

Thirty-ninth Amendment of the Constitution (The Family) Bill 2023

Bill No. 91 of 2023

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Abstract

The purpose of this Bill is to provide for the amendment of Article 41 of Bunreacht na hÉireann in response to recommendations of the Citizens' Assembly on Gender Equality concerning the definition of the family.



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Summary

The purpose of [An Bille um an Naoú Leasú is Tríochoa ar an mBunreacht \(An Teaghlach\), 2023, Thirty-ninth Amendment of the Constitution \(The Family\) Bill 2023](#) is to add text to Article 41.1.1° of the Constitution in both the Irish and English text, that the Family may be founded on marriage or other durable relationships. The Bill also provides for the proposal to delete the words “on which the Family is founded” from Article 41.3.1° in both the Irish and English text.

Article 41 of the Constitution of Ireland	Citizens’ Assembly recommendation	JOC on Gender Equality proposed wording	Thirty-ninth Amendment of the Constitution (Family) Bill 2023 ¹
41.1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.	Article 41 of the Constitution should be amended so that it would protect private and family life, with the protection afforded to the family not limited to the marital family.	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.	41.1.1 The State recognises the Family whether founded on marriage or on other durable relationships as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
41.1.2 The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.		The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.	
41.3.1. The State pledges itself to guard with special care the institution of Marriage, on which the Family is		The State pledges itself to guard with special care the Family, including but not limited to the marital family.	The State pledges itself to guard with special care the institution of Marriage and to protect it against attack.

¹ The Irish text of Article 41 and the proposed amendment is set out later in the Digest.

Article 41 of the Constitution of Ireland	Citizens' Assembly recommendation	JOC on Gender Equality proposed wording	Thirty-ninth Amendment of the Constitution (Family) Bill 2023 ¹
founded, and to protect it against attack.			

Introduction

On 5 December 2023 the General Scheme of the [\[Thirty-ninth\] Amendment of the Constitution Bill 2023 \[\(Family\)\]](#) was published alongside the General Scheme of [the \[Fortieth\] Amendment of the Constitution Bill 2023 \[\(Care\)\]](#).²

The [Explanatory Memorandum](#) states that the purpose of the Bill is to propose “to add text to Article 41.1.1° of the Constitution in both the Irish and English text, which acknowledges that the Family may be founded on marriage or other durable relationships. The Bill also provides for the deletion of the words “on which the Family is founded” from Article 41.3.1° in both the Irish and English text.”

Minister for Children, Equality, Disability, Integration and Youth, Roderic O’Gorman TD, said the present wording of Article 41.1.1° does not reflect the values of the country and “means the exclusion of thousands of families from the recognition and the protection of the Constitution solely because those families aren’t based on marriage”.³

On 7 December 2023, the Government [approved the publication](#) of the Thirty-ninth Amendment of the Constitution (The Family) Bill 2023 and the Fortieth Amendment of the Constitution (Care) Bill 2023. On 8 December 2023 the [Thirty-ninth Amendment of the Constitution \(Family\) Bill 2023](#) (the Bill) was published.

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). A PLS waiver was agreed on 6 December.

The other recommendations of the Citizens’ Assembly on Gender Equality in relation to Article 41.2 of the Constitution are addressed in the [Fortieth Amendment of the Constitution \(Care\) Bill 2023](#). The L&RS has published a [Bill Briefing](#) and [Bill Digest](#) on the Amendment of the Constitution (Care) Bill separately. Therefore, discussion of those issues is beyond the scope of this Digest.

This Digest will provide a summary of the commentary on the operation of Article 41. An overview of the proposals for reform in respect of this provision will also be provided.

² Department of An Taoiseach, ‘[Government approves proposals for referendums on family and care](#)’ (Press Release, 6 December 2023).

³ Jack Horgan-Jones, ‘[Referendums on women in the home and the concept of the family to be held next March](#)’, (The Irish Times, 5 December 2023).

Background: Societal change and ‘the family’

As stated in the leading constitutional law textbook, *Kelly: The Irish Constitution*:

“Because of the conservative ideology originally underpinning Articles 41 and 42, aspects of these articles have been the focus of more debate than many other provisions of the Constitution, given the increasing secularisation and liberalisation of Irish society beginning in the 1960s. [...]

A number of issues continue to generate debate. In particular, the constitutional emphasis on the position of the married family is somewhat at odds with the growing number of non-marital families in the country. In addition, the reference in Article 41.2 to the role of woman in the home is understandably regarded as sexist and paternalistic in contemporary times.”⁴

Similar observations were made by the [Constitutional Review Group](#) (Review Group), established by the government on 27 April 1995 to review the Constitution and, in light of its review, identify areas where constitutional change may be necessary. The Review Group highlighted that Article 41 “was clearly drafted with only one family in mind, the family based on marriage.” The constitutional definition of “family” was identified as one of the issues that needed be addressed owing to significant social change since 1937 and the effect of this definition on non-marital families.⁵

Key statistics

Some key findings from Census 2022 in respect of households and families⁶ include:

- The number of families with no children saw an increase of 11% since 2016 and increase of 14% when compared with 2011.
- The number of same-sex couples⁷ increased by 157% when compared with 2011 and stood at 10,393 in Census 2022.
- Since 2016, the number of cohabiting couples without children living in private households went up by 17%, more than twice the growth rate of married couples without children living in private households.

Reproduced from CSO⁸

Figure 1 below gives an overview of the type of family units in private households as captured by the last three Census, whilst Table 1 overleaf gives an overview of changes in household composition since the previous Census. Figure 1 shows that married with children is still the most common type of family unit. However, as Table 1 shows, whilst married couples with children rose by only 2% between 2016 and 2022, cohabiting couples with children increased by nearly 13% in

⁴ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (Bloomsbury, Fifth Edition 2018) [7.7.02].

⁵ The Constitution Review Group, [Report of the Constitution Review Group](#) (May 1996) 319, 322.

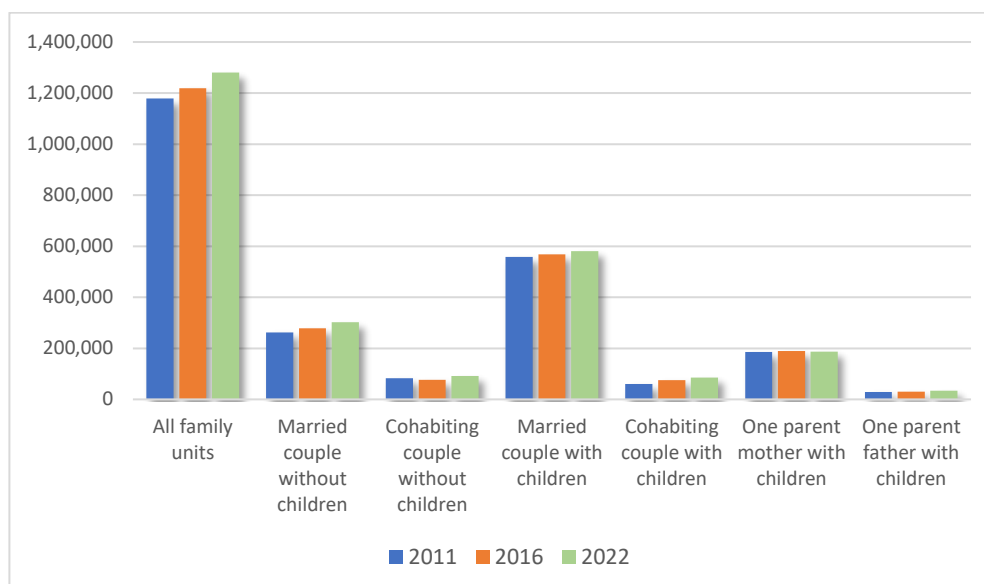
⁶ For census purposes, a family is defined as a couple with or without children, or a one-parent unit with one or more children. Family members must be usual residents of the relevant household. [Source: [Families - CSO - Central Statistics Office](#)]

⁷ The CSO does not appear to provide a breakdown of marriage/civil partnership and cohabiting couples for the 2022 Census, a distinction that is [reported](#) for the 2016 Census.

