AN tARD-AIGHNE
THE ATTORNEY GENERAL

Tithe an Rialtais, Sráid Mhuirfean Uachtarach, Baile Átha Cliath 2
Government Buildings, Upper Merrion Street, Dublin 2
MD Malartán Doiciméad/DX Document Exchange: DX7 Baile Átha Cliath/DX7 Dublin
Teileafón/Telephone: 01 661 6944 Facs/Fax: 01 676 1806
Ríomhphost/Email: info@ag.irlgov.ie url: www.irlgov.ie/ag

Roderic O'Gorman TD
Minister for Children, Equality, Disability, Integration and Youth
Department of Children, Equality, Disability, Integration and Youth
Block 1, Miesian Plaza
50 – 58 Lower Baggot Street
Dublin 2
D02 XW14

8 December 2023

Re: Thirty-ninth Amendment of the Constitution (Family) Bill 2023
Fortieth Amendment of the Constitution (Care) Bill 2023

Dear Roderic,

We are now at the point of finality in relation to the drafting of the Thirty-ninth Amendment of the Constitution (Family) Bill 2023 (the "**Family Amendment Bill**"), and the Fortieth Amendment of the Constitution (Care) Bill 2023 (the "**Care Amendment Bill**") (collectively the "**Bills**"). Stamped drafts of the Bills issued on Wednesday, 6 December from the Office of the Parliamentary Counsel to the Government (the "**OPC**") to your officials and at its meeting on Thursday, 7 December, Government approved their publication.

In arriving at the wording of the proposed amendments contained in the Bills, my officials have endeavoured to provide language which will deliver on the policy objectives that have been provided to us by your Department.

As you know, there has been a high level of engagement between my officials and your Department in relation to the referendum proposals, and a considerable amount of legal advice has been provided. It is nevertheless appropriate at this juncture for me to highlight salient aspects of that advice before the Bills are introduced into the Houses of the Oireachtas.

Article 40.1 – Equality

You will recall that the Joint Oireachtas Committee on Gender Equality recommended that a referendum be held to give effect to the first three recommendations of the Citizen's Assembly on Gender Equality. In relation to the first of those recommendations, namely the insertion of a gender equality and non-discrimination principle into Article 40.1 of the Constitution, it was

the firm advice of my Office that this recommendation would not effectively pursue its own stated objectives. In particular, it was advised that it would:

- not improve existing constitutional protections against sex based discrimination;
- would diminish the constitutional protection currently available to members of other classes of persons who may suffer discrimination; and
- potentially undermine the current constitutional basis on which the State can engage in positive discrimination, afford reasonable accommodation, and make legitimate distinctions between classes of persons in the interest of the common good.

As you are aware, the Government decided not to proceed with an amendment to Article 40.1 of the Constitution.

Amendment of Article 41 – the Family

The Family Amendment Bill provides for an amendment to Article 41.1.1° of the Constitution to insert language which acknowledges that the Family is founded on marriage and on other durable relationships. The Family Amendment Bill provides, in section 1(1)(c), for the substitution, for the existing text of Article 41.3.1°, of the text set out in the Schedule to the Bill. This new text provides for the deletion the words *"on which the Family is founded"* which is currently in Article 41.3.1°. This will remove the link between the Family and Marriage in that provision.

As is clear from the text in the Schedule to the Family Amendment Bill, Article 41.3.1° will retain the special recognition of the institution of Marriage, which will allow the Oireachtas to continue to distinguish between married and unmarried couples and, by extension, marital families and non-marital families where appropriate.

It is understood that the policy objective of the amendment to Article 41.1.1° is that the institutional Family in Article 41 will no longer to be limited to the marital family, but will also encompass other durable relationships, namely cohabitants with or without children, and lone parents and their children.

