), Statistical Spotlight Series #6, December 2021 (Accessed 11 December 2023).

parent/carer's leave, to continue to provide unpaid care to children and other relatives.<sup>53</sup> This can impact women's earnings and career progression. As an example, a small IBEC [survey](#) (2021) reported impacts of the pandemic on women in business, including requests from women for worktime flexibility to accommodate childcare and care of older people.<sup>54</sup>

Women's overall employment is high in Ireland (although there are differences for lone parents, women with disabilities, Roma women, Traveller women and some migrant women.<sup>55, 56</sup>). The Central Statistics Office (CSO) [Labour Force Survey Quarter 2 2023](#) reported an employment rate for females (aged 15-64) of 70.5%. This is the highest level since the series began in 1998. The CSO's [Women and Men in Ireland 2019](#) documented large variations in employment rates between women with and without children. The presence of children had a much smaller effect on the employment rate for men.

Efforts to address gender inequalities in the workplace have increasingly focused on closing the Gender Pay Gap (GPG) (the average difference between the remuneration of working men and women).<sup>57</sup> The [CSO Structure of Earnings Survey 2022](#) estimated Ireland's GPG at 9.6% (i.e. the average male earned 9.6% more than the average female). Amongst the many contributors to the GPG is understood to be the gender segregation in the economy which means women are more likely to work in lower paid (often care-related) sectors, such as education or healthcare, and to hold less senior, lower paid positions.<sup>58</sup> Another factor is that women tend to be responsible for unpaid care for children and older family members and often adjust their paid working patterns to accommodate this.

Historically, Ireland has had a low representation of women in parliament.<sup>59</sup> The 2016 General Election was the first in which gender quotas applied under the [Electoral Amendment \(Political Funding\) Act 2012](#).<sup>60</sup> Efforts to increase gender balance in politics have also directly addressed care responsibilities. Maternity leave entitlements were extended to local government politicians under the [Local Government \(Maternity Protection and Other Measures for Members of Local Authorities\) Act 2022](#). In 2021, the Ceann Comhairle established the [Forum on a Family Friendly and Inclusive Parliament](#), which made a range of [recommendations](#) including on 'childcare and other caring responsibilities' (see p.28-29).

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<sup>53</sup> For a discussion of the intersections of caring and paid employment see: Department of Children and Youth Affairs, [Striking a Balance: The Reconciliation of Work and Family Life](#), Statistical Spotlight Series #3, December 2019 (Accessed 11 December 2023).

<sup>54</sup> IBEC's survey had a sample of 271 responses from organisations.

<sup>55</sup> Department of Justice and Equality, [Ireland - Report of the Comprehensive National-level Review Twenty-fifth anniversary of the Fourth World Conference on Women and adoption of the Beijing Declaration and Platform for Action, June 2019](#), (Accessed 26 July 2023).

<sup>56</sup> For details of the migrant wage gap as it relates to migrant women in Ireland see: ESRI, [Wages And Working Conditions Of Non-Irish Nationals In Ireland](#), January 2023 (Accessed 13 December 2023).

<sup>57</sup> For discussion of the GPG see: Cross, C. = '[Why the gender pay gap matters](#)', *RTÉ Brainstorm*, 8 November 2017 (Accessed 8 September 2023).

<sup>58</sup> For discussion of contributors to the GPG see: European Commission [Pay Transparency](#), Factsheet (Accessed 7 September 2023); The Conversation, [Gender pay gap: how new EU pay transparency laws will make men and women's wages more equal, 16 May 2023](#) (Accessed 8 September 2023).

<sup>59</sup> Fiona Buckley, Department of Foreign Affairs, [Ireland's experience of parliamentary gender quotas](#), 9 May 2019 (Accessed 28 July 2023).

<sup>60</sup> *Ibid.*

## Examples of legal and policy initiatives related to care

There is a wide range of law and policy related to care. This section of the *Digest* is intended to provide a brief overview of the types of initiatives, rather than an in-depth and/or exhaustive exploration, as such an analysis is outside the scope of this *Digest*.