⁸ [Key Findings - CSO - Central Statistics Office](#)

this same period. In addition, the number of cohabiting couples without children rose by approximately 20%, whilst the number of married couples with no children increased by approximately 8%.⁹

Figure 1 Type of family unit in private households, Census 2012, 2016, 2022



Source of data: CSO¹⁰

Table 1 Percentage Change in Family Units in Private Households since previous census

Type of Family Unit	% change since previous census	
	2016	2022
All family units	3.32	5.05
Married couple without children	6.6	8.4
Cohabiting couple without children	-7.9	19.53
Married couple with children	1.72	2.17
Cohabiting couple with children	25.42	12.8
One parent mother with children	1.52	-1.39
One parent father with children	2.32	12.81

Source of data: CSO¹¹

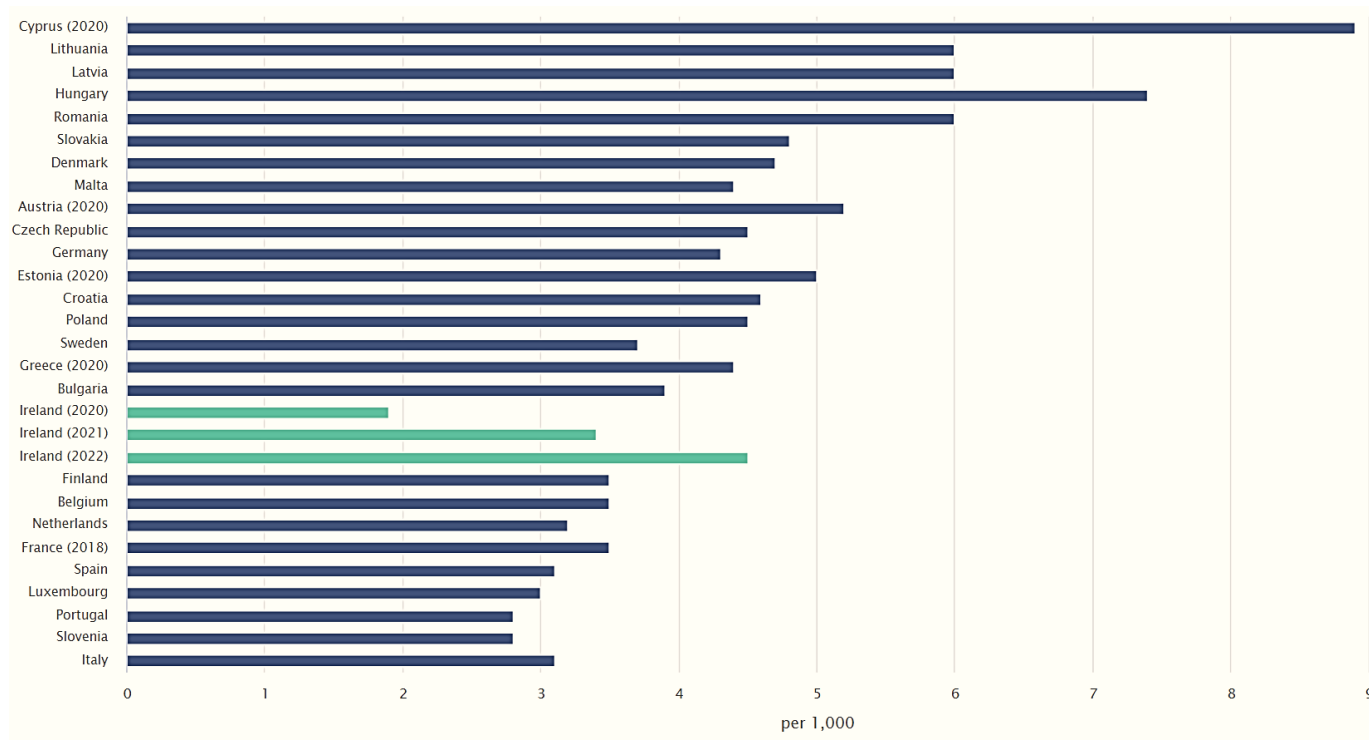
Turning to marriage, data from the Central Statistics Office (CSO) shows that the number of marriages celebrated in 2022 rose by 35% compared with 2021, with a total of 23,173 marriages (both opposite and same-sex) in 2022 compared with 17,217 in 2021, an increase of 5,956 (35%). The CSO noted that this increase reflects the lifting of COVID restrictions and the related impact on marriage numbers in 2022. In terms of marriage rates across the EU, Hungary had the highest with a rate of 7.4 per 1,000 population in 2021 (the most recent available data). Portugal and Slovenia had joint lowest in 2021 with a marriage rate of 2.8 per 1,000 population. In the case of Ireland, there were 4.5 marriages per 1,000 population in 2022, up from 3.4 in 2021 and 1.9 in 2020.¹²

⁹ [Families - CSO - Central Statistics Office](#)

¹⁰ [F3071 - Family Units in Private Households \(cso.ie\)](#)

¹¹ [F3071 - Family Units in Private Households \(cso.ie\)](#)

¹² [Main Results - CSO - Central Statistics Office](#)

Figure 2 Crude marriage rates per 1,000 population in the EU, 2021*Reproduced from CSO¹³*

There were 57,540 births registered in 2022, with 32,786 (57%) registered as within marriage/civil partnerships and 24,754 births registered as outside marriage/civil partnership. Births registered as outside marriage/civil partnership accounted for 43% of all births, an increase of 2.3% from 2021.¹⁴ More broadly, there has been a trend of an increasing proportion of births outside of marriage – from 14.6% in 1990 to 31.5% in 2000 to 33.8% in 2010.¹⁵ Table 2 below gives an overview of this trend from 2010-2022. Whilst quarterly data for 2023 shows a slight reversal in this trend, with 42.6% of birth outside of marriage/civil partnership in Q1 and 40.9% in Q2, both figures are an increase on the same quarters a decade previously (36.5% in Q1 2013 and 34.0% in Q2 2013 respectively).¹⁶

Table 2 Births outside of marriage, %, 2010-2022

Date	2010	2012	2014	2016	2018	2020	2022
%	33.8%	35.1%	36.3%	36.7%	37.9%	39%	43.0%

Sources of data: Eurostat and CSO¹⁷

¹³ [Main Results - CSO - Central Statistics Office](#)

¹⁴ [Vital Statistics Yearly Summary 2022 - CSO - Central Statistics Office](#)

¹⁵ [File:Live births outside marriageTable3.png - Statistics Explained \(europa.eu\)](#)

¹⁶ [Vital Statistics First Quarter 2023 - CSO - Central Statistics Office](#); [Vital Statistics Second Quarter 2023 - CSO - Central Statistics Office](#)

¹⁷ Eurostat, [Fertility indicators \[demo find custom 8969653\]](#); [File:Live births outside marriageTable3.png - Statistics Explained \(europa.eu\)](#); [Key Findings - CSO - Central Statistics Office](#) and [Vital Statistics Yearly Summary 2022 - CSO - Central Statistics Office](#)

Key statistics – including from recent censuses – show changes in family formation in Ireland over the last decade or so. Whilst married couples with children are still the most common family unit with children, trends show that other family types are increasing in frequency – with cohabiting couples, both with children and without children, increasing at a faster rate compared to most other family types (incl. married couples with children) between the most recent censuses.

