
LAWYERS
FOR NO
FAMILY AND CARE
REFERENDUMS
VOTE NO-NO
ON
MARCH 8TH

EXECUTIVE SUMMARY

- The proposal to extend the constitutional family to "other durable relationships" is unnecessary and introduces huge uncertainty into our fundamental law

- The rejection by the Government of wording that would permit the Oireachtas to define by law the meaning of "other durable relationships" to be decided by the courts in disputed cases will create major uncertainties for everyone in short term relationships

- This opens the door to concurrent and successive families with multiple partners

- No constitutional protection will be provided for family members when durable relations break down but married families will still be required by courts to make proper provision before they get a divorce

- The "proper provision" protections afforded by Article 41.3 will be avoided by spouses leaving the home to form new constitutional unmarried families based on durable relations

- There will be long term consequences for family law, family property rights, succession law, pension law, tax law, welfare law, and migration and residence law

- Deleting Article 41.2 will remove important provisions that have been relied on by the courts to protect married people from discriminatory tax laws and to protect mothers in contested alimony and maintenance cases after separation and divorce (the Murphy case, the Lv L case and the DT v CT case)

- The door will be opened to increased individualisation of the income tax system against families

- The only special recognition of the role of mothers will be deleted from the Constitution

- There is no truth whatever in repeat Government statements that the Constitution says that "woman's place is in the home". Article 41.2 gives advantages and no disadvantages to women.

- The Government has rushed the amendments through the Oireachtas to delete Article 41.2 in advance of the Supreme Court hearing of the BM and JM case on 11th April by avoiding pre-legislative scrutiny and wrongly suppressing public access to the working papers on the wording and implications of the amendments, the people are being kept in the dark

- The proposed Care article to be inserted in the Fundamental Rights chapter of the Constitution confers absolutely no justiciable rights on people giving care or people needing care and does nothing for caring or support for people with disability outside the family

- The use of Government funded NGOs to promote a yes vote violates the McKenna principles on the conduct of referendums

- The Government was legally wrong to suppress FOI access to the papers of the Interdepartmental Group until after the people have voted

LAWYERS FOR "NO"

THE REASONS TO REJECT THE 39TH AND 40TH REFERENDUMS

The 39th and 40th amendments of the Constitution proposed in two Bills being promoted by the government are closely related. They both seek to amend Article 41 of the Constitution which deals with the Family. Section 1 (2) of the 39th amendment of the Constitution (the Family) Bill 2023 provides that the 40th amendment of the Constitution (Care) Act 2023 would be deemed to have been enacted before the enactment of the 40th amendment.

Taken together, the 39th and 40th amendments of the Constitution proposed in two separate bills to be decided on by two separate ballots on the same day in two separate referendums, will have the effect of removing from Article 41 of the Constitution the current provision that the *"Family"* is based on matrimony, of introducing a new concept of the *"Family"* being based on *"marriage or other durable relationships"*, and removing from Article 41 all constitutional recognition for women's role in the family and the special protections to prevent mothers being obliged to *"by economic necessity"* to work outside the home against their wish to engage in parenting within the home of their children.

Instead of the explicit recognition of the support that women give to society by their parenting role in the Family, it is proposed to insert a new article, Article 42B, providing that the State *"shall strive to support"* provision of care by *"members of their family to one another by reason of the bonds that exist among them".*

CONSTITUTIONAL IMPLICATIONS

Despite claims made by proponents of these amendments that they will have little or no immediate effect on statute law or the legal status of families, it is abundantly clear to us that the Supreme Court will have to interpret the remainder of the Constitution by reference to the changes made in these two amendments.

It is well settled law that the Constitution must be interpreted as a whole. This means that the other provisions of the Constitution will have to be interpreted in a manner harmonious with the two amendments being proposed on referendum day.

We note a remarkable discordance between ministers and government representatives claiming in the media that the amendments they are proposing will make little or no difference to the manner in which ordinary people stand in relation to law, on the one hand, and absolutely opposite suggestions that the existing provisions of the Constitution which is it proposed to amend have political and social consequences which it is desirable to remove.

Government ministers have consistently contended that it would be inappropriate to provide by statute as to their exact meaning. They ask the citizens of Ireland to accept that the amendments are intended merely as "broad brush" constitutional language without consequence for rights, duties and obligations among citizens, families, and legislation.

We categorically reject as constitutionally wrong and legally untrue the suggestion that the proposed amendments will not have significant social and legal consequences for Irish society. We confidently assert that if the amendments are made, they will significantly alter the interpretation of Article 41 of the Constitution in its entirety, and, furthermore, oblige the courts to regard many existing and future laws differently having regard to their validity under the Constitution.

Any suggestion, therefore, that these amendments are purely symbolic or leave the Oireachtas free to legislate or to keep in legislation laws which deal with the family, equality, and many other areas of law relating to family law (including division powers on incomes, homes, businesses and farms) pension laws, succession law, taxation law, and laws relating to the rights of migrants to remain in Ireland will be unaffected by the passage of these constitutional amendments, is fundamentally wrong, in our view.

DURABLE RELATIONSHIPS

By providing that the existing provisions of the Constitution relating to the Family will apply to families based on marriage **and** to families based on *"other durable relationships"*, the proposed amendments would confer on the courts power to decide in disputed cases, what the term *"other durable relationships"* means, to provide by court decision what the term *"durable"* means, and to provide what the term *"relationships"* means in future.

We note in particular that on 23rd of January 2024, in the course of a three hour guillotined debate, Minister Roderick O'Gorman, in rejecting an amendment which would provide that *"durable relationships"* should be *"prescribed by law",* stated: *"The concern is that this approach would involve differential treatment between families founded on marriage and those not founded on marriage. The former would automatically fall within the constitutional definition and protection. The latter would only do so if they satisfied relevant statutory provisions"*.

By rejecting this amendment to the wording of the proposed 39th amendment, the Minister suggested that there would be no *"differential treatment"* between families founded on marriage and those not founded on marriage. He rejected the idea that it should be up to the Oireachtas, by statute law, to determine what *"other durable relationships"* could give rise to constitutional protection as Families; instead he advanced the view that the interpretation of the phrase *"other durable relationships"* was to be left to the courts.

COURTS ONLY DECIDE DISPUTED CASES

As lawyers, we are acutely aware that courts only decide cases where there is a **dispute** between parties coming before them. The Chair of the Referendum Commission has publicly stated that the courts would decide the meaning of this phrase *"in hard cases."*

In relation to that proposed alteration of the meaning of the term *"the Family"*, we would firstly make the point that *"hard cases"* make bad law. We would also point out that courts' decisions as to the meaning of the term *"other durable relationships"* would not be amendable by ordinary statute law, but would require amendment in a constitutional referendum.

It is also our strong view that proposing to the Irish people that the meaning of the term *"the Family"* should become alterable by court decision in future amounts to asking the Irish people to delegate to the courts, rather than the Oireachtas, significant questions based on policy and resources in a manner that has never been attempted before.

Because courts only determine disputes between parties and do not, generally speaking, determine social and resource related issues by reference to day to day political considerations,

the people are, in effect, being asked to sign a constitutional blank cheque with serious social and resource based consequences for the judiciary to complete.

When Minister O'Gorman rejected the amendment reserving the definition of *"other durable relationships"* for decision by the Oireachtas, and when he advanced the reason that such an amendment would *"involve differential treatment between families founded on marriage and those not founded on marriage"*, he creates a massive uncertainty and proposes jurisdiction for the courts in future to amend the meaning of Article 41 of the Constitution which deals with *"the Family"* in a manner which is wholly uncertain.

COURTS DEFERENCE TO THE OIREACHTAS

Naturally, we as lawyers accept that where the Oireachtas enacts laws or amends them or repeals them, the courts usually defer to a large extent to the wishes of the democratically elected parliament and accord a presumption of constitutionality to any laws enacted by the Oireachtas.

However, that deference and that presumption only go so far. In the last analysis, the judiciary reserves to itself the duty and entitlement to invalidate Acts of the executive and the legislature by reference to judicial interpretation of the meaning of the Constitution.

THE O'MEARA DECISION

On the 22nd of January 2024, the Supreme Court decided the case of *John O'Meara and Others v. The Minister for Social Protection, Ireland and the Attorney General*.