### Leave and social security entitlements

Table 3 below provides an overview of leave entitlements and social security payments for parents who are caring for children.

**Table 3: Leave entitlements and social security payments for parents**

Leave	Who gets it?	How long?	Is it paid?
Maternity leave	Female employees.	26 weeks and up to 16 unpaid weeks.	Yes, Maternity Benefit is paid for 26 weeks.
Adoptive leave	One parent of the adoptive couple, or a parent adopting alone.	24 weeks and up to 16 unpaid weeks.	Yes, Adoptive Benefit is paid for 24 weeks.
Paternity leave	New parents of children under 6 months of age (usually the father or the partner of the mother, or in the case of adoption, the parent who is not taking adoptive leave).	2 weeks.	Yes, Paternity Benefit is paid for 2 weeks.
Parental leave	Parents and guardians of children under 12	26 weeks.	No, it is unpaid.
Parent's leave	Parents of children under 2 years of age. Parents of adopted children in the first 2 years of the placement of the child.	7 weeks.	Yes, Parent's Benefit is paid for 7 weeks.

Source: [www.citizensinformation.ie](http://www.citizensinformation.ie)

The [Work Life Balance and Miscellaneous Provisions Act 2023](#) introduced five (5) days unpaid leave in a consecutive 12-month period for medical care to care or support to a:

- Child (including an adopted child)
- Spouse or civil partner
- Cohabitant
- Parent or grandparent
- Brother or sister
- Housemate.

The individual must need significant care or support for a serious medical reason.

Other care related leave entitlements and payments may be summarised as follows:

- Under the [Carer's Leave Act 2001](#), individuals may take up to up to 104 weeks out of employment to provide full-time care to a person in need of full-time care.
- Carer's Benefit is a social security payment paid to people who leave work or reduce their hours to care for a person in need of full-time care, provided certain criteria has been met.
- Carer's Allowance is a weekly means tested social welfare payment to people who are caring for a person who needs support because of their age, disability, or illness (including mental illness).
- Domiciliary Care Allowance (DCA) is a monthly payment for a child aged under 16 with a severe disability. The child must need ongoing care and attention substantially over and above that usually needed by a child of the same age. It is not means tested.
- The Carer's Support Grant is paid to carers once a year by the Department of Social Protection (DSP). This is automatically provided to individuals in receipt of Carer's Allowance (both full rate and half-rate), Carer's Benefit or Domiciliary Care Allowance.<sup>61</sup>

## Recent policy developments on care

Reflecting the importance of care to citizens, society and the economy, the 2020 [Programme for Government](#) committed, amongst a range of actions to support care, to a new national carers' strategy and a 'Carers Guarantee' to provide a core basket of services to carers. Given the wide range of policy fields and service areas related to care, the following section provides an overview of some of the recent government initiatives on care for different population groups.

There has been a particular focus on improving access to and affordability (for parents) of **early childhood care and education**. Initiatives for early years and childcare, including the [National Childcare Scheme](#) (includes a universal subsidy and an income-based subsidy) and the universal two-year preschool programme [Early Childhood Care and Education Programme](#) (ECCE), have been developed by Government to support early learning and to assist parents meet childcare costs.<sup>62</sup> Under Budget 2024, the hourly subsidy for the National Childcare Scheme will increase from €1.40 to €2.14 from September 2024.<sup>63</sup>

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<sup>61</sup> This information is compiled based on information available on [www.citizensinformation.ie](http://www.citizensinformation.ie).

<sup>62</sup> For details of initiatives see: Department of Children, Equality, Disability, Integration and Youth [Early Learning & Child Care](#), 1 October 2021 (Accessed 12 December 2023).

<sup>63</sup> Citizens' Information, [Budget 2024](#), (Accessed 25 October 2023).

