

Briefing note

The proposal to change the constitutional definition of the family

Iona Institute (January 2024)

If the family referendum is passed, “durable relationships” will receive constitutional recognition on a par with marriage. But no-one is sure what a “durable relationship” is.

Introduction

Two referendums are to be held on March 8. One is to change the constitutional definition of the family and the other to replace Article 41.2, the clause that aims to protect the mother in the home. This briefing note will deal with the referendum on the family. The Government says it wishes to change the definition of the family in order to account for the changed nature of family life in Ireland today. The major change is that the proposed Article 41.1.1 will say that the family is “founded on marriage or other durable relationships”. The term “durable relationships” is not defined.

The current wording and proposed of Article 41.1.1

The current wording is: *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 proposed wording is: *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.*

As you can see, the big change is the introduction of the term “durable relationships”.

The current and proposed wording of Article 41.3.1

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

The proposed wording is: *The State pledges itself to guard with special care the institution of Marriage and to protect it against attack.*

The major change is that the Article will no longer say the family is based on marriage, although it will still commit the State to “guard marriage with special care”.

Government justification for the proposed change

Minister Roderic O’Gorman

“Until our Constitution recognises those families which are founded on committed and enduring relationships other than marriage, however, we cannot say that as both a State and a society we have fully faced this aspect of our past and rejected the discrimination which was experienced. This referendum presents an opportunity to put things right. It is our chance to say to the one-parent families or unmarried couples of the past and the present that they are just as fundamental to our society as any other family.” (Dáil, Dec 14, 2023).

The effect of the proposed changes

How will they affect the status of marriage?

It is clear that the special status of marriage in the Constitution will be downgraded. Although the Constitution (should the referendum pass) will still pledge the State to “guard marriage with special care”, the Constitution will no longer say the family is found on marriage. “Durable relationships” will be on a par with marriage, and this will have unpredictable legal effects.

A big question is whether the downgrading of the Constitutional position of marriage is desirable as social policy. It is true that the family has changed dramatically in the last few decades (see ‘Facts and Figures’ below), but is it a good thing in general that fewer children are now raised by a loving mother and a father living together under the same roof, or is this now a matter of total indifference to the State? Numerous studies attest to the benefits of being raised under the same roof by both of a child’s parents. (See, for example, the recent book ‘The Two Parent Privilege’ by Professor Melissa S. Kearney of the University of Virginia).

What is a “durable relationship”?

However, the concern being raised by most people so far, including influential voices who voted in favour of same-sex marriage in 2015 and the repeal of the 8th amendment in 2018, is about the highly ambiguous term “durable relationships”. We quote some of those concerns below, starting with what was said in the Dáil on December 14, when the ‘39th Amendment of the Constitution Bill’ was introduced.

A selection of quotes about the proposed changes

Dáil debate, Dec 14, 2023

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.”

Minister Roderic O’Gorman (in response to above concerns)

“When the Supreme Court comes to interpret the term ‘durable relationships’, it will be looking at the entirety of that article (41.1) and whether the relationship is a natural, primary and fundamental unit group of society.”

“What are we talking about with the term [‘durable relationships’]? It is the relationship between cohabitants and parent-child relationships. The intention is to capture those committed relationships that exist over a period of time between couples and between a parent and children. It is not intended to capture shorter term fleeting relationships. I think that is right. The constitutional family is an important status and I do not think any one of us wants a very short-term relationship included there. There has to be language used to try and define that. Deputies Clarke and Cronin raised the use of the term ‘durable’ in EU law. They are correct. It is used in the EU citizenship directive and has a meaning. It is used in connection with relationships. It is important to say there are many words used in EU and Irish law that have different meanings. For example, in EU law a regulation is one of its strongest legal tools where in Irish law a regulation is quite low down the pecking order. The definition of ‘durable’ that we are seeking to put into the Irish Constitution is not influenced by the EU law definition of ‘durable’.”

<https://www.oireachtas.ie/en/debates/debate/dail/2023-12-14/37/>

Selected other quotes

Minister of State, Neal Richmond, Fine Gael (The Tonight Show, Virgin Media, Dec 15)

“It [durable relationships] has serious consequences, particularly when we think of immigration law, and proving that someone is a family member, or family reunification...This would allow that to be accommodated as well.”

Senator Michael McDowell (Irish Times, Jan 10)

Concerning ‘durable relationships’: “Are we talking about households with one male cohabiting with two women or vice versa? Or polygamous relations recognised abroad? Are we confining the term to households at all? Are all such relationships to constitute the ‘natural, primary and fundamental unit groups of society’ from now on, as the amendment proposes? Is a family to include relationships where one party to the relationship is by agreement in a durable relationship with another? What are the

implications for family law, immigration law, tax law, citizenship and nationality law, and inheritance law, to name but a few?"

Facts and figures

There 1,279,951 family units in Ireland as of last year. Married couples with or without children living in the household account for a little over two-thirds of the total. The breakdown of all family units is as follows:

Married couple with children: 580,641

Married couple without children*: 302,358

One parent family with children: 220,356

Cohabiting couple without children: 91,694

Cohabiting couple with children: 85,262.

* Family units 'without children' often means the children have grown up and moved away. It does not mean the household never had children.