The primary effect of the extension of the constitutional definition of the Family to non-marital families would be to extend to such families the protective constitutional shield against external or State intervention in the Family's constitution and in its internal decision-making in areas falling within its authority. This is a significant amendment in that it gives a constitutional, rather than merely a legislative or common law foundation for the protection of durable relationships outside marriage. Policy makers will be required to offer greater weight to the rights of the non-marital family, including in child care, immigration and social welfare. It is likely that issues relating to the application of Article 41 to non-marital families will be more heavily litigated than at present, for example it is foreseeable that the provision will be relied upon in the context of immigration and surrogacy.

The amendment to Article 41.1.1° entails the insertion after *"the Family"* of the following text: *", whether founded on marriage or on other durable relationships,"*. In the absence of clear

guidance within the constitutional text or by way of legislation, it is difficult to predict with certainty how the Irish courts would interpret the concept of *"other durable relationships"*. While it is likely the concept would be interpreted so as to encompass relationships between cohabitants, it can be strongly argued that it also encompasses parent-child relationships. Support for the latter contention can be found from the fact that the term *"the Family"* also appears in Article 42.1 in a context which clearly encompasses parent-child relationships. The courts may well address the question of what constitutes a *"durable relationship"* on a case by case basis, having regard to the facts and circumstances of the particular case and the evidence before it.

You will observe that the plural phrase *"durable relationships"* is used in the provision as drafted. There is a risk that the use of this phrase could be distorted by some commentators so as to argue that, for example, polygamous relationships are included within the scope of the provision, which is not the policy intention. However, the reference to *"the Family"* in Article 41.1.1° is to the institution of "*the Family*", rather than to an individual family. This is also the case with the reference to *"the Family"* in Article 41.1.2° and in the existing text of Article 41.3.1°. The effect of the proposed amendments is to state that the institution of the Family, currently founded on the institution of Marriage under Article 41.3.1° is founded on the relationships of marriage, and also on other durable relationships that exist in society. In addition, were the phrase "*durable relationship*" (singular) used, given that it directly follows the reference to marriage, it could be argued that the concept should be interpreted as being limited to relationships similar to marriage, with the attendant risk that parent-child relationships would be excluded. On balance therefore, the decision was made to include the phrase "*durable relationships*" in the plural. In reaching this decision, consideration was given to the likelihood that, in interpreting the concept of "*durable relationship*", the courts would have regard to the other elements of the constitutional text. These would include the provisions of Article 41.1.1° which affirms that the Family is *"the natural primary and fundamental unit group of Society"* and a *"moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law"*.

Finally, in relation to the Family Amendment Bill, I would like to draw your attention to an important technical matter that has been required to be addressed in the Bill. As you will be aware, the Family Amendment Bill and the Care Amendment Bill, if enacted, would both have the effect of amending the current Article 41.3.1° of the Constitution. The former would delete text from Article 41.3.1°. The latter would re-number Article 41.3 as Article 41.2 as a consequence of the repeal of the existing text of Article 41.2. This raises the possibility of uncertainty in the event that the amendment effected by the Care Amendment Bill were to take effect, and the existing Article 41.3.1° to be renumbered, before the amendment to the text of Article 41.3.1° envisaged by the Family Amendment Bill took effect. This scenario could arise if referendum petitions were presented challenging both provisional referendum certificates, and the Court makes its final order confirming the referendum certificate in respect of the Care Amendment Bill before it makes its order confirming the certificate in respect of the Family Amendment Bill, with the consequence that the Care Amendment Bill is enacted before the Family Amendment Bill. In any case, even if both Bills were to be signed by the President on the same day, it remains desirable to put beyond doubt the fact that the envisaged by the Family Amendment Bill takes effect before that contained in the Care Amendment Bill.

In light of the foregoing, the Family Amendment Bill caters, in section 1(1)(c) and section 1(2) for the eventualities of the Family Amendment Bill being enacted before or after the Care Amendment Bill and also for both Bills being enacted on the same day.

Immigration

As referenced above, it is foreseeable that the amended Article 41.1.1° will be relied upon in the context of immigration. However, in my view, it is unlikely that it will have any particularly significant effect in this area.