The government is progressing a new statutory scheme for **home support services**, reflecting Programme for Government commitments to deliver increased home support hours.<sup>64</sup> Almost 20.8 million hours of home support was provided in 2022, with delivery of 21.5 million hours expected in 2023.<sup>65</sup>

To respond to the shortage of care workers in the home support and nursing home sectors, Government established a **Strategic Workforce Advisory Group on Home Carers and Nursing Home Healthcare Assistants**. The group produced [recommendations](#) in September 2022 and an implementation group has been established.<sup>66</sup>

In November 2023, the Minister for Social Protection, Heather Humphreys TD, announced the **Long Term Carers Contributions scheme** as a new scheme to improve access to the State Pension (Contributory) for long-term carers (those caring for over 20 years).<sup>67</sup>

Government has approved plans for a Commission on Care for Older Persons to commence in January 2024.<sup>68</sup> The independent commission will examine the **provision of health and social care services and supports for older persons** and make recommendations to the government for their strategic development.

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<sup>64</sup> See: Department of Health, [Public Consultation on Draft Regulations for Providers of Home Support Services](#), 16 June 2022 (Accessed 13 December 2023); Institute of Public Health. [Draft Regulations for Providers of Home Support Services: An Overview of the Findings of the Department of Health's Public Consultation](#), January 2023 (Accessed 13 December 2023).

<sup>65</sup> Minister of State at the Department of Health, Deputy Mary Butler, T.D., [Home Care Workers and Home Support Scheme: Motion \[Private Members\]](#), *Dáil Éireann Debate*, 8 November 2023, (Accessed 11 December 2023).

<sup>66</sup> Minister of State at the Department of Health, Deputy Mary Butler, [Home Care Workers and Home Support Scheme: Motion \[Private Members\]](#), *Dáil Éireann Debate*, 8 November 2023 (Accessed 11 December 2023).

<sup>67</sup> MerrionStreet.ie, [Minister Humphreys announces New Scheme to Enhance Pension Provision for Long-Term Carers, and €133m in Cost-of-Living Payments](#), *Press Release*, 27 November 2023 (Accessed 11 December 2023).

<sup>68</sup> Department of Health, [Minister Donnelly and Minister Butler announce government approval of Commission on Care](#), *Press release*, 3 October 2023 (Accessed 11 December 2023).

## Provisions of the Bill

This section of the *Digest* examines the provisions of the [Bill](#), which is seven pages long and contains two sections and a Schedule. This section of the *Digest* will also provide a flavour of both the general reactions to the Bill as well as commentary on specific aspects of the proposed Article 42B. Three aspects of the proposed Article 42B will then be considered, namely:

- Recognition of the role of care in society
- Scope of constitutional protection of care: providers and recipients of care
- The nature of the State's obligation to support care.

**Section 1(a), (b)** of the Bill proposes to repeal both the Irish and English text of Article 41.2 Bunreacht na hÉireann, Constitution of Ireland.

**Section 1(c), (d)** of the Bill provides for the consequential renumbering of subsections Article 41.3 and Article 41.4 in both the Irish and English text given the proposed deletion of Article 41.2.

**Section 1(e), (f)** of the Bill provides for the insertion of the proposed new Article 42B into Bunreacht na hÉireann, Constitution of Ireland, which is to be inserted after Article 42A.

**Section 2** of the Bill provides for the citation of this Act and the amendment of the Constitution effect by this Act.

The **Schedule** to the Bill contains two Parts. Part 1 – Cúram sets out the proposed new Airteagal 42B Bunreacht na hÉireann in the Irish text and Part 2 – Care sets out the proposed new Article 42B Constitution of Ireland in the English text, which is reproduced in Box 4.

Reference will be made to both language versions in this *Digest*, particularly given the primacy of the Irish language in the Constitution.<sup>69</sup> However, the content of both texts is subject to constitutional interpretation by the Superior Courts, which may adopt different approaches such as the literal interpretation; the 'broad'/purposive approach; the doctrine of harmonious interpretation; the historical approach; and the natural law approach.<sup>70</sup>

### Box 4: Proposed Airteagal 42B Bunreacht na hÉireann, Article 42B Constitution of Ireland.

#### CÚRAM Airteagal 42B

Admhaíonn an Stát go dtugtar taca don Chomhdhaonnacht, ar taca é nach bhféadfaí leas an phobail a ghnóthú dá éagmais, de bhíthin cúram a bheith á thabhairt ag daoine de theaghlach dá chéile toisc na snaidhmeanna atá eatarthu, agus beidh an Stát ag dréim le tacú leis an gcúram sin a thabhairt.