The majority decision stated as follows:

> *"For almost 60 years the Constitution provided that no law could be enacted permitting a dissolution of marriage. Since 1995, the Constitution has no longer contained such a provision, but instead, contains provisions which specially regulate the circumstances in which a marriage may be dissolved and notably requires that proper provision be made for the spouse and, where applicable, children of such a marriage.* ***No similar provision is included in the Constitution in relation to any other form of relationship.*** *While marriage, even in the legal context, tends to be viewed through rose-tinted glasses, the inescapable fact is that marriage is a legal status achieved only when formalities specified by the State are complied with, and which cannot be varied, set aside or dissolved by parties themselves without seeking and obtaining the permission of the State."[emphasis added]*

CONSTITUTIONAL SAFEGUARD IN DIVORCES

The amendment made in Article 41 to permit divorce now states, at Article 41.3.2 as follows:

> *"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 and*
> *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."*

Article 41.3.2 will remain in existence if the proposed amendments are made. However, **no provision** is now to be included in the Constitution along similar lines in relation to any other form of relationship.

In effect, parties to *"other durable relationships"* will be free to dissolve those relationships by mutual consent or by the unilateral act of one party to such a relationship.

In other words, if a man and a woman have established an *"other durable relationship"*, the man or the woman simply by exiting the relationship may bring it to an end without any legal formality.

Thus, while marriages will require court orders to dissolve them, *"other durable relationships"* may be dissolved *"de facto"* by the actions of the parties to such relationships.

This *"differential treatment"* (to use the term rejected by Minister O'Gorman in the Seanad) is of profound importance in assessing the likely effects of the 39th Amendment if enacted.

SUCCESSIVE RELATIONSHIPS

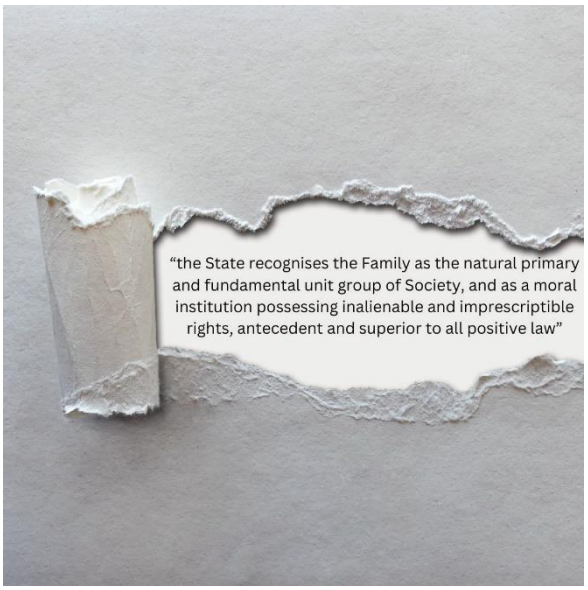
The Taoiseach, the Tánaiste and Minister O'Gorman and others have claimed that the term *"durable relationship"* will not merely confer family status on horizontal relationships between adults but will also confer such status on vertical relationships between a single mother and her child.

While many people might consider that according Family status to what are now termed *"single parent families"* would do any harm, the amendments fail to deal with *"the Family"* as proposed to be redefined.

If, say, a woman is a single parent with a child and that relationship is deemed to be *"the Family"* for the purposes of the Constitution, and if a man and that woman later form a

household and there are two further children of her relationship with that man, will her pre-existing relationship with her first child remain a *"Family"* within the meaning of the Constitution or will it be subsumed in the new *"durable relationship"* between herself, her male partner, and the two children that she and her partner have begotten?

Taking the matter one stage further, if the male partner in that *"durable relationship"* subsequently leaves the household which he and the woman established and which gave rise to a *"Family"* for the purposes of Article 41, will the relationship which he has ended terminate the *"Family"* which the two adults constituted along with three children, and will he be precluded from forming another *"durable relationship"* with a second woman and children he may have with her? Will it be open to a party to a durable relationship to freely enter into a marriage with another partner?



Bearing in mind that Article 41 of the Constitution will still provide that ***"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"***, the question arises as to whether there can be concurrent families or successive families, and whether, in the example mentioned above, the male partner can simultaneously be a member or a parent in two or more constitutional Families notwithstanding the collapse of his durable relationship with the first woman.

Can a male parent and partner become part of two co-existing "primary and fundamental unit groups" of Society? Which of the three family unit groups will continue to exist as *"a moral institution"* notwithstanding the breakdown of the relationship between the man and the first woman in the given example?

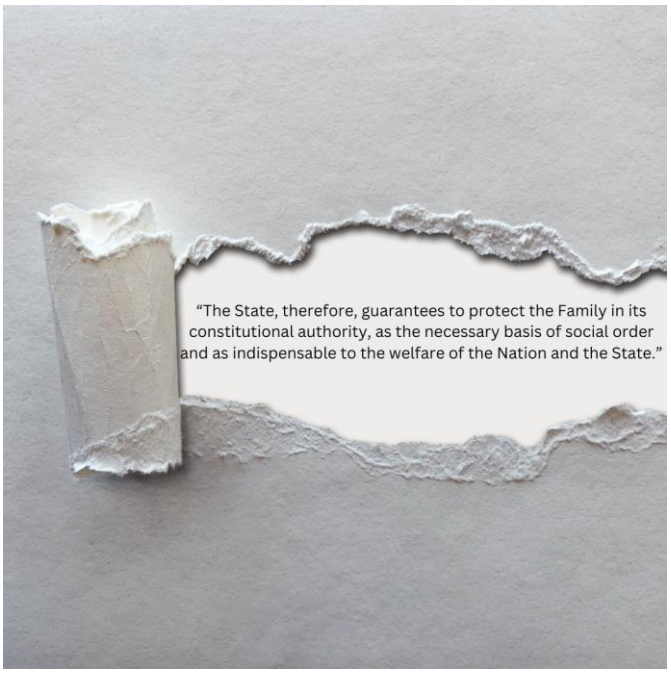
If the male partner marries the second woman with whom he has established a new *"durable relationship"*, can it be said that the State continues to *"guard with special care the institution of marriage and to protect it against attack"*.

By continuing to describe the *"Family"* as a *"moral institution"*, Article 41 produces wholly irreconcilable outcomes. Taken together with Article 42 which provides that the *"Family"* is the natural educator of the child and that the State *"guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children"*, the idea that *"institutions"* can come in and out of existence and coexist with other such "*institutions"*, all sharing inalienable rights and protections and that a parent can be a member of such "*moral institutions*" on a multiple basis, successively and contemporaneously, seems to approach Alice in Wonderland dimensions of irrationality.

And yet, this deeply confused and confusing formula of Family is being proposed for the acceptance of the Irish people as *"the necessary basis of social order"* requiring protection as to *"its constitutional authority"* and as being *"indispensable to the welfare of the Nation and the State"*.

With respect to those who have crafted these constitutional amendments, this is not merely constitutional gobbledegook; it is nonsense unworthy of argument or support.

"OTHER DURABLE RELATIONSHIPS"



As stated above, Article 41.2 provides as follows:

> *"The State, therefore, guarantees to protect the Family in its constitutional authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."*

It is proposed that this should remain part of our Constitution.

If *"the Family"* can come into and out of existence on the basis of its being a *"durable relationship"* terminable at the option of any adult party thereto, how can it be stated to have *a "constitution and authority"*, and how can it be claimed to be the *"necessary basis of social order,"* or how can it be *"indispensable to the welfare of the Nation and the State"*?

Article 41, in our view, would become an unmitigated shambles of mutually contradictory aspirations and entitlements.

The Government has repeatedly claimed that the term *"durable"* does not mean having any defined duration, but does mean that it has the capacity to have duration. Minister Mary Butler wrongly claimed, in the course of a recent radio interview, that the term *"durable"* meant

"permanent". But that interpretation has not been accepted by the interpretation of the Electoral Commission or by Minister O'Gorman.

Even if Minister Butler's view was to be accepted in defining *"durable"* as *"permanent"*, how can one describe a relationship which can be ended by one of two adults unilaterally and without formality as *"permanent"* and therefore as *"durable"*?

The question also arises as to when an *"other durable relationship"* would start. In the case of a single mother, would it start at birth? Would it cease to exist and become merged in another relationship if long-term cohabitation involving that mother took place with another adult?

Would the term *"durable relationship"* be confined to relationship other than what are termed *"open marriages"*? Does the term *"durable relationship"* involve *"cohabitation in a single home or household to the exclusion of cohabitation in any other relationship"*? Can a durable relationship family exist without cohabitation?