Recommendations of the Citizens' Assembly and subsequent developments

The main purpose of the Thirty-ninth Amendment to the Constitution (Family) Bill is to provide for the amendment of the Constitution in response to recommendations of the Citizens' Assembly on Gender Equality (Citizens' Assembly).

Article 41 of the Constitution: the family

41.1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

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

41.3.1. The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

Citizens' Assembly on Gender Equality Recommendation

"Article 41 of the Constitution should be amended so that it would protect private and family life, with the protection afforded to the family not limited to the marital family."

Citizens' Assembly on Gender Equality

The Citizens' Assembly on Gender Equality was established by [a motion](#) proposed on 9 July 2019.¹⁸ As stated in the motion to Dáil Éireann on 9 July 2019, the Citizens' Assembly was called to consider matters concerning the advancement of gender equality. The Terms of Reference required the Citizens' Assembly to bring forward proposals to the Houses of the Oireachtas for consideration that:

- "challenge the remaining barriers and social norms and attitudes that facilitate gender discrimination towards girls and boys, women and men;
- in particular, seek to ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in the workplace, politics and public life;
- 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 co-responsibility for care, especially within the family; and,

¹⁸ Dáil Éireann debate – Tuesday 9 July 2019, '[Citizens' Assembly on Gender Equality: Motion](#)'.

- scrutinise the structural pay inequalities that result in women being disproportionately represented in low pay sectors.”

As stated in the motion debate, priority was to be given to proposals “which may include policy, legislative or constitutional change, having regard to the legal requirements and the costs versus the potential impact ...”¹⁹.

As specified by the Oireachtas, the Citizens’ Assembly comprised one chairperson (Chair) and 99 citizens randomly selected from local authorities’ register of electors. The method for selection of members was set out in the Oireachtas resolution which specified that:

‘Membership of the Assembly will consist of 100 persons as follows:

- A Chairperson to be appointed by the Government;
- 99 citizens entitled to vote at a referendum, recruited at national level and randomly selected in accordance with best recruitment practice, as advised by industry experts so as to be broadly representative of Irish society.

Membership of the Assembly will not include participation by politicians.’²⁰

Dr Catherine Day, former Secretary General of the European Commission, was appointed to the role Chair in October 2019.²¹ A public call for submissions opened on 29 January 2020 and ran until 6 March 2020. A total of 246 published responses were received. These can be viewed [here](#). The first (introductory) meeting took place on 25 January 2020, with the first full meeting taking place in person from 15-16 February 2020.²²

The Citizens’ Assembly focused on Article 41 of the Irish Constitution at an online meeting on 13 February 2021. The Agenda for this meeting can be viewed [here](#), with circulated presentations and papers available [here](#). The summary outline of this meeting (from Appendix 3 of the Citizens’ Assembly’s report) is as follows:

Summary outline of meeting: 13 February 2021 (online) - Article 41

On Saturday 13 February the Assembly met from 10am to 3.45pm, with an hour’s lunch break.

This meeting focused on Article 41 of the Irish Constitution and agreeing a draft ballot paper on this topic for voting on in April.

Members were sent 7 videos in the four weeks leading up to the meeting:

1. Dr Tom Hickey on 'The Irish Constitution';
2. Dr Laura Cahillane on Article 41.2

Members were also recirculated with 3 videos of the presentations and videos from the February 2020 meeting on the family. In addition, members were recirculated with videos played at optional evening meetings in advance of the meeting. These were:

¹⁹ Dáil Éireann debate – Tuesday 9 July 2019, ‘[Citizens’ Assembly on Gender Equality: Motion](#)’.

²⁰ Further details in respect of the background to this can be found in the [Bill Digest](#) for the Citizens’ Assemblies Bill 2019, a short technical Bill providing for the use of the register of electors to select members for a Citizens’ Assembly on gender equality.

²¹ The Citizens’ Assembly, 2020 – 2021 Assembly on Gender Equality, [Members](#).

²² The Citizens’ Assembly, 2020 – 2021 Assembly on Gender Equality; please see links to all meetings held by the Citizens’ Assembly [here](#).

3. Chair's video explaining the Pathway to Recommendations;
4. Chair's video on the approach to the meeting on 13 February

Members also received a paper on 'Submissions received on Article 41 of the Constitution' prepared by Dr Pauline Cullen and the draft ballot paper on the Constitution.

The following legal experts were available to answer questions on the draft ballot paper: Dr Tom Hickey, Dr. Laura Cahillane, Professor Oran Doyle, Professor Conor O'Mahony and Dr Fergus Ryan. Members agreed the draft ballot paper on Article 41 by Zoom poll at this meeting.

A number of submissions referenced in the paper ([The Constitution: Summary of organisational submissions to the public consultation process](#)) circulated to members at this meeting of 13 February addressed definitions of the family, including those referenced here. All those referenced sought reform of the current definition of the family to one that is broader in scope. For instance, the National Women's Council of Ireland asserted that the current definition of the family does not encompass the diverse range of family units within society:

.. the definition of family within the Constitution is based on a narrow understanding of the family that prioritises heterosexual, married families and fails to recognise and protect the diverse range of family forms that exist in modern Ireland. Failure to recognise diverse family forms means that the care work of many people goes unrecognised and is devalued.²³

For One Family, the current definition of the Constitutional family results in certain types of families – those not falling within the definition of the Constitutional family - not receiving certain rights and protections:

One Family has been seeking an expansion of Article 41.3 of the Constitution in relation to the definition of the family for over 45 years. There are many important reasons for reviewing and expanding the understanding of family in the Constitution which include: 1. The Constitutional definition of family only affords rights and protection to the marital family and no other set of people are considered a Constitutional family. An expanded understanding of family will build on other recent changes such as the Children's Referendum; the Child and Family Relationships Act; marriage equality and the role of women in the home.²⁴

The Irish Human Rights and Equality Commission (IHREC) also sought reform of Article 41, including a broader construction of family life to ensure that it is line with societal developments and international human rights:

Article 41 of the Constitution of Ireland protects the rights of the family and contains a number of provisions imposing duties on the State. Article 41.1 recognises the family as the 'natural primary and fundamental unit group of Society'. Noting that Article 41.3.1 obliges the State to 'guard with special care the institution of Marriage, on which the Family is founded' the Supreme Court has interpreted the references to the family in Article 41 as the family founded on marriage... The [Irish Human Rights and Equality] Commission is of the view that further reform of Article 41 is required to ensure its compatibility with

²³ Citizens' Assembly on Gender Equality, [The Constitution: Summary of organisational submissions to the public consultation process](#), p.9

²⁴ Citizens' Assembly on Gender Equality, [The Constitution: Summary of organisational submissions to the public consultation process](#), p.10

developments in domestic law and policy, social norms, and the broader conception of family life recognised in international human rights law.²⁵

Both One Family and IHREC proposed potential ways to “address these shortcomings”. IHREC recommended that Article 41.3.1 be amended in a manner that is consistent with the broader conception of family life recognised in international human rights law. Recommending that Article 8 of the European Convention of Human Rights be added to Article 41, One Family asserted that this would (a) offer “high level symbolic change” without inserting either restrictive wording or automatic rights for any parties and (b) remove existing barriers to family equality (incl. non-nuclear families, foster families and non-marital families).²⁶

At its meeting of 13 February, the questions below were agreed in respect of the final ballot.