#### CARE Article 42B

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.

<sup>69</sup> Airteagal 8 agus Airteagal 26 Bunreacht na hÉireann.

<sup>70</sup> See 'III. Constitutional Interpretation' in Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh 'Kelly: The Irish Constitution (Bloomsbury Professional, 2018).



## Reactions to the General Scheme/Bill

When the General Scheme was published, a coalition of six civil society organisations<sup>71</sup> said:

“While we welcome the announcement of the referendum, we note that the wording the Irish people will vote on is significantly different to that recommended [by the committee and assembly].”<sup>72</sup>

Releasing their Government Scorecard on 7 December 2023, Family Carers Ireland stated:

“In the week that Government announced a referendum to take place on March 8th 2024, which seeks to recognise and value care in the home, we urge them to redouble their efforts by taking immediate action to deliver the commitments they have made to family carers.”<sup>73</sup>

Commenting on the proposed wording, David Quinn, Director of the Iona Institute, stated:

“... the Government is not seeking simply to make the present clause gender neutral. It could have chosen to tweak the present Article 41.2 to read something like: “In particular, the State recognises that by their life within the home, carers give to the State a support without which the common good cannot be achieved.

...

The “home” receives no mention. Nor does the proposal seek, even in theory, to protect the main carer from being forced out of home by “economic necessity”.<sup>74</sup>

## State recognition of care in society

The proposed Article 42B states:

“The State recognises that the provision of care, ... gives to Society a support without which the common good cannot be achieved, ...”

While Article 41.2 refers to “life within the home” and “duties in the home”, it does not refer specifically to care work. However, as outlined above, many of the cases brought before the Superior Courts relate to care work. Therefore, the explicit use of the word “care” is a departure from the wording in Article 41.2. The word “care” was used in the proposals by the Citizens’ Assembly and the Joint Oireachtas Committee.

While the phrase “a support without which the common good cannot be achieved” also appears in Article 41.2, the proposed Article 42B recognises the value of care work to society rather than the State. Similarly, the Irish text uses the word “Chomhdhaonnacht” which appears elsewhere in Bunreacht na hÉireann, rather than “an Stát”, which is used in Article 41.2.

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<sup>71</sup> Coalition of six includes NWCI, One Family, Treoir, SIPTU, Family Carers Ireland and Independent Living Movement.

<sup>72</sup> Jack Horgan-Jones, Mary Carolan, Pat Leahy, ‘[Civil society groups to ‘consider’ approach to referendums over wording on care](#)’ *Irish Times*, 6 December 2023 (Accessed 13 December 2023).

<sup>73</sup> Family Carers Ireland, [Family Carers Ireland Published Programme For Government Progress Scorecard](#) (Accessed 13 December 2023)

<sup>74</sup> David Quinn, ‘[Don’t be fooled into thinking referendum is about sexism](#)’ *The Sunday Independent*, 10 December 2023 (Accessed 13 December 2023).



## Scope of constitutional recognition of care

### Gender neutral language

The proposed Article 42B states that care is provided:

“... by members of a family to one another by reason of the bonds that exist among them  
...”

This wording gives effect to the Citizens’ Assembly recommendation that the language in Article 41.2 which refers to the “woman” be replaced with language that is gender neutral. Commenting on this language Director of the National Women’s Council (NWC) Orla O’Connor said:

“... the referendum was the opportunity to “remove limits on women’s role from our Constitution and close this dark chapter of our past”.<sup>75</sup>

Dr Laura Cahillane, associate law professor at the University of Limerick, stated:

“I welcome that the proposed wording removes the outdated language, but I am very disappointed and frustrated that it is being replaced by a purely symbolic provision, a cosmetic change.”<sup>76</sup>

Dr Cahillane’s comments were made in the context of the Citizen’s Assembly recommendations which she argues would have imposed a stronger obligation on the State to support care, which will be discussed further below.