The Tánaiste in a recent exchange with Deputy McGrath in the Dáil, suggested that the term *"durable relationship"* could encompass single parent relationships with their child, and relationships between certain grandparents and grandchildren.

There is no clear constitutional foundation for such a claim to be found in the wording of the *"Family"* amendment. For a grandparent – grandchild relationship to be regarded as a *"durable relationship"* giving rise to the entitlement of constitutional protection as a *"moral institution"*, would that be compatible with the continued presence in the relationship of the parents of the grandchild?

Questions About the Coming Constitutional Chaos

- Anne (24) is single mother with baby daughter.

  If the Family Amendment is passed Anne and her daughter will be regarded as having durable relationship and will be a constitutional family under the amended Article 41.

  [Family 1]

- Anne meets Barry (25) and they cohabit together for two years and they have a baby son. If the Family Amendment is passed, Anne and Barry may be eligible to be regarded as having a durable relationship with each other, with their son and with Anne's daughter. Are they a constitutional family for the purposes of the amended article?

  [Family 2]

  Does Family 1 still exist or is it subsumed in Family 2? Without a Court decision, who can tell?

  After two years, Anne (26) and Barry (27) split up.

  Barry leaves the home for good and meets Cathy and moves in with her.

  Does **Family 2** continue to exist or is Anne now a single parent with a durable relationship with her two children and to be regarded as being in an enlarged version of **Family 1**.

- After three years, Cathy and Barry have a baby girl. Can this relationship be regarded as durable without a court decision? Can it amount to a family for the purposes of the amended Article 41?

  [Family 3]

  Can Family 2 still exist?

- Eventually Barry leaves Cathy and meets and marries Deirdre. This is a fully fledged matrimonial family.

  [Family 4]

Have Anne and Cathy now single parents with durable relationships with their children?

Has Barry any constitutional family relationship with Anne or Cathy or any of his children under Article 41 and 42?

- Do any of the Children have a constitutional family relationship with Barry who was at one stage their father in a constitutionally recognised family?

  Can a male parent/partner be contemporaneously part of more than one family?

  Do families based on durable relationships survive when the relationship ends?

- Can a married man who separates without obtaining a divorce be regarded as a party to a later durable relationship capable of being recognised as a family?

- Can an unmarried man or woman be found by a court against his or her wishes to be part or have been part of a constitutional family with all the duties and rights provided for in Article 41 and 42?

- Can unmarried people validly agree that they will cohabit and never be regarded by each other or by their children as part of a constitutional family?

- Will courts be able to effectively "marry" people against the wishes of one of them in disputed cases

STATUTORY COHABITANTS

Number 24 of 2010

CIVIL PARTNERSHIP AND CERTAIN RIGHTS AND OBLIGATIONS OF COHABITANTS ACT 2010

ARRANGEMENT OF SECTIONS

PART 1

PRELIMINARY AND GENERAL

Part 15 of the **Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010** makes provision for certain rights of parties to cohabiting relationships depending upon whether they are *"qualified cohabitants"* within the meaning of Section 172 (5). To be a *"qualified cohabitant"* one must be *"an adult who was in relationship of cohabitation with another adult and who, immediately before the time that the relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period of two years or more in the case where they are the parents of one or more dependent children (meaning a child of whom both cohabitants are the parents) or five years or more in any other case"*.

That Act allows *"qualified cohabitants"* to apply to family courts on notice to the other cohabitant for property adjustment orders, compensatory maintenance orders, and pension adjustment orders *"subject to any agreement under section 202"*.

Section 172 provides that *"cohabitant"* is one of "two adults whether or the same or the opposite sex who live together as a couple in an intimate and committed relationship," and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other".

In determining whether or not two adults are cohabitants, the court is obliged in particular to have regard to the duration of the relationship, the basis on which the couple live together, the degree of financial dependence of either adult on the other and any agreements in respect of their finances, the degree and nature of any financial arrangements between the adults including joint purchase of property or assets, and whether or not there are one or more dependent children, whether one of the adults cares for and supports the children of the other and the degree to which the adults present themselves to others as a couple.

These criteria are subject to the above mentioned time periods provided for in Section 172 (5) relating to the duration of their relationship.

These statutory provisions confer on the courts jurisdiction to make an order for the benefit of either of the cohabitants or of a dependent child, varying any settlement including a will or codicil made on the cohabitants.

It is not clear whether these statutory qualified cohabitants would be automatically accepted to be parties to a *"durable relationship"* for the purposes of the proposed amendments and, accordingly, to be part of a constitutional family.

But it seems unlikely that someone would be denied Family status as a party to an *"other durable relationship"* if that party was a *"qualified cohabitant"* within the meaning of the 2010 Act.

In other words, we have, at the moment, very limited rights for categories of cohabitants under a statutory scheme. Would the courts interpret the term *"other durable relationships"* to a wider or narrower basis than that provided by the current statute? Would the Oireachtas be free to reduce or expand the rights and obligations of cohabitants in future if the courts deem existing statutory cohabitants to be members of a constitutional family under the new definition of the term *"the Family"*?

It is noteworthy that the term *"qualified cohabitant"* is confined to an adult in a relationship of cohabitation with another adult who was *"immediately before the time that that relationship ended"* living with the other adult as a couple for a period of five years or more or two years where there was a child of both of them.

How will this limited status of *"qualified cohabitant"* be reconciled with membership of a Family founded on an *"other durable relationship"*?

Would the courts permit parties to *"other durable relationships"* to opt out of the consequences of cohabitation as they can do at present under **Section 202 of the 2010 Act** by a valid cohabitants' agreement? In other words, would the courts permit members of a *"moral institution"* which is the fundamental unit group of society with inalienable rights to agree by contract among themselves to exempt themselves from mutual obligations in the manner now permitted for cohabitants under **Section 202 of the Act of 2010**?

Under existing statutory provisions in relation to cohabitants, a cohabitant could not be made liable for maintenance of a child of which he or she was not the parent. Would that continue?

FREEDOM NOT TO MARRY

In the recent O'Meara case, the Supreme Court referred to *"marital status"*. Observing that it is not necessarily nowadays *"the subject of prejudice or stereotyping"*, the court stated that *"its distinctive characteristic is that it is a legal status freely chosen by the parties with knowledge that it involves a corpus of rights and obligations, burdens and benefits"*.

The court added that *"it follows, that it is a status which may be rejected by individuals who do not wish to incur the obligations or obtain the benefits, or who simply do not want the State's involvement in what is an intimate and personal relationship."* The court said that some part of the protection and vindication of the personal responsibility and autonomy guaranteed by the Constitution *"involves requiring the State to respect such choices"*.

That view of marriage as a purely optional status, albeit with legal obligations, duties and entitlements attached to it, must be reconciled with the claim made by Minister O'Gorman in the Seanad that the purpose of the 39th Amendment was to have a *"positive and upfront recognition of the concept of family in Article 41, and stating that it is no longer limited to the marital family but also encompasses other durable and committed relationships – namely one parent families, cohabitating couples, and any children they have."*

If durable relationships give rise to family status, parties cohabiting may become subject to family obligations against their wishes.

A *"DIFFERENTIAL APPROACH"* BETWEEN MARITAL AND NON-MARITAL FAMILIES AT A CONSTITUTIONAL LEVEL?

In that context, Minister O'Gorman's claim that *"in respect of durable relationships being prescribed by law, the concern is that this approach would involve differential treatment between families founded on marriage and those not founded on marriage"* must be examined. He said that the *"former would automatically fall within the constitutional definition and protection. The latter would only do so if they satisfied relevant statutory provisions"*. He stated that the Government disagreed *"with that approach"*.

Parliamentary Question from Deputy Michael McNamara:

"Article 41.3 of the Constitution states: "The State pledges itself to guard with special care the institution of marriage … and to protect it from attack". If the referendum proposals are accepted by the people and passed, will there be favourable measures that apply to married couples that will not apply to persons in a durable relationship? What favourable measures that apply to married couples now will continue in the event that this is passed?

The **Taoiseach told Deputy Michael McNamara** that "If the referendums are passed and the Constitution is so amended, it will still be possible for future Governments and the Oireachtas to discriminate in favour of people who are married. That will not change. It will obviously be up to the Oireachtas and Government at the time to decide exactly on what basis they wish to favour or discriminate in favour of people who are married"

KNOCK-ON EFFECTS OF ACCORDING FAMILY STATUS TO NON-MARITAL RELATIONSHIPS

In the O'Meara case, the majority of the Supreme Court held that *"the imposition of taxation and conferring on benefits are matters peculiarly appropriate to the democratic decision of the legislative branch"*. However, the Supreme Court also said that *"measures which are challenged as under inclusive on the grounds that they do not extend the benefit to parties allegedly to be similarly situated to those in receipt of the benefit may be easier to justify than*

those which are over inclusive and which apply their provisions, particularly burdens, to persons not properly within the targeted group".