Final Ballot paper questions on Article 41- The Family

Question 4:

Should the Constitution continue to provide recognition for the family?

Yes/No

If a majority choose ‘No’ in response to question 3 during the voting in April, there will be no further vote. If a majority votes ‘Yes’ in April, there will be a vote on question 4. If this occurs, all Members will be entitled to vote on question 4 regardless of their vote on question 3.

Question 5:

Should the Constitution protect private and family life, including forms of family life beyond the marital family?

Yes/No

In the final vote on 17 April, members of the Citizens’ Assembly voted by 93.3% in favour of the first question (Yes: 83 votes; No: 6 votes) and by 98.9% (Yes: 87 votes; No: 1 vote) in favour of the second question.

Joint Oireachtas Committee on Gender Equality

The Joint Oireachtas Committee on Gender Equality (the Committee) was established to consider the 45 recommendations made by the Citizens’ Assembly on Gender Equality and to provide a response to the Government on each of the recommendations.²⁷ It was agreed by the Committee to prioritise consideration of proposed changes to Articles 40.1 and 41 of the Constitution. In total, the Committee held 23 public meetings and received over 60 written submissions which formed the basis of the Committee’s final report: [Unfinished Democracy: Achieving Gender Equality](#) (December 2022).²⁸

²⁵ Citizens’ Assembly on Gender Equality, [The Constitution: Summary of organisational submissions to the public consultation process](#), p.10

²⁶ Citizens’ Assembly on Gender Equality, [The Constitution: Summary of organisational submissions to the public consultation process](#), p.11

²⁷ Houses of the Oireachtas, Joint Committee on Gender Equality, [Unfinished Democracy: Achieving Gender Equality](#) (Final Report, December 2022) 35.

²⁸ Houses of the Oireachtas, Joint Committee on Gender Equality, [Unfinished Democracy: Achieving Gender Equality](#) (Final Report, December 2022) 5.

The Committee's [Interim report](#), which was published in July 2022, detailed its considerations of the 45 Citizen Assembly recommendations. It outlined a number of perspectives on potential constitutional amendments that were discussed in its meeting of 10 March, some of which are referenced below. For instance, the National Women's Council recommended that constitutional recognition/protection should be afforded to all families involving caring and interdependence and posited that the transposition of Article 8 of the European Convention of Human Rights (ECHR) could offer a broader recognition of family (beyond marriage). Similarly, Professor Fennell (Commission Member, IHREC) noted that whilst there might be a case for removing much of the language on family altogether, international definitions and the ECHR potentially offer an "easier route". Nonetheless, she did caution that the ECHR is itself a document of its time. Thus, she suggested reform provides the potential to offer "a fresher and cleaner take on a modern Ireland, and err more on the side of modern language and shorter, clearer concepts". As per their submissions to the Citizen's Assembly, IHREC recommended that Article 41 be amended to recognise the broader conception of family life recognised in international human rights law and One Family proposed that Article 41.3 could be enhanced with the addition of /replacement with ECHR wording, whereby recognition of family rights could be extended to everyone without the current recognition of marriage being undermined. Further, it noted that Sinéad Gibney (Chief Commissioner, IHREC) referenced the potential offered by the ECHR definition and that "family does not exist because people are married; family exists because of the ties people have and the activities they do".²⁹

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.³⁰

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.³¹

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.

²⁹ Houses of the Oireachtas, Joint Committee on Gender Equality, [Interim Report on Amendments to the Constitution \(oireachtas.ie\)](#) (July 2022), p.15,16

³⁰ gov.ie - Referendums on Family, Care and Gender Equality – request for submissions (www.gov.ie)

³¹ gov.ie - Referendums on Family, Care and Gender Equality – request for submissions (www.gov.ie)

Article 41: Constitutional context, concepts and judicial interpretation

The constitutional conception of “the family”

Article 41 of the Constitution of Ireland (Bunreacht na hÉireann) “recognises the Family as the natural primary and fundamental unit group of Society ... and guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.” According to Article 41.3.1 the guarantees and protections afforded by the provisions are limited in scope to the family based on marriage “on which the Family is founded”.

Article 41 Bunreacht na hÉireann, Constitution of Ireland

Article 41 of the Constitution of Ireland (Bunreacht na hÉireann) provides:

41.1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

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

41.3.1. The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

As stated in the leading constitutional law textbook, *Kelly: The Irish Constitution*, Article 41 is “among the most innovatory in the entire constitution”. In terms of the origin of the provision, it is “generally thought to have been inspired in part by papal encyclicals and by Catholic teaching”.³²

The constitutional protection of the marital family

The constitutional protection afforded to the family featured in early case law on the Constitution. Recognising the primacy of the social institution, Gavan Duffy P, in *Re O'Connor*, said: “...our own Constitution, wherein very definitely the family is recognised as a fundamental unit of society and as a moral institution with imprescriptible rights...”³³

The meaning of “family”

In *The State (Nicolaou) v An Bord Uchtála*,³⁴ the applicant (an unmarried father) claimed that his right under Article 41 had been contravened when his child was given up for adoption without the applicant’s views being heard by the Adoption Board as to whether the child should be adopted. The Supreme Court held that non-marital relationships do not fall within the scope of protection of Article 41:

³² Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (Bloomsbury, Fifth Edition 2018) [7.7.01].

³³ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (Bloomsbury, Fifth Edition 2018) [7.7.04].

³⁴ *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567.

“It is quite clear from the provisions of Article 41, and in particular section 3 thereof, that the family referred to in this Article is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State. While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless so far as Article 41 is concerned the guarantees therein contained are confined to families based upon marriage ...”³⁵

As observed by Forde and Leonard:

“On numerous later occasions, the Court has reiterated that it is ‘well established in ... case law ... that the family recognised by the Constitution, particularly in Art 41, is the family based upon marriage ...’; that a ‘*de facto* family or any right arising therefrom, is not recognised by the Constitution ...”³⁶

The primacy of the constitutional marital family was reaffirmed in 2010 in *McD v L*. The applicant, a biological father sought, among other things, to be appointed guardian to his child born through artificial insemination (McD had donated sperm to a same-sex couple). The Supreme Court rejected the findings of the High Court that *de facto* families had any legal status or any rights in Irish law. Referring to the wording of Henchy J in *The State (Nicolaou) v An Bord Uchtála*, the Supreme Court said:

“For the state to award equal constitutional protection to the family founded on marriage and the “family” founded on an extramarital union would in effect be a disregard of the pledge ... in article 41.3.1 to guard with special care the institution of marriage.”³⁷

The meaning of marriage in a constitutional context

The meaning of “marriage” in a constitutional context was originally informed by a Christian ethos of “a partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special lifelong relationship”.³⁸

The constitutional concept of marriage may no longer be grounded in a Christian notion of marriage; however, “the notion of equal partnership between two individuals remains at its core” as illustrated by Hogan et al in the following:

³⁵ *State (Nicolaou) v An Bord Uchtála* [1966] 1 IR 567 at 643–644.

³⁶ Forde and Leonard, *Constitutional Law of Ireland* (Bloomsbury 2013) [24.02], citing *O’B v S* [1984] 1 IR 316 at 333 and *WO’R v EH (Guardianship)* [1996] 2 IR 248 at 265.

³⁷ *McD v L* [2009] IESC 81, [2010] 2 IR 199, [2010] 1 ILRM 461.