In relation to the use of gender neutral language, it may be of interest to note that one commentator made the following observation that:

““Gender” in the Irish language has nothing to do with biological sex. Some Irish words one would assume would be masculine, like stail (stallion), are grammatically feminine. The words cailín (girl) and bangharda, (a female Guard), are masculine. The words saoránach (citizen), Uachtarán, Taoiseach, and Tánaiste are all masculine, not because they are presumed to be masculine roles, but because they follow grammatical rules which make them so.”<sup>77</sup>

Nevertheless, Airteagal 41.2 Bunreacht na hÉireann refers to “an bhean” and “mháithreacha clainne”. The proposed Airteagal 42B removes such references and refer to an teaghlach as follows:

“de bhíthin cúram a bheith á thabhairt ag daoine de theaghlach dá chéile toisc na snaidhmeanna atá eatarthu”

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<sup>75</sup> Jack Horgan-Jones, Mary Carolan, Pat Leahy, ‘[Civil society groups to ‘consider’ approach to referendums over wording on care](#)’ *Irish Times*, 6 December 2023 (Accessed 13 December 2023).

<sup>76</sup> Jack Horgan-Jones, Mary Carolan, Pat Leahy, ‘[Civil society groups to ‘consider’ approach to referendums over wording on care](#)’ *Irish Times*, 6 December 2023 (Accessed 13 December 2023).

<sup>77</sup> Caoimhe Molloy, ‘[Understanding the Constitution through Irish: Tackling both Androcentrism and Anglocentrism](#)’ *The Eagle: The Trinity College Law Gazette* (Accessed 12 December 2023).

## Family care

The proposed Article 42B proposes to recognise family care work, where such care work is carried out by family members “by reason of the bonds that exist between”. This may give rise to the question whether care work that is carried out for monetary or contractual purposes may be excluded from the scope of constitutional recognition.

The reference to “family” must also be interpreted in the context of the constitutional family, in line with the principle of harmonious interpretation of the Constitution<sup>78</sup>. If the Thirty-Ninth Amendment of the Constitution Bill 2023 (Family) is to be passed by the Houses of the Oireachtas and subsequently agreed to by the people at referendum, this definition would be as follows:

“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.”

If the Thirty-Ninth Amendment of the Constitution Bill 2023 (Family) is not passed by the Houses of the Oireachtas or if it is passed and not subsequently agreed to by the people at referendum, the reference to the family in the proposed Article 42B would be construed in the context of the existing Article 41 of the Constitution, i.e. the marital family, and the interpretation of that provision in case law.

## Care within the home

Article 41.2 of the Constitution of Ireland refers to “work within the home”. It may be of interest to note that the Irish language text, Airteagal 41.2 Bunreacht na hÉireann, does not refer to “the home” explicitly. Instead it refers to “saol sa teaghlach” or “ndualgais sa teaghlach”. According to Foclóir Gaeilge-Béarla Ó Dónaill, 1977, “teaghlach” may be translated as “family” or “household”. Forde and Leonard also note that the word ‘teaghlach’ means “the household and not just husband, wife and (their) children”.<sup>79</sup> It should be noted that the Irish language version of the constitutional text “has primacy in the event of conflict with the version in the other official language.”<sup>80</sup>

Both the Citizens’ Assembly and the Joint Oireachtas Committee recommended that both care work carried out “in the home” and “in the wider community” should be recognised and supported by the State. Both the Irish and English texts of the proposed Article 42B does not refer to “home” or “community” and is therefore, silent as to where the provision of care takes place. When the General Scheme of the Bill was published Professor Conor O’Mahony, Professor of Constitutional law and child law at University College Cork, stated “the wording further departs from the Citizens’ Assembly by excluding other forms of care in the wider community.”<sup>81</sup>

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<sup>78</sup> See ‘III. Constitutional Interpretation’ in Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh. *Kelly: The Irish Constitution* (Bloomsbury Professional, 2018).