This is in part because, as a matter of EU law, Article 3(2)(b) of the EU Citizenship Directive provides, that Member States shall, in accordance with national legislation, facilitate entry and residence for "*the partner with whom the Union citizen has a durable relationship, duly attested*".

The concept of a "*durable relationship*" under the Directive clearly relates only to the "*partner*" of a Union citizen, which is a horizontal relationship. The Directive deals with the children of a Union citizen (i.e. a vertical relationship) separately.

Neither the Directive, nor the transposing European Communities (Free Movement of Persons) Regulations 2015 provide express criteria for what constitutes a "*durable relationship*" under EU free movement of persons law.

The Supreme Court, in ***Pervaiz v Minister for Justice***[1] observed that "*partner*" in this context denotes a person with whom the Union citizen has a connection which is personal in nature, and which is broadly akin to marriage. In the judgment of the Court, to be durable, a relationship must be one which has continued for some time and to which the parties are committed, with an intent that it continue for the foreseeable future, and that while the length of the relationship may indicate the degree of commitment, its duration was not its defining feature. The High Court, in ***Singh v Minister for Justice***[2], confirmed that "*the Minister can have regard to a very wide range of matters that may indicate one way, or the other, whether the couple is in fact in a durable relationship*", with each case turning on its facts.

In relation to non-EEA nationals applying to be treated as a permitted family member of an EEA national under the European Communities (Free Movement of Persons) Regulations 2015, the Department of Justice seeks evidence of cohabitation for the last two years and evidence of a durable relationship. However, this policy should be seen in the light of ***Pervaiz***.

With respect to Non-EEA family reunification, and applications for *de facto* immigration permits made by the partner of an Irish national, a non-EEA national legally resident in the State or a UK national living in Ireland, the Department of Justice seeks evidence from the applicant of a durable relationship with their partner and evidence of cohabitation of at least two years on the date of application.

---

[1] [2020] IESC 27.
[2] [2022] IEHC 284.

It may be that persons challenging a refusal of permission to join their partner, with whom they claim to have a "*durable relationship*", in the State would seek to rely, in litigation, on the recognition of the Family based on durable relationships in Article 41.1.1°. However, durability of relationships for the purposes of EU free movement of persons law or for the purpose of family reunification more broadly, is distinct from any concept of durability of a relationship in an Irish Constitutional context, and indeed, as mentioned above, is narrower as it applies to partners only, rather than to a parent-child relationship.

It must also be remembered that Article 41.1.1° of the Constitution does not confer any specific rights or benefits, but rather limits the State from interfering in relation to the internal workings of the family.

Moreover, the interpretation by the Court of Justice of the European Union, and indeed by the Irish Supreme Court, of the concept of "*durable relationship*" for the purposes of the Citizenship Directive, appears consistent with the policy intention behind the use of the phrase "*durable relationships*" in Article 41.1.1° to the extent that it is intended to encompass long-term horizontal relationships between cohabitants.

Thus, the law in this area is *already* based on durable inter-personal relationships beyond marriage and any change to the Irish Constitutional definition of the Family will therefore be of limited significance.

In summary, the State can continue to define which family members may benefit from particular immigration schemes. The interests of public policy and the common good in maintaining the immigration system are very weighty, and as it is, they often justify interference in family life rights under Article 41. This can continue to be the case.

Amendment of Article 41.2 and insertion of Article 42B – Care

The Care Amendment Bill provides for:

- the repeal of Article 41.2 of the Constitution; and
- the insertion of a new Article 42B on Care as set out in the Schedule to the Bill.

There are two limbs to the proposed new Article 42B. The first is a recognition of the value of the provision of care by members of a family to one another. The second is an obligation on the State to strive to support the provision of care. Contrary to the views of some commentators, it is unlikely that a court would conclude that such constitutional recognition for the value of the provision of care would have no impact on the State's obligations to ensure support for the provision of care. It is highly likely that this recognition of the value of care, and the imposition of an obligation on the State to strive to support it, would be invoked by litigants in a very wide variety of contexts in support of legal claims that the Constitution required the State to provide and / or support the provision of care. There is, therefore, real potential for a significant volume of litigation consequent on the amendment. Litigation in this area is likely to be brought by individual litigants who may be highly vulnerable or in very difficult

circumstances, whose rights the courts will be vigilant to protect. It is foreseeable that this could arise in areas such as health, child care, social protection, education and immigration.