³⁸ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (Bloomsbury, Fifth Edition 2018) [7.7.06] citing at fn 13: *Per Costello J in Murray v Ireland* [1985] IR 532 at 536, [1985] ILRM 542 at 545, a view subsequently adopted by the Supreme Court in *TF v Ireland* [1995] 1 IR 321, [1995] 2 ILRM 321. With the introduction of divorce in 1995, it is clearly the case that marriage may no longer necessarily be for life. That said, in *DT v CT* [2002] 3 IR 334, [2003] 1 ILRM 321, Murray J referred to marriage as a solemn contract of partnership entered into between man and woman ‘in principle for life’ (at 426 and 374 respectively) and as a result of which divorced spouses may be obliged to meet certain obligations towards their former partner, even after the marriage has been dissolved.

“... in *HAH v SAA*,³⁹ the Supreme Court, per O'Malley J, identified the defining characteristic of marriage as:

‘the voluntary entry into mutual personal and legal commitments on the basis of an equal partnership between two persons, both of whom possess capacity to enter into such commitments, in accordance with the requirements laid down by law.’”⁴⁰

The constitutional concept of marriage was limited to heterosexual couples until Article 41 was amended, following the approval by the people of the [Thirty-fourth Amendment of the Constitution \(Marriage Equality\) Act 2015](#), which provided “marriage may be contracted in accordance with law by two persons without distinction as to their sex”.

The constitutional position remains that Article 41 does not apply to unmarried couples.

The State’s obligation to protect the “marital family” – judicial interpretation

Since the 1980s the rights of married couples were increasingly subject to scrutiny by the courts.⁴¹ In *Murphy v Attorney General*, the applicants, a married couple, claimed disadvantage because of provisions of the Income Tax Act 1967, which resulted in their two incomes being treated as a single income. The aggregation of their income pushed them into a higher tax-band which cost then more than if they were unmarried.⁴²

The Supreme Court said:

“...the pledge [of Article 41.3.1^o] 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^o 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.”⁴³

On the claim of disadvantage, the Supreme Court said:

“...the nature and potentially progressive extent of the burden created by s 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.”⁴⁴

The courts have considered the constitutional protection of marriage in other legislative contexts, as illustrated in *Kelly*⁴⁵ in the following examples:

“*Hyland v Minister for Social Welfare*⁴⁶ the Supreme Court applied this principle to invalidate a provision in the social welfare code – s 12(4) of the Social Welfare (No 2) Act

³⁹ *HAH v SAA* [\[2017\] IESC 40](#), [2017] 1 IR 372, [2017] 1 ILRM 69.

⁴⁰ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (Bloomsbury, Fifth Edition 2018) [7.7.06] citing *HAH v SAA* [\[2017\] IESC 40](#), [2017] 1 IR 372, [2017] 1 ILRM 69 [01].

⁴¹ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (Bloomsbury, Fifth Edition 2018) [7.7.20].

⁴² *Murphy v Attorney General* [1982] IR 241.

⁴³ *Murphy v Attorney General* [1982] IR 241 at 286.

⁴⁴ *Murphy v Attorney General* [1982] IR 241 at 287.

⁴⁵ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (Bloomsbury, Fifth Edition 2018) [7.7.23].

⁴⁶ *Hyland v Minister for Social Welfare* [1989] IR 624, [1990] ILRM 213.

1985 – which reduced the amount of unemployment assistance payable to a married claimant whose spouse was in receipt of some other form of welfare.

In *Greene v Minister for Agriculture*⁴⁷ Murphy J granted a declaration that administrative schemes designed to provide *[sic]* compensatory payments to persons farming in disadvantaged areas were invalid because the means test provided for the aggregation of certain income of married, but not cohabiting, claimants.”

Having regard for the State’s obligation “to guard with special care the institution of marriage” the Supreme Court has found that “the provisions of Article 41 create not merely a State interest but a State obligation to protect the family”, as noted by the Supreme Court in *O’B v S*.⁴⁸ *O’B v S* concerned a claim that the Succession Act 1965, which excluded non-marital children from claiming an interest in their father’s estate, as contrary to the guarantee of equality in Article 40.1. The Supreme Court said:

“It can scarcely be doubted that the Act of 1965 was designed to strengthen the protection of the family as required by the Constitution and, for that purpose, to place members of a family based upon marriage in a more favourable position than other persons in relation to succession to property, whether by testamentary disposition or intestate succession ... Having regard to the constitutional guarantees relating to the family, the Court cannot find that the differences created by the Act of 1965 are necessarily unreasonable, unjust or arbitrary.”⁴⁹

As stated in *Kelly*, there are limits to the protection afforded to families. Such limits arise in the context of immigration law which will be discussed in more detail later in this *Digest*.

Legislation related to the current Bill

As is illustrated from the caselaw above, the constitutional concept of the “marital family” is relevant to several areas of law and statute, including, but not limited to:

- Taxation
- Social Welfare
- Succession
- Guardianship
- Family law

There have also been legislative developments that have sought to extend some of the privileges provided for in Article 41 to non-marital families, including: The [Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010](#) provides for rights and obligations of cohabitants and connected matters.

This section of the *Digest* is intended to provide a brief overview of the the interaction between the constitutional concept of the marital family and these areas of law, rather than an in-depth and/or exhaustive exploration, as such an analysis is outside the scope of this *Digest*.

⁴⁷ *Greene v Minister for Agriculture* [1990] 2 IR 17, [1990] ILRM 364.

⁴⁸ *O’B v S* [1984] IR 316, [1985] ILRM 86.

⁴⁹ *O’B v S* [1984] IR 316 at 335, [1985] ILRM 86 at 96.

The textbox below illustrates one example of the operationalisation of this concept of the ‘marital family’ – namely the intersection between civil status and the income taxation system.

Current protections offered to the marital family in the income taxation system

The income tax system is one key instance where civil status⁵⁰ impacts on assessment and treatment, with married people/civil partners receiving differential treatment. This differential treatment on the basis of civil status stems from the Supreme Court decision in *Murphy vs. Attorney General* (1980), described by the Department of Finance (2023:86-87) as follows:

This decision was based on Article 41.3.1 of the Constitution where the State pledges to protect the institution of marriage. The decision held that it was contrary to the Constitution for a married couple, both of whom are working, to pay more tax than two single people living together and having the same income. The Constitutional protection of Article 41.3.1 does not extend to non-married couples. This may be contrasted with the social welfare system which assesses on the household basis and is based on consideration of household needs, regardless of whether married or cohabiting

Whilst the standard (20%) rate band for a single person is currently €40,000⁵¹ per year, the equivalent rate for couples in a marriage or civil partnership is €49,000.⁵² Importantly, this tax treatment is restricted to married couples/civil partners only and does not include cohabiting couples.⁵³ A recent Department of Finance [Review of the Personal Tax System](#) sets out the following elements of the current tax system that are only available to married couples/civil partners, including:

- the ability to be jointly assessed;
- the transfer of certain tax credits such as the personal/married tax credit and part of the standard rate band (up to €9,000); and
- the ability to claim the home carer tax credit (if applicable).⁵⁴

It noted that such tax treatment “can result in significant tax savings for married couples when compared to cohabiting couples on the same income” and provided a number of illustrative examples of this, showing the maximum tax savings between the household types.