<sup>79</sup> Michael Forde and David Leonard, *Constitutional Law of Ireland* (Bloomsbury, 2013), para. 24.02.

<sup>80</sup> *Roche v Roche* [2009] IESC 82, [2010] 2 IR 321 at [164]–[165]. Similarly in *IRM v Minister for Justice* [2018] IESC 14 at [11.17], the Court considered the Irish language text of ‘all children’ in Article 42A in considering the meaning of that term.

<sup>81</sup> Conor O’Mahony, [‘Referendum will just replace a sexist dead letter with a gender-neutral dead letter’](#) *Irish Times*, 6 December 2023 (Accessed 13 December 2023).

## The nature of the State's obligation to support care

The proposed Article 42B requires the State to “strive to support” care. Article 41.2 requires the State to “endeavour to ensure”. The Oxford English Dictionary defines “endeavour” as “try hard to do or achieve something” whereas “strive” is defined as “make great efforts to achieve or obtain something.” Taking the literal approach to constitutional interpretation,<sup>82</sup> it seems Article 42B places a weightier obligation on the State than Article 41.2.

However, the phrase “strive to support” is different to the recommendations of the Citizens’ Assembly and the Joint Oireachtas Committee both of which proposed that there should be an obligation on the State to “take reasonable measures”.

Commenting on the distinction between the wording in the proposed Article 42B and the recommendations of the Citizens’ Assembly, Dr Laura Cahillane, associate law professor at the University of Limerick, stated:

“The wording advocated by the Assembly did not impose an “overly onerous” duty on the State, she said. “It meant the State could argue it was taking reasonable measures to support care, but it would still have allowed carers to bring a case arguing that what was being provided was not reasonable.”<sup>83</sup>

Professor Conor O'Mahony, Professor of Constitutional law and child law at University College Cork, also stated:

“In practical terms, the use of the word “strive”, and the omission of the requirement to take “reasonable measures”, mean that no remedy other than political campaigning will be available if future Governments ignore the aspirations of Article 42B.”<sup>84</sup>

In the Irish language text, Article 41.2 couches the State obligation in the following phrase: “féachfaidh an Stát”. The proposed Airteagal 42B uses the word “dréim” which according to Foclóir Gaeilge-Béarla Ó Dónaill, 1977, may be translated “strive”.

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<sup>82</sup> See ‘III. Constitutional Interpretation’ in Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh ‘*Kelly: The Irish Constitution* (Bloomsbury Professional, 2018).

<sup>83</sup> Jack Horgan-Jones, Mary Carolan, Pat Leahy, ‘[Civil society groups to ‘consider’ approach to referendums over wording on care](#)’ *Irish Times*, 6 December 2023 (Accessed 13 December 2023).

<sup>84</sup> Conor O'Mahony, ‘[Referendum will just replace a sexist dead letter with a gender-neutral dead letter](#)’ *Irish Times*, 6 December 2023 (Accessed 13 December 2023).

## Potential considerations: Interpretation of proposed Article 42B

If this Bill is passed by both Houses of the Oireachtas and the question put to the People is agreed to, then Article 41.2 of the Constitution of Ireland will be repealed and Article 42B will be inserted into the Constitution of Ireland. Given the primacy of the Constitution, all law and policy within the State must align with the Constitution and where issues arise, applications may be made to the Superior Courts. The Superior Courts will then be tasked with interpretation of the Constitution. As outlined above, different interpretations of Article 41.2 have emerged over the years and a case dealing with questions which may emerge in the context of the proposed Article 42B stands referred to the Supreme Court. In light of this, it may be of interest to note that the leading Constitutional law textbook, *Kelly*, states:

“Courts have noted that the context in which a constitutional amendment was passed is ‘important and relevant’ to its interpretation”.<sup>85</sup>

For example, *IRM v Minister for Justice* the Supreme Court concluded that ‘all children’ in Article 42A did not include unborn children, because, inter alia, of the context in which Article 42A was introduced.<sup>86</sup>

As mentioned above, it should be noted that the Irish language version of the constitutional text “has primacy in the event of conflict with the version in the other official language.”<sup>87</sup> The content of both texts is subject to constitutional interpretation by the Superior Courts, which has adopted five different approaches to interpretation, namely literal interpretation; the ‘broad’/purposive approach; the doctrine of harmonious interpretation; the historical approach; and the natural law approach.