It is important to highlight that, in accordance with policy instructions, there is intended to be a difference in scope between the amended Article 41.1.1° and Article 42B. The *"Family"* in Article 41.1.1° will be that which is founded on marriage and other durable relationships, which is intended to comprehend relationships between cohabitants with or without children, and lone parents and their children. The phrase *"members of a family"* in Article 42B is intended to be broader in its scope.

With respect to the formulation of the wording of the obligation on the State, as you know, advice was furnished in respect of a number of possible options including *"shall endeavour"* (which is in the current wording of Article 41.2, Article 40.6.1°, Article 42.4, Article 42A.2.1° and in Article 45), and "*shall take reasonable measures*", which was recommended by both the Citizens' Assembly on Gender Equality and the Joint Oireachtas Committee on Gender Equality.

As with any obligation placed on the State which is expressed by use of the term *"strive"*, there can be little doubt that the obligation on the State to *"strive"* to support the provision of care will have real effects which will be enforced by the courts, and that it will be relied upon in a very wide range of contexts in support of claims that the Constitution requires the State to provide, and/or support the provision of care. This could have the effect of drawing the courts further into questions of resource allocation than is currently the case and could result in declaratory orders against the State with significant financial implications.

There is a lack of guidance from the courts on how the word *"strive"* will be interpreted. Although the term is used in Article 45.1 of the Constitution in relation to the promotion of the welfare of the people as a whole, this forms part of the Directive Principles of Social Policy, which are expressly stated to be non-justiciable. There is therefore uncertainty as to the likely meaning and effect of an obligation to *"strive"* to support the provision of care in a new Article 42B and whether, in its interpretation by the courts, it would be regarded as imposing a more onerous obligation than an obligation to *"endeavour"*.

With respect to the Irish version of the provision, as outlined above, the term *"strive"* appears in one other provision of the Constitution. In Article 45.1, the phrase *"the State shall strive"* is expressed in Irish as "*Déanfaidh an Stát a dhícheall*". It must be highlighted that by contrast, the term *"strive"* used in Article 42B will be expressed in Irish as *"dréim"* meaning that, if the Referendum passes, there will be two different Irish terms used in the Constitution for the same English word. It is also important to emphasise that Article 25.4.6° of the Constitution provides that the Irish text of the Constitution prevails over the English text in case of conflict, which may influence the interpretation of the proposed amendment as comprehending a more aspirational commitment.

Question and Answers Document

Advice has been furnished in relation to a Questions and Answers Document, which I understand is intended as an additional background document to support Government deliberations, and is not intended for publication.

The advice that has issued to date is predicated on the policy position that the Family in Article 41 is no longer to be limited to the marital family. It is understood that the intention is also to encompass other durable relationships, principally cohabitants with or without children, and lone parents and their children, while acknowledging that in very particular circumstances the courts may interpret it more broadly.

It is important to note that the role of the State where other relationships are concerned vis-à-vis caring for children, for example, grandparents, non-parent guardians, step-parents or blended families raise separate issues and a myriad of potential legal relationships. The policy objective has been not to include those relationships in the amendment to Article 41.1.1° as benefitting from the constitutional protection given to the Family. This is because the potentially varied permutations and competing rights that may present are more amenable to clarification by the comprehensive statutory regime in the Children and Family Relationships Act 2015 and the Guardianship of Infants Act 1964, as amended.

To avoid relationships which are clearly intended to be outside the intended effect of this amendment being discussed as falling within it in the course of the referendum campaign, it is of the utmost importance to clearly and consistently articulate what is intended to be included, so that the purpose and scope of the proposed amendment is clear. However, it should be acknowledged that the courts may ultimately interpret this more broadly in particular circumstances.