While accepting that *"in the field of taxation and social welfare, the State is generally entitled to make broad generalisations which are subject to democratic scrutiny and which will not be set aside similarly because a more precisely targeted provision could be envisaged so long as the differentiation is not one going to the essence of the human personality protected by Article 40.1"*, having considered the Donnelly decision which acknowledged that it was *"particularly necessary for the courts to respect the role of the legislature in enacting laws concerned with social and revenue matters, because the raising and spending of public monies involves policy decisions that are more appropriate to the elected members of the legislature than to the courts,"*, the Supreme Court held that *"none of this means that provisions in the field of taxation or social welfare are beyond scrutiny on equality grounds"*.

In the O'Meara case, the Supreme Court held that the existing provisions of the Constitution requiring the State to uphold marriage did not outweigh the State's obligation not to discriminate unlawfully between the equality rights of Mr. O'Meara and his children protected by Articles 40 and 42A of the Constitution.

The court held that the Constitution *"as interpreted, recognises the rights of all children, and obligations of their parents, irrespective of the status of their parents. In this respect, there is no distinction, and certainly no relevant constitutional distinction between children in long-standing non-marital unit such as the O'Meara's and those of a comparable family whose parents were married. Significantly, nor is there any difference in the duties and obligations of the parents married or unmarried owe to the dependent children. In the light of the essential equality of children under the Constitution vis-à-vis their parents, and the rights to which they all have to look to their parents for support, both emotional and financial, and the loss they all suffer on the death of a parent, the stark differential treatment in the [Social Welfare Consolidation Act 2005] requires particular justification"*.

Blandly asserting that marital and non-marital families can continue to be the subject of differential legislative treatment in relation to succession and taxation ignores some fairly obvious and inevitable constitutional issues.

For the O'Meara family, the death of their mother created "conditions of need" indistinguishable between the O'Meara household and a household based on matrimony.

Could it be confidently asserted that, in the field of taxation, for instance, the imposition of capital acquisitions tax on the surviving cohabitant of a homeowner could not have equally unchosen and serious adverse consequences on a non-marital household compared with the tax free consequences of a transfer of the family home on death between the surviving spouse and his deceased's partner in a marital relationship?

Could it be argued that the family rights and the children's rights as members of family and as children in their own right and the surviving spouse's rights could be radically different in such circumstances from that of a married couple?

The Supreme Court has already held that unequal discrimination in social welfare and taxation matters is not beyond the purview of the courts under Equality and Children rights guaranteed by Articles 40 and 42A of the Constitution.

If the proposed amendments are made, could anybody confidently state that two constitutionally recognised families could be radically differently treated as regards the taxation implications of the death of one of the parents owning the family home between marital and non-marital families?

We believe that widening the constitutional definition of the family will inevitably have serious consequences in family law, family property rights and division, pensions law, welfare law, tax law, and immigration law.

RESIDENCY RIGHTS WITHIN THE STATE

While it may well be the case that the Oireachtas would still retain the right to legislate to some degree on a discriminatory basis between married people and unmarried people as regards family reunification rights having regard to requirements of European law, very few lawyers would accept that, in relation to a decision as to whether or not a person who was party to a "durable relationship" but unmarried, a person could not invoke their constitutional status as a member of a family to resist deportation if the proposed amendments are passed. The caselaw of the Superior Courts is replete with consideration of the circumstances and the grounds upon which the State may choose to override the rights of family members to remain within the State on the grounds that they are members of a constitutional family.

There is a significant danger that misleading arguments as to the entitlements of non-residents to family reunification being affected by their being members of a durable relationship could be confused with the right to resist deportation on the grounds of the constitutionally recognised family arising from a non-marital durable relationship if these amendments are passed.

MINISTER NEALE RICHMOND ON SERIOUS CONSEQUENCES

As Minister Neale Richmond stated on the Tonight programme, there are such implications. He said:

> *"And this is what I want to get to the key point of, changing what the definition of family is ... this has* ***serious consequences*** *particularly when we think of immigration law, and proving that somebody is a family member, family law, family reunification this will allow that to happen as well, so we're keeping up to pace with other communities."*

When asked by the presenter, Clare Brock: *"So you're talking about durable relationships?"*, Minister Neil Richmond replied: *"Absolutely, yeah"*.

SUCCESSION LAW

While undoubtedly it is open to the State to argue in support of maintaining existing provisions in relation to succession rights of spouses that these arise from the protection accorded by the Constitution to the institution of marriage and the family based on marriage, it is our considered view that, having regard to the existing law relating to cohabiting couples, and the proposed conferral of *"Family status"* on "other durable relationships", the State would have significant difficulties along the lines encountered in the O'Meara decision of the Supreme Court in maintaining that parties in non-marital families can be entirely deprived of rights equivalent to Succession Act rights in respect of their partner's estate.

We note that wills are not revoked by cohabitation or by divorce. There will be inevitable pressure based on equality rights and family rights as redefined to accord spousal succession rights to partners in other durable relationships so as to prevent manifest injustice and unfairness in "hard cases."

We would observe that few people foresaw that the Children Amendment in Article 42A would later feature as it did in the O'Meara decision to invalidate the law relating to widow's pensions.

ARTICLE 41.2 IS NOT MISOGYNIST OR LIMITING FOR WOMEN IT IS A VALUABLE PROTECTION

In the case of *James Sinnott v. The Minister for Education, Ireland and the Attorney General* and *Kathryn Sinnott v. The Minister for Education, Ireland and the Attorney General* [2001] 2 IR 545, Ms. Justice Susan Denham, later the first woman Chief Justice of Ireland, said the following:

> *"The Constitution is a living document. It must be construed as a document of its time. In Magee v. The Attorney General [1974] IR 284 at page 319, Walsh J. stated: '... no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.' Thus Article 41 is an Article of the 21st century, of our times. In this century the family remains the core unit of our society. While the nature of families evolving in society, as a constitutional unit the family remains grounded on marriage.*
>
> *The Constitution is a constitution of the people expressing principles for its society. It sets the norms for the community. It is a document for the people of Ireland, not an economy or a commercial company. The first of the cases in this judgment illustrates the promise given by the people of Ireland to future generations that the State will provide for free primary education for its children. The promise is an acknowledgement of the great importance placed by the people of Ireland on the education of children.*

Equally the second case in this appeal is grounded on a fundamental concept – even more so perhaps – ***that our society is built on the family. Further, that within the family the special benefit given by women in the home is recognised.*** *It is acknowledged that the benefit is not just for the particular home, family and children, but for the common good.*

This special recognition is of the 21st century and belongs to the whole of society. It is not to be construed as representing a norm of the society long since changed utterly. Rather it is to be construed in the Ireland of the Celtic Tiger. As important now as ever is the recognition given. It is a recognition for all families – of whatever religion or none.

Thus, in Ireland, in relation to the family and the home women have a constitutionally recognised role which is acknowledged as being for the common good. ***This gives to women an acknowledged status in recognition not merely the physical aspect of home making and family building but of the emotional, social, physical, intellectual and spiritual work of women and mothers. The undefined and valuable role of the father was presumed and remained unenumerated by the drafters of the Constitution.***

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 acknowledgment 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."

The foregoing passage neatly and emphatically declares that Article 41.2 in its present form is pro-woman and pro-mother and not in any way limiting of women and cannot reasonably be described as *"misogynistic"*, the term used by the National Women's Council of Ireland when launching their referendum campaign.

The Chair of the Referendum Commission, Ms. Justice Marie Baker has repeatedly emphasised that the present Constitution at no point asserts or means that *"woman's place is in the home"*. Far from suggesting that the Constitution contains such a provision, Article 45 states, at Section 2, that ***"the State shall, in particular, direct its policy towards securing that the citizens (all***

<u>of whom, men and women equally, have the right to an adequate means of livelihood)</u> may through their occupations find the means of making reasonable provision for their domestic needs."

MARRIAGE BAR IN THE PUBLIC SERVICE

It has been <u>falsely</u> suggested that Article 41.2 was the basis of the marriage bar requiring women in the public service to resign upon marriage.