Nevertheless, there are two issues that may arise in the context of the proposed Article 42B if it were to be inserted in the Constitution of Ireland.

### Separation of powers

As mentioned earlier in this *Digest*, in its determination to allow an appeal to be heard in the Supreme Court in relation to a decision of the Social Welfare Appeals Office regarding Carer’s Allowance, the Supreme Court, noted:

“The application also raises important issues regarding the separation of powers, not least given that if the Minister were in fact obliged to make regulations under s. 186(2), this would have implications for the appropriation of public monies. It is not clear whether this Court could ever make an order of this kind: see the comments of Finlay C.J. in *The State (Sheehan) v. Government of Ireland* [1987] IR 550 at 559-560<sup>88</sup>. Nor is it clear whether the

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<sup>85</sup> Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh *Kelly: The Irish Constitution* (Bloomsbury Professional, 2018), para. 1.1.27.

<sup>86</sup> [2018] IESC 14 at para 11.18–11.20.

<sup>87</sup> *Roche v Roche* [2009] IESC 82, [2010] 2 IR 321 at [164]–[165]. Similarly in *IRM v Minister for Justice* [2018] IESC 14 at [11.17], the Court considered the Irish language text of ‘all children’ in Article 42A in considering the meaning of that term.

<sup>88</sup> In *The State (Sheehan) v. Government of Ireland* [1987] IR 550 at 559 Finlay C.J. stated:

Oireachtas could validly authorise the making of regulations of this kind by the Minister in circumstances where the entitlement to eligibility is itself prescribed by statute.”<sup>89</sup>

The separation of powers doctrine is set out in Bunreacht na hÉireann, the Constitution of Ireland, and relates to the division of the functions of government i.e., legislative, executive, and judicial, between independent separate institutions. The legislative power, which is the power to make laws for the State, is reserved to the Oireachtas: (Article 15.2.1 of the Constitution of Ireland). The executive power, which is the power to carry laws into effect, is vested in the Government (Article 28(2) of the Constitution of Ireland). The judicial power, which is the power to administer justice, is reserved to the Courts (Article 34(1) of the Constitution of Ireland). Moreover, the Courts have no power to interfere with the exercise by the Government of its executive functions; however, if it is clearly established that the Government has acted otherwise than in accordance with the provisions of the Constitution, the Courts are obliged to intervene.<sup>90</sup>

In *In The Matter Of Article 26 Of The Constitution And In The Matter Of The Judicial Appointments Commission Bill 2022* it was stated:

“... at its heart, the doctrine of the separation of powers reflects the constitutional balance as between the three organs of State, and the fact that each, in their own turn, operates a system of checks and balances to ensure that one branch of government does not exceed the powers granted to it under the Constitution.”<sup>91</sup>

Therefore, since the Supreme Court considers that the BM case relating to the rate of pay of Carers’ Allowance may give rise to separation of powers issues, it may be the case that the proposed Article 42B may give rise to similar issues, particularly since the obligation on the State to “strive to support” care (proposed Article 42B) is arguably stronger than the existing obligation to “endeavour to ensure” (Article 41.2). It may be the case that the Supreme Court decision in *B.M. and another v Chief Appeals Officer and Others* will be instructive in how the proposed Article 42B will be interpreted by the Superior Courts if this Bill is to be passed by the Houses of the Oireachtas and the constitutional amendment is to be agreed to by the People at referendum.

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The issues (a) as to whether having regard to the separation of powers provided for in the Constitution the Courts may by order direct the introduction into effect of legislation which the Oireachtas has provided should be introduced by an order made by the Government or by a Minister of the Government; and (b) as to whether such an order could be made in the particular case where the introduction of such legislation might impose a significant burden on the Exchequer have neither been raised nor argued in this Court and fall to be decided in some future case where they have been fully argued.