On the basis of societal changes in respect of family structures/units, the recent Commission on Taxation and Welfare (2022) problematised the concept of relying on marital status:

Given trends in family formation over the past 30 years ... relying on marital status to capture the range of household types and to identify needs within a household is unsatisfactory ... In particular, conferring Income Tax advantages on the basis of marital

⁵⁰ ‘Civil status’ means being single, married, separated, divorced, widowed, in a civil partnership or being a former civil partner in a civil partnership that has ended by death or been dissolved. [Source: [Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Section 7 \(irishstatutebook.ie\)](#)]

⁵¹ The standard rate tax band for 2024 will be increased by €2,000 to €42,000 for a single person, with proportionate increases for married couples and civil partners. [Source: [Budget 2024 \(citizensinformation.ie\)](#)]

⁵² [What is a tax rate band? \(revenue.ie\)](#); [What is an increased rate band? \(revenue.ie\)](#)

⁵³ Commission on Taxation and Welfare Secretariat (2021) *Briefing Paper: Employment Disincentives*, p.21

⁵⁴ [Review of the Personal Tax System](#) (July 2023), Department of Finance

status alone is questionable as a feature of Ireland's taxation system for the forthcoming decades.⁵⁵

Highlighting the important role that taxation, amongst others, can play in terms of gender equality, the EU's [Gender Equality Strategy 2020-2025](#) asserts that:

Social and economic policies, taxation and social protection systems should not perpetuate structural gender inequalities based on traditional gender roles in the realms of work and private life.⁵⁶

Internationally, tax systems differ in how they treat married/non-married couples. Recent [research](#) by the European Commission's Joint Research Centre (JRC) found that being married did not result in substantial gains/losses⁵⁷ for a couple in the majority of EU Member States. However, significant differences were found in a number of countries – mainly as a result of personal income taxation. Most of the countries that treated married and cohabiting couples differently favoured married couples⁵⁸ – in other words, there was a “marriage bonus”, whereby a couple was financially better off if they were married as opposed to cohabiting. This was noted in five (5) countries, of which Ireland was one⁵⁹.⁶⁰ In some countries, the positive impact would mostly be for couples in the low and medium part of the income distribution. By contrast, in Ireland (as well as Luxembourg), the impact is positive across all income deciles, with the middle part of the income distribution benefiting the most.⁶¹ Policy-wise, the report concluded that there were significant implications in respect of this differential treatment, including that such treatment “violated” the principle of horizontal equity – in other words, parity of treatment for married couples/civil partners and cohabiting couples – and raised questions in respect of gender equality on the basis that it might impact on the labour force participation of secondary earners (typically married women).⁶²

⁵⁵ [Foundations for the Future: Report of the Commission on Taxation and Welfare](#), 2022, p.274

⁵⁶ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions [A Union of Equality: Gender Equality Strategy 2020-2025](#), 2020, COM/2020/152

⁵⁷ The authors used [EUROMOD](#), which is the tax-benefit model of the European Union, to investigate the impact of the marriage-related tax and benefit rules on the incentives to work.

⁵⁸ There was a “marriage penalty” a minority of countries (Italy, Greece, Malta and Cyprus), with cohabitation offered several advantages via means-tested benefits/pensions.

⁵⁹ The other countries were Luxembourg, Germany, Poland and Belgium.

⁶⁰ Christl, M., De Poli, S., Ivaškaitė-Tamošiūnė, V. (2021) [Does it pay to say “I do”? Marriage bonuses and penalties across the EU](#). JRC Working Papers on Taxation and Structural Reforms No 07/2021, European Commission, Joint Research Centre, Seville. JRC125690

⁶¹ Christl, M., De Poli, S., & Ivaškaitė-Tamošiūnė, V. (2023). Does it pay to say ‘I do’? Marriage bonuses and penalties across the EU. *Journal of European Social Policy*, 33(3), 317-336. <https://doi.org/10.1177/09589287231159492>

⁶² Christl, M., De Poli, S., Ivaškaitė-Tamošiūnė, V. (2021) [Does it pay to say “I do”? Marriage bonuses and penalties across the EU](#). JRC Working Papers on Taxation and Structural Reforms No 07/2021, European Commission, Joint Research Centre, Seville. JRC125690

The legal concept of “the family” – International perspective

The recognition of “the family” as a “social institution deserving of special protection” is referenced in several international legal instruments.⁶³

The concept of “the family” is referred to in several international human rights instruments. The Universal Declaration of Human Rights (UDHR), drafted as a “common standard of achievements for all peoples and all nations”, refers in Article 16 to “the family” as follows:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.⁶⁴

The International Covenant on Civil and Political Rights (1966) (ICCPR) provides at Article 23(1) that: “[T]he family is the natural and fundamental group unit of society and is entitled to protection by family and state.”⁶⁵

The concept of the family is difficult to define. In its General Comment 19 in 1990 on the Family, the Human Rights Committee stated with respect to the ICCPR:

“The Committee notes that the concept of the Family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. Consequently, State parties should report on how the concept and scope of the family is construed or defined in their own society and legal system.”⁶⁶

Article 10(1) of the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) provides that “[T]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”⁶⁷

The United Nation Convention on the Rights of the Child (1989) (CRC) sets out the standards that apply to children and binds States party to the CRC to adhere to these standards. Reference is made to “the family” in the Preamble, as follows:

⁶³ Forde and Leonard, *Constitutional Law of Ireland* (Bloomsbury 2013), Chapter 24: The Family, Children and the Unborn.

⁶⁴ The [Universal Declaration of Human Rights](#) was adopted by the UN General Assembly in Paris on 10 December 1948 during its 183rd plenary meeting.

⁶⁵ [International Covenant on Civil and Political Rights](#) adopted 16 December 1966 by General Assembly resolution 2200A (XXI).

⁶⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses (27 July 1990) UN Doc HRI/GEN/1/Rev.6 at 149 (2003) para 2.

⁶⁷ [International Covenant on Economic, Social and Cultural Rights](#) adopted 16 December 1966 by General Assembly resolution 2200A (XXI).

“Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community [...]”⁶⁸

Pursuant to Article 8(1) of the European Convention on Human Rights (1953) (ECHR):

“[E]veryone has the right to respect for his private and family life, his home and correspondence.”⁶⁹

The European Court of Human Rights (ECtHR) has recognised the importance of the protection of family life. As observed by Geoffrey Shannon:

“The ECHR (unlike the Irish Constitution) makes no distinction between family life of a marital and non-marital family [...] Family life constitutes not only relations between parents and their children, but also extends to grandparents and grandchildren. For other relationships, it is necessary to produce evidence of a real and close family tie. In summary, the existence of family life is a question of fact and degree ...”⁷⁰

The ECtHR will look at *de facto* ties, such as whether the applicants are living together, the duration of the relationship, if the applicants have had children together.

As stated in the Guide on Article 8 of the ECHR:

“Therefore, the notion of “family” in Article 8 concerns marriage-based relationships, and also other *de facto* “family ties”, including between same-sex couples, where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy.”⁷¹

In *McD v L*, Article 8 ECHR⁷² rights were considered by the courts. In *McD v L*, *de facto* family rights were considered by Hedigan J in the High Court in the context of a claim made by an applicant who sought guardianship rights over his biological child. The applicant had donated sperm to the respondent mother (who is in a same-sex relationship) and entered into an agreement regarding the limits to be placed on access to the child. The applicant sought greater access to the child. Hedigan J refused the reliefs sought and found that *de facto* family rights arose in the context of the same-sex couple and the child under Article 8 of the ECHR. The Supreme Court found the High Court to have erred in its decision and strongly rejected that “*de facto* families” have any legal status in Irish law.⁷³

⁶⁸ [Convention on the Rights of the Child](#) adopted 20 November 1989 by General Assembly resolution 44/55.