In truth, the marriage bar existed in the public service since Victorian times, long before the creation of an independent Irish State in 1922 and reflected Victorian and Edwardian social attitudes across the entirety of what was then the United Kingdom. Article 41.2 in no way required its maintenance or inhibited its abolition, which happened in 1973 in the wake of Ireland joining the EEC.

That unfair policy long predated the 1937 Constitution and was enforced in the Irish Free State which operated under the 1922 Constitution.

Moreover, it has been <u>falsely</u> claimed that Article 41.2 of the Constitution brought about the exclusion of women from serving on juries. Again, the discriminatory provisions in the Juries Acts in 1924 and 1927 long predate the enactment of Bunreacht na hÉireann and were enacted under the Irish Free State's Constitution of 1922, a Constitution which made no discrimination of any kind between men and women.

The reality is that Article 41.2 places no limitations whatsoever on the equal rights of women protected by Article 40 *"as human persons,"* to be held equal before the law.

DELIBERATE FALSEHOOD

It is particularly disappointing that ministers of the Irish government should repeat the untruth that Article 41.2 provides that *"Women's place is in the home"*. **That suggestion is entirely false.** And yet it is being used by senior politicians who know that it is false to misrepresent the effect of the proposed 40th amendment to the Constitution. There is nothing in Article 41.2 which in any way diminishes the equal standing of women in Irish society.

On the contrary, Article 41.2, as interpreted by Ms. Justice Susan Denham in the *Sinnott* case recognises the reality that the parenting role of women is at least equal in social value to other economic roles carried out by women in the workplace.

Article 41.2 requires the State to endeavour to ensure that parenting mothers should not be obliged against their wishes by economic necessity to work outside the home.

The wording of the Article cannot be construed as in any way confining women to the home or to being excluded from fully and freely choosing to live and work outside the home and outside the family.

ARTICLE 41.2 AND TAXATION POLICY

In the case of *Murphy v. The Attorney General*, the Supreme Court, as early as 1980, struck down provisions of the Income Tax Acts which had the consequence of making *"the amount of tax which Mr. Murphy pays greater than the aggregate of the amounts which would be payable by Mr. and Mrs. Murphy if they were either not married or married and separated."* The judgment of the Supreme Court read as follows:

"It is to be noted that Article 41 has three sections. Section 1 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. It is because of those fundamental features that the State gives the guarantee in section 1 subsection 2. ***Section 2 stresses the importance of women in the home and pledges that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home****. Section 3 subsection 1 must be read not only in the context of the whole of section 3 but in that of the whole article. This means that the pledge given in section 3 subsection 2 to guard with special care the institution of marriage is a guarantee that this institution in all its constitutional connotations including the pledge given in article 41.2.2 as to the position of the mother in the home, will be given special protection so that it will continue to fulfil its function as the basis of the family and as a permanent indissoluble union of man and woman."*

The decision ends with the following paragraph:

"The Court accepts the proposition that the State has conferred many revenue, social and other advantages and privileges on married couples and their children. Nevertheless, the nature and potentially progressive extent and the burden created by section 192 of the Act of 1967 is such that, in the opinion of the Court, it is a breach of the pledge by the State to guard with special care the institution of marriage and to protect it against attack. Such a breach is, in the view of the Court, not compensated for or justified by such advantages and privileges. The Court will accordingly declare that sections 192 to 198 (inclusive) of the Act of 1967 insofar as the sections provide for the aggregation of the earned incomes of married couples are repugnant to the Constitution."

While some commentators have claimed that Article 41.2 was or is a "constitutional dead letter", it is clear from the *Murphy* judgment that the Supreme Court regarded the provision now proposed to be deleted as granting to families based on marriage a protection from discriminatory tax treatment when compared to unmarried persons.

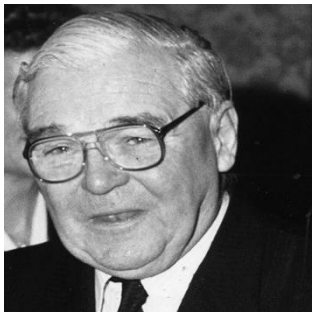
In our view, it is arguable that the removal of Article 41.2 and of the linkage between the family and marriage would tend to weaken the position of families with one parent

working in the home and would increase the opportunity for future governments to engage in income tax *"individualisation"* and the removal of many protections in the tax system which accrue to families based on matrimony.

THE L V. L DECISION – ALIMONY AND MATRIMONIAL CARE RIGHTS

In the case of *L v. L* [1992] 2 IR 77, the Supreme Court rejected a claim that Article 41.2 was a basis for providing homemakers with a share in the matrimonial property.

However, the judgment of Chief Justice Finlay remains of major importance in the approach required by the Constitution to be taken by courts when assessing maintenance and alimony in cases of judicial separation and more recently in divorce law.



Chief Justice Finlay stated the following:

> *"With regard to Article 41.2 on the other hand, the State by subsection 1 clearly recognises the value to the common good of the activities of the wife within the home, and by subsection 2 accepts an obligation to ensure that if the wife is a mother as well she shall not be obliged by economic necessity to engage in labour to the neglect of her duties in the home.*
>
> *It is this last subsection which is particularly relied on by the plaintiff in this case both in the High Court and in this Court.* ***I accept the contention made that the judiciary is one of the organs of the State and that, therefore, the obligation taken by the State to endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour outside the home to the neglect of their duties is an obligation imposed on the judiciary as well as the legislature and the executive.***
>
> *There is, however, I am satisfied, no warrant for interpreting that duty on the judiciary as granting to it jurisdiction to award to a wife and mother any particular interest in*

the family home, where that would be unrelated to the question of her being obliged by economic necessity to engage in labour to the neglect of her duties. ***If a court is assessing the alimony or maintenance payable by a husband to a wife and mother, either pursuant to a petition for separation or to a claim under the Family Law (Maintenance of Spouses and Children) Act 1976, it should, in my view, have regard to and exercise its duty under this subsection of the Constitution in a case where the husband is capable of making proper provision for his wife within the home by refusing to have any regard to a capacity of the wife to work herself, if she was a mother in addition to a wife and if the obligation so to earn could lead to the neglect of her duties in the home. In other words, maintenance or alimony could and must be set by a Court so as to avoid forcing by an economic necessity the wife and mother to labour out of the home to the neglect of her duties in it.*** *Beyond that capacity of the judiciary to take part in the endeavour to comply with the provisions of Article 41.2.2 of the Constitution, I do not consider that the transfer of any particular property right could be a general jurisdiction capable of being exercised in pursuance of that subsection of the Constitution."*

In the same case, Mr. Justice McCarthy stated the following:

"Apart from the President, it is only the judiciary who are expressly bound by the Constitution to make a public declaration of commitment to that duty. Article 41.2 proclaims the State's recognition that by her life within the home a woman gives to the State support without which the common good cannot be achieved and guarantees ***'therefore*** *(emphasis added) (to) endeavour to ensure that mothers should not be obliged by economic necessity to engage in labour to the neglect of their duties in the home'.* ***The question does not arise in this appeal ... but I am not to be taken as holding that these guarantees are restricted to mothers of families based upon the institution of marriage.*** *It is because of the importance of their life within the home that the State shall 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. It is common case that many mothers, in order to devote themselves to their duties in the home, sacrifice material and emotional rewards that might follow from being gainfully employed outside the home."*

Mr. Justice O'Flaherty, in a short concurring judgment, stated the following:

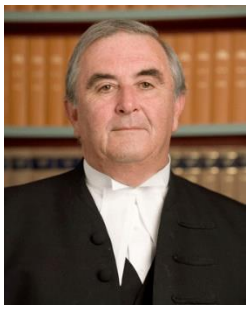
> *"For my part, however, I would make a further point. While Article 41 of the Constitution is headed 'The Family', section 2 of the article clearly refers to 'mothers' only, not wives nor wives and mothers but mothers. This makes clear that it cannot be called in aid to govern the division of property rights between spouses.* ***What it does to is to require the State to endeavour to ensure that mothers with children to rear or to be cared for are given economic aid by the State. If a mother in dire circumstances were to invoke this Article it would be no answer for the State to say that it did not have to make any effort in her regard as all, though it would be open for it to say that it was doing its best having regard to the State's overall budgetary situation."***

Far from being a constitutional dead letter, the Supreme Court decisions in ***Murphy*** and in ***L v. L***, clearly accept that Article 41.2 has important consequences in its present form for the treatment of families and mothers within families.