The need for such clarity is particularly important when one considers this year's Supreme Court judgment in ***Heneghan v Minister for Housing, Planning and Local Government***.[3] This is a notable example of the courts finding that they are entitled to consider the background and campaign leading up to a constitutional amendment when interpreting its purpose or scope. While that occurred in ***Heneghan*** in the context of apparent inconsistencies between different constitutional provisions, it is nevertheless a reason to exercise caution in communicating the purpose of the amendment in the course of the referendum campaign.

With respect to the proposed Article 42B, the policy intention behind the insertion of this text is to recognise the value of the provision of care by family members to each other. My Office has advised your Department that the term "*kinship*" which appeared in the Questions and Answers Document does not have a clear or readily ascertainable meaning. It is an obscure and imprecise term, the use of which could give rise to uncertainty. It is therefore not desirable that this term would feature prominently in any campaign.

Principles governing Referendum Campaigns – *McKenna* and *McCrystal*

As you will be aware, advice has been provided to your Department on the use of public funds by Government when providing information relating to a referendum. You will also be aware that the Department of the Taoiseach circulated a Guidance Note on same to all Departments on 5 December 2023 which is intended to apply from the Government Decision made on that date to approve the drafting of the Bills. The legal principles applying to the use of public funds by the Government when providing information relating to a referendum were established by

[3] ***Heneghan v Minister for Housing, Planning and Local Government*** [2022] IESC 7.

the Supreme Court in ***McKenna v An Taoiseach (No.2)***.[4] These principles were affirmed and elaborated upon by the Supreme Court in ***McCrystal v Minister for Children and Youth Affairs***.[5]

I would like to take this opportunity to again highlight the need for Government Ministers and Government Departments to be aware of, and adhere to, these principles. I would comment as follows on the ***McKenna/McCrystal*** principles:

(a) The Government has a constitutional role in the formulation of any proposal to amend the Constitution, including any text, and, during the debate over the passage of a referendum Bill, Government Ministers are entitled to express in both Houses their views on the merits or otherwise of any such proposal and to advocate reasons why it should or should not be adopted. Civil servants may assist Ministers in the ordinary discharge of this constitutional role during this phase by, for instance, providing speaking notes or draft speeches for use in the Oireachtas.

(b) The Government is entitled to campaign for a particular outcome in a referendum by any method it chooses, ***other than by the expenditure of public funds***.

(c) The Government may therefore permissibly campaign by methods which are cost free, such as writing, speaking, broadcasting on ordinarily scheduled current affairs programmes, and canvassing.

(d) Individual Government Ministers are entitled in their personal, party or Ministerial capacity to advocate for the proposed change and they may use State transport (which is provided to them as a security measure) in relation to the referendum and they may avail of the radio, television and other media to put forward their point of view. However, ***the Government and its members must not spend public monies in favour of one side***.

(e) In response to a question raised at Government on Tuesday, my view is that civil servants should play no role in any campaign after the Bills have been passed by the Oireachtas. The civil service has no role in promoting a particular outcome in a referendum.

(f) Special advisers are in a slightly more nuanced position. Their tenure in Government is linked to that of the Minister who they advise. Whilst their role is directed to the discharge of the Minister's work as Minister, it seems to me that they are entitled to provide practical assistance to a Minister even where a Minister engages in political activity *qua* Minister. They are entitled to attend with a Minister on a canvass and indeed, there could be no prohibition upon them engaging in canvassing-type activity in their own personal time. If a special adviser wished to campaign, they ought to take unpaid leave for that purpose as, fundamentally, they cannot act as a partisan campaigner on the taxpayer's account.

[4] ***McKenna v An Taoiseach (No.2)*** [1995] 2 IR 10.
[5] ***McCrystal v Minister for Children and Youth Affairs*** [2012] IESC 53, [2012] 2 IR 726.