⁶⁹ The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the [European Convention on Human Rights](#), was opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953.

⁷⁰ Geoffrey Shannon, *Child and Family Law* (Round Hall, Third Edition, 2020) [2 – 86]

⁷¹ European Court of Human Rights, ‘[Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence](#)’ (Updated on 31 August 2022) 77.

⁷² The ECHR was indirectly incorporated into Irish law by the European Convention on Human Rights Act 2003, which includes a provision requiring judicial notice to be taken of ECHR provisions and any declaration, decision, advisory opinion or judgment of the European Court of Human Rights.

⁷³ *McD v L* [2009] IESC 81, [2010] 2 IR 199, [2010] 1 ILRM 461.

Provisions of the Bill

This section of the *Digest* examines the provisions of the Bill, which is 10 pages long and contains two Sections and one Schedule containing two Parts. This section of the *Digest* will provide an outline of the provisions of the Bill and then discuss two key themes, namely:

- Scope of constitutional definition of family
- “Durable relationships”

Section 1 of the Bill proposes to amend Article 41 of the Constitution of Ireland.

If the Bill is passed by both Houses of the Oireachtas the proposal to amend Article 41 concerning the definition of the family will be put to the People in a referendum. According to a [Press Release](#) from the Department of the Taoiseach on 7 December 2023 the referendum will be held on 8 March 2024.

Section 1(1)(a) of the Bill provides for the proposal to amend Article 41 of the Constitution by the insertion of “bíodh sé bunaithe ar an bpósadh nó ar chóngais bhuanfasacha eile,” after “an Teaghlach” in subsection 1° of section 1 of Article 41 of the Irish text.

Section 1(1)(b) of the Bill provides for the proposal to amend Article 41 of the Constitution by the insertion of “whether founded on marriage or on other durable relationships,” after “the Family” in subsection 1° of Article 41.1 of the English text.

If the Bill is to be passed by the Houses of the Oireachtas and subsequently agreed to by the People at referendum the Irish text of the provision would read as follows:

41.1.1° Admhaíonn an Stát gurb é an Teaghlach [**bíodh sé bunaithe ar an bpósadh nó ar chóngais bhuanfasacha eile**] is buíon-aonad príomha bunaidh don chomhdhaonnacht de réir nádúir, agus gur foras morálta é ag a bhfuil cearta doshannta dochloíte is ársa agus is airde ná aon reacht daonna.

If the Bill is to be passed by the Houses of the Oireachtas and subsequently agreed to by the People at referendum the English text of the provision would read as follows:

41.1.1° The State recognises the Family [**whether founded on marriage or on other durable relationships**] as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

Section 1(1)(c) of the Bill provides for two scenarios which are dependent on whether or not the Fortieth Amendment of the Constitution (Care) Act 2023 has been enacted.

In the first scenario, where the Fortieth Amendment of the Constitution (Care) Act 2023 has not been enacted, **section 1(1)(c) (I) and (II)** of the Bill provides that, Article 41.3.1. of the Irish text and the English text will be substituted with the provisions set out in Parts 1 and 2 of the Schedule to the Bill respectively.

The Irish text of the provision would read as follows:

41.3.1° Gabhann an Stát air féin coimirce faoi leith a dhéanamh ar ord an Phósta agus é a chosaint ar ionsaí.

This substitution would replace the present wording of the Irish text as follows:

41.3.1° Ós ar an bPósadh atá an Teaghlach bunaithe gabhann an Stát air féin coimirce faoi leith a dhéanamh ar ord an phósta agus é a chosaint ar ionsaí.

The English text of the provision would read as follows:

41.3.1° The State pledges itself to guard with special care the institution of Marriage and to protect it against attack.

This substitution would replace the present wording of the English text as follows:

41.3.1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

In the second scenario, where the Fortieth Amendment of the Constitution (Care) Act 2023 has been enacted, **section 1(1)(c)(ii)(I)** provides for the numbering of the Irish and English text of which is set out in Part 1 and 2 of the Schedule.

There appears to be an error in page ordering at page 5 and 6.

Scope of proposed definition of family

The proposed amendment of Article 41.1.1° would broaden the definition of family – presently founded on marriage – to encompass those relationships that are “founded ... on other durable relationships”.

The Citizens’ Assembly recommended the following language:

Article 41 of the Constitution should be amended so that it would protect private and family life, with the protection afforded to the family not limited to the marital family.

According to [RTÉ](#): “The Citizens’ Assembly had recommended language that was far broader than “durable relationship”.

Professor Conor O’Mahony, lecturer in constitutional law and child law at University College Cork referred to proposals on the definition of the family as “progressive” and stated the following:

“Removing the link between the definition of the family and the institution of marriage is an overdue recognition of the fact that this link has long ceased to be the norm in Irish society. The Constitution Review Group recommended this reform in 1996 at a time when 25 per cent of births took place outside of marriage. This proportion has since increased to 40 per cent and there are also many committed relationships outside of marriage in which children do not feature.”⁷⁴

O’Mahony states that the expansion of the provision to include the words “whether founded on marriage or on other durable relationships” should “effectively achieve the aim” of remedying the limitations associated with the provision for families that are not founded on marriage.

The [Catholic Review](#) reported on the proposed referendum and quoted David Quinn who stated that the proposal to “include relationships other than marriage as a further downgrading of the importance of marriage to society ...”⁷⁵

⁷⁴ Conor O’Mahony, ‘[Referendum will just replace a sexist dead letter with a gender-neutral dead letter](#)’ (The Irish Times, 6 December 2023).

⁷⁵ Michael Kelly, ‘Proposed referendum for Irish Constitution calls for widening the definition’ (Catholic Review, 6 December 2023).

The Bill proposes to retain the definition of the family as one based on marriage and to expand the scope of this definition and to “other durable relationships”.

According to The Irish Times. Minister O’Gorman made the following observations regarding the proposed definition:

“The idea of extending protection to a “durable” relationship would probably lead to the concept of durability being tested in the courts through litigation. He said the change would be understood within the wider language of the constitution which describes marriage as a moral institution and a fundamental group within society. He said that language would form the “guardrails” for how courts would interpret the term “durable”, which he said was picked deliberately to ensure transient relationships were not given the same constitutional protections.”⁷⁶

“Durable relationships”

The legal concept “durable relationship” is to be found in European Union (EU) law regarding the rights of EU citizens and their family members to move and reside freely within the EU. This language has not previously been recommended by the Citizens’ Assembly or the Committee.

Freedom of movement and residence constitutes one of the fundamental freedoms of the EU.⁷⁷ This right is enshrined in article 45 of the [Charter of Fundamental Rights](#) (the Charter).⁷⁸ This right is conferred directly on every EU citizen by Article 21 of the [Treaty on the Functioning of the European Union](#) (TFEU).

Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, OJ L/158 ([the Citizens Directive](#)) aims to *inter alia* (among other things) codify Community standards to simplify and strengthen the right of free movement and residence of all EU citizens and to also grant to their family members, irrespective of nationality, the right to reside with them. The right of family members to enter and reside in a Member State is not an automatic one. The decision whether entry and residence could be granted to such persons is examined by the host Member State on the basis of its own national legislation taking into consideration matters including the person’s relationship with the Union citizen.⁷⁹

The Citizens’ Directive was transposed into Irish law by the European Communities (Free Movement of Persons) Regulations 2015 ([2015 Regulations](#)) and entered into force in February 2016.

⁷⁶ Jack Horgan-Jones, ‘[Referendums on women in the home and the concept of the family to be held next March](#)’ (The Irish Times, 5 December 2023).