Removal of the provisions of Article 41.2 will inevitably have legal consequences in relation to future taxation policies affecting the family and the law relating to maintenance and alimony for separated and divorced spouses.

THE POST-DIVORCE EFFECT OF ARTICLE 41.2

In the case of *DT v. CT* [2002] 3 IR 334, the Supreme Court considered what constituted *"proper provision"* in the context of a divorce application. Mr. Justice Murray stated the following:



> *"In my view, the work of a spouse in the home in this case the respondent wife, cannot be a basis for discriminating against her by reason only of the fact that the husband was the major earner or the breadwinner during the course of the marriage. The Constitution views the family as indispensable to the welfare of the State.* ***Article 42.2.1 recognises that by her life in the home the woman gives to the State a support without which the common good cannot be achieved****. No doubt the exclusive reference to women in that provision reflects social thinking and conditions at the time it does, however, expressly recognise that work within the home by a parent is indispensable to the welfare of the State by virtue of the fact that it promotes the welfare of the family as a fundamental unit in society. A fortiori it recognises that work in the home is indispensable for the welfare of the family, husband, wife and children where there are children.* ***In my view, in ensuring that proper provision is made for the spouses of a marriage before a decree of divorce, the courts should, in principle, attribute the same value to the contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home as the principal earner.*** *The value to be attached to their respective contributions in those circumstances is, perhaps, underscored by Article 42.1 of the Constitution which refers, inter alia, to the '... duty of parents to provide according to their means for the religious and moral intellectual physical and social education of their children'.* ***I would observe in passing that the Constitution, as this Court has stated on a number of occasions, is to be interpreted as a contemporary document.*** *The duties and obligations of spouses are mutual and, without elaborating further since nothing turns on this point in this case, it seems to me*

that it implicitly recognises similarly the value of a man's contribution in the home as a parent."

In the same case, Ms. Justice Denham reiterated her analysis of Article 41.2 in the *Sinnott* case mentioned above.

The judgment of Fennelly J. specifically referred to the fact that when divorce was introduced by the 15th Amendment to the Constitution, the terms of Article 41.2 of the Constitution remained unchanged and circumscribes the power given to courts by requiring that a court granting a divorce to be satisfied, even in uncontested divorces, that proper provision is made in the light of Article 41.2.

THE REMOVAL OF ANY MENTION OF MOTHER FROM THE CONSTITUTION

Especially in the light of some of the judicial dicta mentioned above, the 39th Amendment Bill must be seen as removing the only reference to women as mothers or to the use of the term *"mother"* in the Constitution.

We are of the opinion that there appears to be a current unstated ideological agenda to eliminate reference to the male and female gender in legislation and to regard all citizens simply as *"persons"*.

Given that Article 41.2 has played a role in protecting the rights of women who choose to work in the home from discriminatory tax treatment and, in the event of marital breakdown, protect the rights of mothers to continue their parenting lives within the home, we can see no benefit whatever in the removal of Article 41.2 in its present form when viewed in the manner described so eloquently by Ms. Justice Denham in her judgment in the *Sinnott* case.

Removal of Article 41.2 does not in any way advance the rights or status of women either within the home or outside of the home. The provisions viewed as Ms. Justice Denham viewed them are not patronising, demeaning, misogynistic or role limiting in any way.

We note that no advocates of the 40th Amendment have been able to identify any new protection or advantage arising from the proposal to delete Article 41.2. But the downside dangers are obvious.

Even regarded symbolically, there is no advantage or benefit bearing in mind what Ms. Justice Denham so clearly stated to be the correct approach to Article 41.2 in the 21st century.

In short, we regard any suggestion that this alteration to the Constitution will improve rather than disimprove the rights of women and mothers to be **entirely false**.

In addition, we regard the proposed insertion of a new Article 42B as proposed (which we will consider below) as in no way compensating for the damage done by the removal of Article 41.2 to the existing legal protections and recognitions already given by Article 41.2 to women and mothers.

Legally speaking, the removal of Article 41.2 of the Constitution can only be viewed as retrograde in terms of the interests of women and mothers.

THE GOVERNMENT'S ACTIONS IN RELATION TO A PENDING SUPREME COURT APPEAL

In the case of *BM and JM (a minor suing by his mother and next friend BM) v. The Chief Appeals Officer and Social Welfare Appeals Officer and Minister for Social Protection and Ireland and the Attorney General*, the facts are as follows.

BM is the mother of a young man, *JM*, who suffers from Downs Syndrome, epilepsy and borderline autism. He suffers from hyperactivity, behavioural issues, including repeated head-banging. He has poor sleep patterns and *BM* is essentially a fulltime carer, 24 hours a day, seven days a week.

The Department of Social Protection have assessed *BM* as being entitled to a carer's allowance but are not paying her the full rate of such an allowance even though she has no means of her own and cannot seek employment or earn an income because of her commitments as *JM*'s fulltime carer. The Department has taken the view that she was not entitled to the full rate of carer's allowance as she was in receipt of weekly income earned by her partner who is also the father of the child.

Carer's allowance is a non-contributory form of social assistance provided under Part 3 of the Social Welfare (Consolidation) Act 2005. It is means tested. Section 186 (2) (b) enables the

minister to make regulations which in effect dispense with the means test requirement and – depending on the nature of any order made – might thereby augment the reduced payment presently paid to *BM*. *BM* and *JM* are seeking an order that the minister is legally obliged to make regulations.

In the High Court, Ms. Justice Hyland held that even accepting that *"the provision of a carers allowance vindicates the life of a 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 carers' allowance."* The High Court judgment also rejected a claim made on equality grounds under Article 40.1 of the Constitution.

BM and *JM* applied to the Supreme Court for leave to make a *"leapfrog"* appeal to that court. The Government and the Attorney General strongly opposed the granting of leave to the Supreme Court, stating that the mere fact that *BM* invoked Article 41.2 *"does not meant that the appeal was one of general importance"*.

The Supreme Court, by it's preliminary determination, granted leave to *BM* and *JM* for a leapfrog appeal to the Supreme Court. The Supreme Court determination noted that Article 41.2 has not been the subject of extensive consideration by the Supreme Court or other courts.

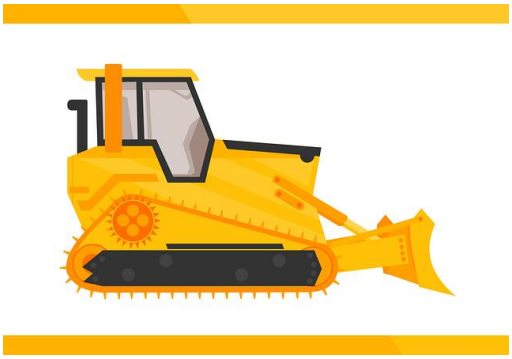
However the Supreme Court went on to hold that the provisions of Article 41.2 have never been considered or examined in the context of the provision of public funds to parents who are obliged to care on a fulltime basis for severely disabled children. The court noted that the case raises ***"issues of systemic importance for the carers of severely disabled children".***

The court's determination recited that the court is ultimately persuaded that the case is an exceptional one within the meaning of Article 35.5.4 of the Constitution in that it raises issues of general public importance which are of systemic importance for carers and that these issues deserve to be examined directly by the Supreme Court.

One of the questions to be determined in the appeal is whether Article 41.2 has any bearing on the proceedings and whether the High Court was correct to state that Article 41.2 cannot be regarded as dictating the level at which the State must provide a carer's allowance or as otherwise mandating the making of regulations by the Minister under the 2005 Act.

The Supreme Court determination allowing the leapfrog appeal was made on the 31st of October 2023. Subsequently, the Supreme Court fixed the 11th of April 2024 as the date on which the appeal would be heard by the Supreme Court.

INTERVENTION IN THE JUDICIAL PROCESS BY RUSHED REFERENDUM



In the meantime however, the Government decided to hold a referendum which would remove from Article 41 of the Constitution the **very provisions** on which the appellants were relying in support of their claim that the minister was constitutionally obliged to make regulations exempting *BM* from being means tested in respect of her carer's allowance.

We note with concern that the acting leader of the Seanad informed the Seanad that the Government was aware of the pending appeal at the time when it fixed the date of the referendum to remove Article 41.2 from the Constitution.