<sup>89</sup> *B.M. and another v Chief Appeals Officer and Others*

<sup>90</sup> *McKenna v An Taoiseach* [1996 SC] 1 ILRM 81. See also *Kavanagh v Government of Ireland* [1996 HC] 1 ILRM 132.

<sup>91</sup> *In The Matter Of Article 26 Of The Constitution And In The Matter Of The Judicial Appointments Commission Bill 2022* [2023] IESC 34, para 148.

## Right to social security and the justiciability of socio-economic rights

Commenting on the proposed Article 42B and the proposals made by the Citizens' Assembly Professor Conor O'Mahony, Professor of Constitutional law and child law at University College Cork, noted:

"Having considered this option, the Citizens' Assembly instead voted by a margin of 81 per cent to 19 per cent in favour of a stronger wording that would "oblige the State to take reasonable measures to support care within the home and wider community". This wording is modelled on the South African Constitution, which allows the courts to declare government policies on issues such as housing, healthcare, or education to be unreasonable. Courts may not formulate policy themselves – but they can tell Government that existing policy falls short of constitutional obligations and to go back to the drawing board."

The reference to the South African Constitution by Professor Conor O'Mahony would appear to be in relation to Article 27 of the South African Constitution, which provides:

- "1. Everyone has the right to have access to -
  - a. health care services, including reproductive health care;
  - b. sufficient food and water; and
  - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

This provision is reminiscent of the [International Covenant on Economic Social and Cultural Rights \(ICESCR\)](#) which requires States Parties to progressively realise socio-economic rights and safeguard against retrogressive measures<sup>92</sup>. Ireland has ratified ICESCR and is bound by its commitments as a matter of international law.

However, the Courts have previously cited Article 45 of the Constitution of Ireland, which sets out Directive Principles of Social Policy rather than justiciable rights, as support for the view that social welfare rights would not exist at a constitutional level.<sup>93</sup> Nevertheless, the law is not settled in this area and it has been suggested that:

"...the fact that the right to earn a livelihood is only referred to in the non-justiciable Directive Principles of Social Justice in Article 45 meant that if the issue had not been previously decided, he would regard the question of whether the Constitution guarantees a 'legally enforceable and justiciable' right to earn a livelihood as still open."<sup>94</sup>

During pre-legislative scrutiny of a 2018 General Scheme, which proposed to repeal Article 41.2, it was noted that:

"There was a difference of opinion, however, between those preferring a more symbolic type of recognition, and those who wished to go further and entrench meaningful socio-

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<sup>92</sup> CESCR, [General comment No. 3: The nature of States parties' obligations](#) (Accessed 13 December 2023).

<sup>93</sup> *TD v Minister for Education* [2001] IESC 101.

<sup>94</sup> *NVH v Minister for Justice* [2016] IECA 86 at 54.

economic rights in Article 41.2, upon which individuals could reply and seek to have enforced by the courts if necessary”.<sup>95</sup>

However, since the proposed Article 42B places an obligation on the State to “strive to support” family care, rather than an explicit right to social security, it is unclear whether a rights-based argument would succeed before the Courts. Nevertheless, even if such a right were to be found to exist, the separation of powers doctrine, mentioned above, would play a role in determining the scope of such a right. Given the questions pending for hearing in *B.M. and another v Chief Appeals Officer and Others*<sup>96</sup> these issues may be determined by the Supreme Court soon.

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<sup>95</sup> Joint Committee on Justice and Equality, [Report on pre-legislative scrutiny of the General Scheme of the 38<sup>th</sup> Amendment of the Constitution \(Role of Women\) Bill](#), December 2018 (Accessed 13 December 2023). See also IHREC, [The Incorporation of Economic, Social and Cultural Rights into the Irish Constitution](#), February 2023 (Accessed 13 December 2023).

<sup>96</sup> [2023] IESCDT 000131.



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