



**Tithe an
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**Houses of the
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Tithe an Oireachtais

An Comhchoiste um Dhlí agus Ceart agus Comhionannas

**Tuarascáil maidir leis an nGrinnscrúdú Réamhreachtach ar Scéim
Ghinearálta an Bhille um Chosaint Sonraí 2017**

Nollaig 2018

Houses of the Oireachtas

Joint Committee on Justice and Equality

**Report on pre-legislative scrutiny of the General Scheme of the 38th
Amendment of the Constitution (Role of Women) Bill**

December 2018

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Chairman's Preface

In July 2018, the Taoiseach, Leo Varadkar TD, requested the Oireachtas Joint Committee on Justice and Equality to consider the General Scheme of the 38th Amendment of the Constitution (Role of Women) Bill, mindful of the Government's wish to give effect to the Bill's provision in a referendum to be held in October.

Such was the importance that the Committee attached to any proposed amendment of Article 41.2 of the Constitution, whether by deletion or otherwise, that it returned early from the summer recess, on 5 September 2018, in order to facilitate the prompt, detailed consideration of the Bill, and whether pre-legislative scrutiny was needed.

The Committee decided that pre-legislative scrutiny was necessary, and a very thorough examination and discussion took place over the course of two hearings that took place on the 19th and 26th of September. There was universal consensus amongst both the Members and witnesses who came before us that the language contained in Article 41.2 is sexist, anachronistic and no longer appropriate to the Ireland of today. However, a very wide range of views were expressed as to how best to address the provision. Whilst some favoured a simple deletion, others wished to see its replacement with a new form of words that reflected the vital role and contribution of carers to our society.

Of the various possible recommendations canvassed in the course of the hearings, two received the broadest range of support amongst the Members. Some Members favour replacing Article 41.2 with an alternative provision containing more appropriate, gender-neutral language, which acknowledges the support that home and family life gives to society. Other Members support the view expressed by a number of stakeholders in the course of the hearings that these complex issues require time for public engagement, and a conversation that considers a range of constitutional, legislative and policy options in this area. The two alternative options are outlined in full under the Recommendations at the end of the report.

A copy of this report has been sent to the Minister for Justice and Equality. The Committee hopes it will assist and inform the Government in whatever steps it decides to take next, not only in terms of Article 41.2, but in terms of addressing the wider needs of carers in our society.

I would like to express my gratitude on behalf of the Committee to all the witnesses who attended our public hearings to give evidence. Finally, I also wish to thank staff of the Committees Secretariat, and of the Library & Research Service, who assisted in the preparation of this report. Go raibh maith agaibh.



A handwritten signature in black ink, reading "Caoimhghín Ó Caoláin".

Caoimhghín Ó Caoláin T.D.
Chairman – December 2018

Introduction

The General Scheme of the 38th Amendment of the Constitution (Role of Women) Bill was published by the Department of Justice in July 2018. The Bill is very short and provides as follows:

Head 1 – Amendment of Article 41 of the Constitution

Provide that:

Article 41 of the Constitution is hereby amended as follows:

- (a) by the deletion of section 2 of the Irish text; and
- (b) by the deletion of section 2 of the English text.

Explanatory Note

Article 41.2 of the Constitution provides as follows:

1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

For the reasons set out in the Memorandum, it is proposed that this section be deleted.

Head 2 - Citation

Provide that:

(1) The amendment of the Constitution effected by this Act shall be called the Thirty-eighth Amendment of the Constitution.

(2) This Act may be cited as the Thirty-eighth Amendment of the Constitution Act 2018.

Explanatory Note

This is the usual citation provision in Bills to amend the Constitution.

Pre-legislative scrutiny by the Committee

On 12 July 2018, the Taoiseach, Leo Varadkar TD, requested the Oireachtas Joint Committee on Justice and Equality ('the Committee') to consider the General Scheme of 38th Amendment of the Constitution (Role of Women) Bill in terms of pre-legislative scrutiny ('PLS').

Given the significance of the proposal in the Bill to delete Article 41.2 of the Constitution, via a constitutional referendum, the Committee returned early from the summer recess, on the 5th of September 2018, in order to facilitate the prompt, detailed scrutiny of the Bill.

As part of its scrutiny of the Draft Heads of the General Scheme, the Committee heard evidence from witnesses in public session over the course of two engagements - on the 19th of September, 2018 and the 26th of September, 2018.