We express grave concern that the Government would, with the full knowledge that an important decision for fulltime carers was about to be made by the Supreme Court having regard to the provisions of Article 41.2 nonetheless chose to expedite the holding of a referendum to remove that wording by fixing the 8th of March as the date on which the 40th Amendment to the Constitution (Care) Bill 2024 would be submitted to the people.

Our concern is heightened by the fact that the Government did not permit the usual pre-legislative scrutiny for the wording of its proposed amendments and guillotined the debates on the wording of the proposed amendments in both Dáil Éireann and Seanad Éireann in a manner which effectively excluded any decision on the many amendments proposed by members of both Houses.

We also expressed concern that the Government apparently informed the media that the 8th of March was chosen because it was International Women's Day.

By choosing the 8th of March as the referendum polling day, the government forced the Electoral Commission into the invidious position of having to warn the government that the legislation would have to be passed by both Houses by Tuesday the 23rd day of January in order for the commission to comply with its obligations under statute.

We regard this sequence of events and the timing of the Referendum to occur so as to make moot a pending decision in the Supreme Court to which the Government itself was party with the gravest concern.

THE NEED FOR CLARITY AND FOREKNOWLEDGE

Any amendment to the Constitution deserves proper consideration and requires affording the Houses of the Oireachtas sufficient time to consider its implications before asking the people to vote on it.

In this case, the government has failed to advance any meaningful interpretation of the phrase *"other durable relationships"*.

The upshot is that the people are being asked to make a very important decision on the basis of a complete absence of clarity as to the consequences of their vote.

Ivana Bacik, Labour leader: "Durable relationships…is not a phrase which has that precise and established legal meaning which I think we need."

Holly Cairns, Social Democrats leader: "What exactly is being defined as a durable relationship under the law? For example, at what point does a couple in a relationship come under the protection of Article 41? What are the implications for the application of taxation

policy, social welfare payments, joint income assessments, succession, family law and mortgages, to name just a few areas?"

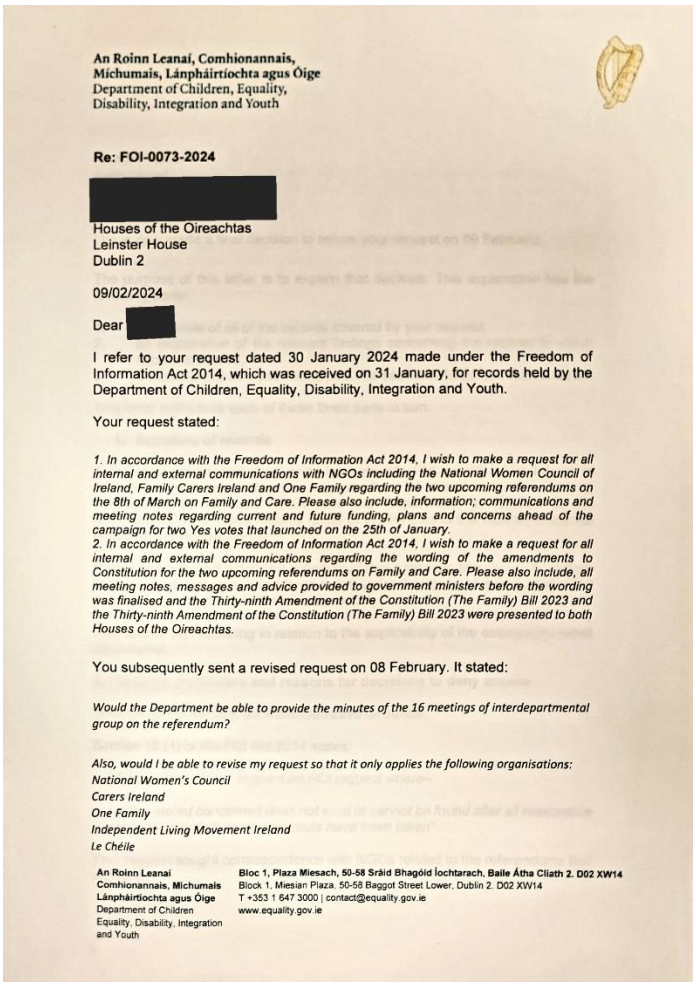
Jennifer Carroll MacNeill, Fine Gael TD: "It [durable relationships] is not a constitutional concept that I have ever seen. I questioned what it meant. It is really important that we tease this through now because it is naturally going to be a question later. What is durability? Is it about commitment or enduring?"

Sorca Clarke, Sinn Fein TD: "The word 'durable' is peculiarly odd and vague in a constitution…We need assurances that this language will not cause legal issues or loopholes. Ambiguity is not much use. We should have clear and defined wording."

Verona Murphy, Independent TD "The proposed amendment to the Constitution includes the words 'durable relationships'. Marriage is a legal contract that is clearly defined and easy to understand. Therefore, we refer to marriage in the Constitution and it is legally clear what is being referred to. However, the phrase 'durable relationships' is open to interpretation, whomever you discuss it with. Is it a good idea to insert a clause in the Constitution which contains a very subjective term?"

Catherine Connolly, Independent TD "I have the greatest difficulty with the word 'durable'. If I take it on a personal basis in my own experience, I might apply the term 'durable' to one particular relationship and not another that was much longer than a shorter relationship. I do not know about that word. It needs to be teased out."

SUPPRESSION OF RELEVANT RECORDS



An Roinn Leanaí, Comhionannais, Míchumais, Lánpháirtíochta agus Óige
Department of Children, Equality, Disability, Integration and Youth

Re: FOI-0073-2024

[redacted]
Houses of the Oireachtas
Leinster House
Dublin 2

09/02/2024

Dear [redacted]

I refer to your request dated 30 January 2024 made under the Freedom of Information Act 2014, which was received on 31 January, for records held by the Department of Children, Equality, Disability, Integration and Youth.

Your request stated:

1. In accordance with the Freedom of Information Act 2014, I wish to make a request for all internal and external communications with NGOs including the National Women Council of Ireland, Family Carers Ireland and One Family regarding the two upcoming referendums on the 8th of March on Family and Care. Please also include, information; communications and meeting notes regarding current and future funding, plans and concerns ahead of the campaign for two Yes votes that launched on the 25th of January.
2. In accordance with the Freedom of Information Act 2014, I wish to make a request for all internal and external communications regarding the wording of the amendments to Constitution for the two upcoming referendums on Family and Care. Please also include, all meeting notes, messages and advice provided to government ministers before the wording was finalised and the Thirty-ninth Amendment of the Constitution (The Family) Bill 2023 and the Thirty-ninth Amendment of the Constitution (The Family) Bill 2023 were presented to both Houses of the Oireachtas.

You subsequently sent a revised request on 08 February. It stated:

Would the Department be able to provide the minutes of the 16 meetings of interdepartmental group on the referendum?

Also, would I be able to revise my request so that it only applies the following organisations:
National Women's Council
Carers Ireland
One Family
Independent Living Movement Ireland
Le Chéile

An Roinn Leanaí Comhionannais, Míchumais Lánpháirtíochta agus Óige
Department of Children Equality, Disability, Integration and Youth

Bloc 1, Plaza Miesach, 50-58 Sráid Bhagóid Íochtarach, Baile Átha Cliath 2. D02 XW14
Block 1, Miesian Plaza, 50-58 Baggot Street Lower, Dublin 2. D02 XW14
T +353 1 647 3000 | contact@equality.gov.ie
www.equality.gov.ie

The government's refusal to disclose under the Freedom of Information Act the minutes of the Inter-Departmental Group meetings which considered the proposed amendments had 16 meetings during the year 2023. On the 20th of February 2024, Minister Roderick O'Gorman, the Minister for Children, Equality, Disability, Integration and Youth, was asked by Deputy Carol Nolan in Dáil Éireann if he would publish in full the minutes and documents associated with the Inter-Departmental Group that met to discuss the forthcoming referenda on the Constitution and whether he would provide details of the membership of the group, the number of times it met, the attendees at each meeting and whether he would make a statement on the matter.

Minister O'Gorman replied that the two referendums were planned to take place on the 8th of March 2024. He then stated in his reply that *"in line with the McKenna and McCrystal principles on the use of public funds in a referendum, all papers in relation to the work of the Inter-Departmental Group are precluded from publication* ***until after the referendum votes have taken place."***

This claim by Minister O'Gorman that he was prohibited by law and, in particular, by the Supreme Court decisions in the *McKenna* case and the *McCrystal* case from publishing the minutes of the Inter-Departmental Group which considered the wording of the proposed amendments is, in our opinion, utterly misconceived. The Seanad Independent Group had previously requested access to these records by an FOI request dated the 30th of January 2024.