⁷⁷ [The Charter of Fundamental Rights of the European Union](#) (2000/C 364/01). Chapter 5 of the [EU Charter of Fundamental Rights](#) is on citizens’ rights.

⁷⁸ **Article 45 Freedom of movement and of residence**

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

⁷⁹ Article 3 of the Directive 2004/38/EC On the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, OJ L/158 ([the Citizens Directive](#)).

Regulation 5(1)(b) of the [2015 Regulations](#) concerns ‘permission for permitted family member to enter State’ and includes within the definition of ‘permitted family’ a person who “is the partner with whom a Union citizen has a durable relationship, duly attested.” Where a person can demonstrate that they are in a durable relationship with an EU citizen, they can seek liberty to enter and remain in the State under the 2015 Regulations.

The Supreme Court

The Supreme Court considered the interpretation and application of the Citizens’ Directive and the 2015 Regulations in *Muhammad Uzair Pervaiz v. The Minister for Justice and Equality, Ireland and the Attorney General* [2020] IESC 27.⁸⁰

Mr Pervaiz, a non-EU citizen, had sought liberty to enter and remain in the State on the basis that he and Ms L (an EU citizen) were in a “durable relationship”. Mr Pervaiz made an application for liberty to reside in the State in 2017. The Minister refused his application, finding that Mr Pervaiz had failed to demonstrate that he and Ms L were in a durable relationship. The refusal was upheld by an internal review and Mr Pervaiz then sought judicial review.

In the High Court, Mr Justice Barrett (Barrett J) found that the Citizens’ Directive had not been properly transposed into Irish law and held that the test applied by the Minister concerning the examination of “durable relationship” requirement was vague and unclear.⁸¹ Barrett J accepted the argument that the 2015 Regulations failed to define the concept of “durable relationships duly attested” and the lack of legislative guidance as to how the test should be applied, or proofs needed to satisfy the test, means the law does not offer an effective means by which to exercise the rights provided by the Citizens’ Directive.

In 2020, the Supreme Court heard an appeal by the Minister for Justice and Equality concerning the High Courts’ decision in *Pervaiz* regarding the interpretation of the 2015 Regulations. Ms Justice Marie Baker (Baker J) held that the High Court had erred in their findings and that Regulations 2015 “permit a plain reading and do not lack clarity or sufficient precision”.⁸²

On the language of the legislation, Baker J said:

“The language of legislation is, by its nature, almost always general, and that is because, as a general rule, the Oireachtas would intend that the legislation not require amendment on a frequent basis and be sufficiently flexible and broad to permit application in cases which can be anticipated at the time of its enactment and those the concrete facts of which were not necessarily anticipated as being likely at the time of its enactment. Legislation must be sufficiently general not to leave a lacuna in application, and general language can often be resilient and capable of meeting a number of factual circumstances, and of providing flexibility in application.”⁸³

On the term “durable”, Baker J said:

⁸⁰ [Muhammad Uzair Pervaiz v. The Minister for Justice and Equality, Ireland and the Attorney General](#) [2020] IESC 27.

⁸¹ *Pervaiz v Minister for Justice and Equality* [2019] IEHC 403.

⁸² [Muhammad Uzair Pervaiz v. The Minister for Justice and Equality, Ireland and the Attorney General](#) [2020] IESC 27 [67] (Baker J).

⁸³ [Muhammad Uzair Pervaiz v. The Minister for Justice and Equality, Ireland and the Attorney General](#) [2020] IESC 27 [65] (Baker J).

“Durable” does not mean “permanent”, and a test that required permanence in that sense would be an impossible burdensome hurdle, and would not be in accordance with any modern understanding of intimate relationships. What is meant, it seems to me, is that the relationship be one which has continued for some time and to which the parties are committed, with an intent that the commitment continues, one, therefore, which carries the indicia of commitment such that, at the present time, each of the parties to the partnership would express a view and a hope that the relationship will continue for the foreseeable future.

74. Thus, a durable partnership will tend to be one of some duration, but that is not to say that the duration of the relationship is, in itself, a defining feature. The length of a relationship will be an important, and sometimes compelling, index of the degree of commitment between the couple, but it is perfectly possible for a committed long-term, what is often called a “serious” relationship, to exist between persons who have known one and other for a short time. Indeed, that profile, while it is not common, is found in persons who marry after a short relationship, and the duration of the relationship is not, therefore, always a useful indicator of its durability.

75. Duration, therefore, is an important factor, but not always an essential one. Durability is not measured only, or even always, by duration, but a durable relationship is often one which has endured, such that the duration may illustrate its durability. [...]

77. While all of the elements of a durable partnership might not be easy to list, it is probably true to say that most persons would be aware when their friends, acquaintances, or family members are in a durable partnership. For that reason, it seems to me that the language of the 2015 Regulations can readily be understood in its plain terms as connoting a committed personal interconnectedness which is recognised and recognisable between the couple and by the members of their circle or broader acquaintances, whether social or business, and which is anticipated as being likely to continue for the foreseeable future.”⁸⁴

Baker J also assessed the argument that the examination process engaged by the Minister of the personal circumstances of the applicant was flawed.

Baker J concluded that the trial judge was incorrect in his conclusion that the Citizens Directive has not been properly incorporated into Irish law, and in his conclusion that the test applied by the Minister concerning durable relationships was vague and uncertain.

Should the proposal to amend the Constitution be approved by the People it will be for the legislature and the courts to legislate and interpret the parameters that might exist in the context of those that claim to be in a “durable relationship”.

Potential considerations: Interpretation of proposed Article 41

If this Bill is passed by both Houses of the Oireachtas and the question put to the People is agreed to, then Article 41 of the Constitution of Ireland will be amended and “other durable relationships” will be inserted Article 41.1.1 of the Constitution of Ireland. Given the primacy of the Constitution,

⁸⁴ [*Muhammad Uzair Pervaiz v. The Minister for Justice and Equality, Ireland and the Attorney General*](#) [2020] IESC 27 [65] (Baker J).

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 have emerged over the years and a case dealing with questions which may emerge in the context of the proposed Article 41 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”.⁸⁵

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.”⁸⁶ 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.

⁸⁵ *Kelly*, para. 1.1.27.

⁸⁶ *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.

Appendix One – Amending the Constitution

Article 46 of the Constitution sets out the procedural requirements for amending the Constitution.

Pursuant to Article 46: “Any provision of this Constitution may be amended, whether by way of variation, addition or repeal, in the manner provided by this Article.”

However, the Constitution cannot be altered by the Oireachtas alone. The provisions of Article 46 require every proposal for an amendment to the Constitution to be initiated in Dáil Éireann as a Bill and, having been passed by both Houses of the Oireachtas, be submitted to the people for a decision by means of a Referendum.

The Bill must be expressed as “An Act to amend the Constitution”. The contents of the Bill must not contain proposals other than proposals for amendment of the Constitution.

Referendums are also regulated by statute including the Electoral Reform Act 2022 (2022 Act). Chapter 5 of the 2022 provides for matters relating to Referendum functions. Pursuant to Section 31 of the 2022 Act, it is the role of the Coimisiún Toghcháin (Electoral Commission) to prepare and publish statements containing a general explanation of the subject matter of the proposal for the referendum consider and of the text in the Bill.

Article 47.1 provides that in the circumstances where a majority of votes cast at a Referendum are in favour of the proposal to amend the Constitution, the enactment to amend the Constitution will be taken as approved by the people.

Article 46.5 provides that where a proposal to amend the Constitution is approved by the people, the President will sign it into law.

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