(g) Permissible methods of partisan campaigning by Government or its Ministers may incur a cost, so long as that cost is not borne by the public purse.

(h) It is not the role of Government Departments to provide the public with information in relation to the subject matter of the referendum or to explain such matters to the electorate. That is the statutory role of An Coimisiún Toghcháin (the "**Electoral Commission**") established under the Electoral Reform Act 2022 which is independent in the exercise of its statutory functions.

(i) That said, the Government is entitled to disseminate information related to a referendum ***using public funds***, but such information may not be partisan to any outcome. Any information disseminated by the Government at public expense must be "***equal, fair, impartial and neutral***".

(j) It is prudent to assume that the ***McKenna/McCrystal*** principles apply now, even ***before*** the Bills are passed.

It is to be noted that the work of the Referendum Commission was praised by the Supreme Court in both ***McCrystal*** and ***Jordan***. In ***Jordan v Minister for Children and Youth Affairs***, O'Donnell J. commented that if the government's campaign was lawfully executed it would "*merely duplicate the efforts of the Referendum Commission established to provide neutral and fair information*".[6] It is therefore best left to its successor, the Electoral Commission to educate and inform the public. Any attempt by the Government to inform the public in a manner that complies with the limitations set out in ***McKenna/McCrystal*** would only amount to a duplication of the function performed by the Electoral Commission.

As the ***McKenna*** and ***McCrystal*** jurisprudence illustrates, there is a high bar for equality, fairness, neutrality and impartiality in relation to the provision of information using public resources. The more comprehensive any communication is, the more difficult it will be to ensure it is "*equal, fair, impartial and neutral*" and to avoid an argument that public funds are being used to advocate for a vote in favour of the proposed amendments. Your Department has been advised that great care must be taken to ensure that any communication made using public resources is "*equal, fair, impartial and neutral*" and that any such communication should be kept to an absolute minimum.

It is important to note at this juncture that the consequences of failing to comply with these principles are very grave indeed. Referendums are often the subject of legal challenge, and invariably so where their subject matter is contentious. A failure to observe these principles risks a finding by the courts that the Government has acted in breach of the Constitution and the potential invalidation of the result of one or both of the referendums. As this advice on the conduct of the referendum campaign applies not only to your Department but to all Government Departments, I am copying this correspondence to the Taoiseach, the Tánaiste and to all Ministers of the Government.

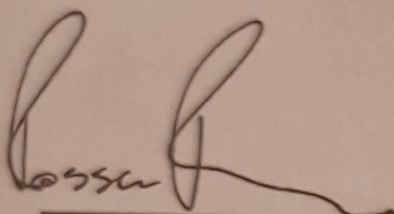
Conclusion

[6] ***Jordan v Minister for Children and Youth Affairs*** [2015] IESC 33, [2015] 4 IR 232, [90].

The referendum proposals are innovative measures in areas of intensely sensitive social policy. There will doubtless be criticism of the Bills. For some, their measures will not go far enough. For others, they will go too far. Commentators may raise textual and legal arguments about their meaning, and others may even distort and misrepresent their effect. That is the essence of any referendum on a social issue. These are political matters for your consideration on which I express no view. It is nevertheless appropriate for me at this stage to reiterate the firm and consistent advice which has been provided by my Office that the it is of the utmost importance that the policy intention behind the Bills and the proposed amendments is clearly and consistently articulated.

I am available to advise further as required.

Yours sincerely,



ROSSA FANNING
ATTORNEY GENERAL

cc.

Leo Varadkar TD
An Taoiseach
Department of the Taoiseach
Government Buildings
Merrion Street Upper
Dublin 2
D02 R583.

Micheál Martin TD
Tánaiste and Minister for Foreign Affairs
Department of Foreign Affairs
Iveagh House
81 St Stephen's Green
Dublin 2
D02 VY53.

Eamon Ryan TD
Minister for the Environment, Climate and Communications
Department of the Environment, Climate and Communications
29-31 Adelaide Road
Dublin 2
D02 X285.