A department's officer, in the Constitutional Referendum Unit claimed that it was the function of the Electoral Commission to provide neutral and accurate information to the public about the upcoming referendums and to promote public awareness of them. He further stated that premature release of the records would impair the integrity and validity of the referendums as public officials could be seen to promote directly or indirectly a particular outcome in a referendum in breach of the *McKenna/McCrystal* principles. He stated *"It is my opinion that to release these records in advance of the referendums in March 2024 would be contrary to the principles set down in the judgments of McKenna v. The Taoiseach and McCrystal v. The Minister for Children. As such I believe it would not be in the public interest to release them at this time."*

The bottom line is that the Government has invoked two totally irrelevant court decisions to prevent the public from understanding the basis on which the proposed wording was chosen in respect of each of the referendum proposals.

At the Fine Gael campaign launch for a Yes vote, the Taoiseach in general terms informed the attendance that the Government had carefully considered the ups and downs and advantages and disadvantages of various choices in respect of the wording.

We believe that there is nothing in the *McKenna* case or in the *McCrystal* case that supports the suppression of records of the Inter-Departmental Group which considered all of the implications both for and against the wordings now proposed. We are astonished that the government could claim that it is in the public interest that the public should not know what the Inter-Departmental Group considered were the advantages and disadvantages and the

consequences of the choices that had been made in drafting the proposed constitutional amendments.

We cannot accept that the public interest would be in any way compromised by the public having access to the deliberative process records involving multiple state departments before exercising its own sovereign judgment to amend the Constitution. The people of Ireland are the sovereign authority in this State.

It cannot be in the public interest to deprive the electors of access to records which would enlighten them one way or another as to the reasons why the referendum wordings had been cast in the very unsatisfactory manner that they have been.

For instance, we know that the proposed referendums do not implement the recommendations of the Citizens Assembly. Likewise, we know that the referendums are not in accordance with the All Party Committee Report which dealt, *inter alia*, with these constitutional issues.

The public have no access to the likely knock-on effects for public policy as understood by the various departments of state which participated in the Inter-Departmental Group.

Having considered the Supreme Court decisions in the McKenna and McCrystal cases, it is abundantly clear to us that they do not justify withholding important records from public knowledge relating to the likely consequences of the making of the amendments to the Constitution and of the wording chosen for each of the proposed amendments.

On the contrary, we are of the view that it would have been open to any Minister of the Government to place some or all of the likely consequences and the wording reasoning into the public domain at any time during its deliberative process.

Publication of the minutes of any inter-departmental group could not constitute *"advocacy"* or the expenditure of public funds with the intention of procuring one result rather than another in the people's deliberative process which occurs during the period up to polling day.

Furthermore, we express astonishment that it appears from the reply given to the Independent Senators Group and to Deputy Carol Nolan that these records will be released once the referendums' outcomes are known.

We instance the wording of the proposed Care Referendum in this regard. Why was the word *"strive"* inserted into the proposed amendment? Was it intended to deprive any person in care or providing care of any direct right to seek redress in the courts for failures by the Government to provide for care as in the *BM and JM* case referred to above?

Access to the minutes of the Inter-Departmental Group which considered these issues would be of inestimable value to voters in assessing whether the proposed amendments to the Constitution have any significant value, any significant disadvantages, and any significant implications for persons who need care and for persons providing care.

THE ELECTORAL COMMISSION IS ALSO "IN THE DARK"

Furthermore, the statement that it is for the Electoral Commission acting as referendum commission to inform the public about the proposed amendments, entirely misses the point that the Referendum Commission will have no access to the same records for the purposes of its information role.

In short, we regard the refusal of FOI access to the extensive records of the meetings of the Inter-Departmental Group examining the proposals to amend the Constitution and to consider the implication of the wording to be put before the people as perverse and sinister, especially having regard to the abrogation of the normal pre-legislative scrutiny procedures in the Houses of the Oireachtas and the guillotining of debate to ensure that the referendum would be held on the 8th of March, a date of no constitutional significance.

THE CARE ARTICLE

We note that it is proposed to create a new Article 42B headed *"Care"* in the Fundamental Rights chapter of the Irish Constitution. The new article would read as follows:

> *"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."*

This proposed wording, even though it is inserted in the Fundamental Rights chapter of the Constitution, confers absolutely no rights of a justiciable kind on any person who is in need of care or who is providing care to a person in need of care.

Professor Conor O'Mahony, Professor of Constitutional Law and Child Law in University College Cork has 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"*

The phrase *"strive to support"* is very different indeed 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"*.

As Senator Tom Clonan, himself a family carer and parent of a person who will be in need of lifelong care, commented:

> *"I cannot express this strongly enough. This wording is such a lost opportunity and it adds insult to injury. It is a slap in the face for disabled citizens and the huge community and network of carers. I believe these proposed changes are going to fail and what a waste of an opportunity apart from the waste of millions of taxpayers' euro. This is such a poorly worded proposal. I have been in this House for almost two years and I cannot get my head around this. I do not understand why the government would persist."*

Moreover, both Senator Clonan and other bodies have emphasised that the proposed new wording of Article 42B strongly implies that the provision of care is a family responsibility. Many persons in need of care will have no family members in a position to care for them. This amendment to the Constitution will leave them excluded from the only constitutional provision relating to their needs.

We have come to the conclusion that the proposed amendment to the Constitution is political window dressing of a worthless kind. Although located in the Fundamental Rights chapter of the Constitution, no citizen will be given any entitlement to demand that the State personally supports him or her in the provision of care.

Bearing in mind that the Care amendment in addition to the worthless insertion of a new Article 42B which gives rise to no enforceable rights, also removes from the Constitution Article 41.2, which has been the basis of important decisions such as the *Murphy* case, the *L v. L* decision and the *CT* decision, the amendment only has negative legal effects for mothers providing parenting within the home and does nothing for people in need of care in terms of the right to independent living, community support or the provision of care by persons other than family members who may or may not be in a position, if they exist, to provide care at all.

Especially in the context of a general consensus that caring in Ireland both within and without the home is underfunded, the expenditure of €23 million on a referendum without any direct effect on carers and persons in need of care is, in our view, legally and politically futile and misconceived.

CONSTITUTIONAL ISSUES IN THE REFERENDUM CAMPAIGN

We are deeply concerned about the gross imbalance in resources available to those supporting and opposing the proposals to amend the constitution. The courts in a series of cases have laid down a clear and important principle that the use of public resources to advocate or to support amendments to the Constitution by those who control such resources is itself unconstitutional.

The involvement of heavily state-funded NGOs, (including the National Women's Council of Ireland which is 95% state funded) to campaign and advocate for a yes vote, is, in our view hugely indistinguishable from direct expenditure and advocacy of the kind prohibited by the McKenna judgement.

The deployment of full time NGO staff where salaries are almost entirely paid for by the exchequer amounts to state subsidised involvement in an election campaign.

Political parties are also in receipt of Exchequer funding and are supposed to apply all of that funding to non-electoral and non-referendum expenditure.

In these referendums, between political parties and NGOs, the yes campaigns are supported by organisations which are hugely dependent on the exchequer.

Those who are advocating for a NO vote are left to their own devices. Raising money for posters is made very difficult by the requirements of the Electoral Acts and SIPO legislation.

Our concerns are heightened by the behaviour of Minister Roderic O'Gorman in stating that NGOs would have to justify any failure to support the yes campaigns. He said that "organisations who regard themselves as progressive will have to explain themselves if they campaign against a yes vote in the referendum on removing the article from the Constitution about a woman's place being in the home". (Irish Times, January 2024)

Apart from repeating the manifest lie that the Constitution says that "woman's place is in the home", his words were also perceived as a verbal threat of Government disfavour to state funded NGOs to align themselves with the yes campaign.

We regard the use of state funded NGOs as advocacy bodies in the yes campaign as clear breaches of the Constitution arising from the McKenna judgement and other cases.

CONCLUSION

Having regard to the proposed amendments to the Constitution and their likely effects and to the uncertainties and self-contradictory language proposed to be inserted in the definition of Family and the utterly vacuous proposal in respect of Care, while deleting Article 41.2, which has had important legal effects in the past, we are strongly of the view that there is no legal or constitutional argument for acceptance of these amendments and, accordingly, we urge the citizens of Ireland to go out and vote *"No"* in both referendums on the 8th of March.