The following stakeholders and witnesses appeared before the Committee as part of the scrutiny process:

19 September 2018

- The Minister for Justice and Equality;
- The National Women's Council of Ireland;
- Irish Human Rights & Equality Commission; and
- Dr Laura Cahillane (University of Limerick).

26 September 2018

- Ms. Justice Catherine McGuinness;
- The Economic and Social Research Institute;
- Family Carers Ireland;
- Irish Countrywomen's Association; and
- Stay-at-home Parents Association Ireland.

Following the outcome of its deliberations, the Committee arrived at certain conclusions and made recommendations, which can be found at the end of this report.

Background

Article 41.2 of the Constitution recognises the specific contribution of women in the home, and obliges the State to 'endeavour' to support mothers not to have to work outside the home. This Article has a long history as a contentious provision of the Constitution, and has been the subject of several reports and much commentary in recent decades. While much of the debate has centred on the patriarchal and stereotyping nature of the provision, commentators have also noted that the aspiration to reward care work is a valuable one. As a consequence, there is a dominant view amongst policy-makers and commentators that it is desirable to amend or repeal Article 41.2.

The role of Article 41.2 has proven largely symbolic, and while it has been cited in the courts on a small number of occasions, legal historians have concluded that the Article has had little practical value. In the past, the courts have used Article 41.2 to justify gender discrimination in certain social welfare payments, and it has been considered in the context of a woman's claim on the family home in divorce proceedings. More recently, the courts have speculated that to interpret Article 41.2 in a contemporary light would mean applying its provisions to women and men caring in the home. Overall, Article 41.2 has proven more of a symbolic instrument than a practical one, and the case for amending or repealing it has similarly been rooted in its symbolic value, as a reflection of cultural norms.

In 2013, the Constitutional Convention considered Article 41.2 during its second session, and subsequently reported to the Houses of the Oireachtas. The Convention voted overwhelmingly to amend the provision to make it a gender-neutral recognition of care work, with a smaller majority voting that it should apply to care work inside *and* outside the home.

The Government Task Force, established to consider the next steps, set out three broad options:

- 1) to replace Article 41.2 with a provision which recognises the work of carers in the home, and a commitment to endeavour to support this work;
- 2) to extend the commitment to 'endeavour to support' to carers beyond the home, through a new Article 45.4.3 which would recognise care in the broader community, as well as in the home. Article 45 provides general, non-prescriptive, advice to Government about the direction of social policy; or
- 3) to repeal Article 41.2 altogether (this approach was not recommended by the Task Force).

The Programme for a Partnership Government commits to holding a referendum on "Article 41.2.1 of Bunreacht na hÉireann regarding a 'woman's life within the home'". The Taoiseach had previously indicated plans to hold a referendum in October 2018, in conjunction with a referendum to repeal Article 40.6.1, which provides that blasphemous publications will be punishable by law. Regardless of how the Government proposes to address Article 41.2, a referendum offers an opportunity for

broader discussion on the role of care work, and the ongoing challenges of addressing gender inequality in the provision of unpaid care work across society.

This section begins by presenting a summary of the key reports and recommendations on Article 41.2 of the Constitution (Table 1).

Table 1: Overview of reports and official commentary on Article 41.2, Source: Library & Research Service

Date	Report	Recommendation
1937	Constitution of Ireland	41.2.1 "In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved". 41.2.2 "The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home".
1993	Report of 2nd Commission on the Status of Women	Recommended deleting Article 41.2.2 and introduction of a prohibition of all forms of discrimination, both direct and indirect, based on sex.
1996	Constitution Review Group	Called for a revised form of Article 41.2.1 and acknowledged that retaining Article 41.2.2 might not be appropriate: "The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home".
1997	All-Party Oireachtas Committee on the Constitution, 1st Progress Report	Recommended replacing Article 41.2.1 and 41.2.2 with: "The State recognises that family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home".
2005	UN Committee on the Elimination of All Forms of Discrimination against women	"The Committee is concerned at the persistence of traditional stereotypical views of the social roles and responsibilities of women and men in the family and in society at large which are reflected in Article 41.2 of the Constitution and its male-oriented language". In 2016 the Committee once again raised concerns about the impacts of Article 41.2 on gender equality.
2006	All-Party Oireachtas Committee on the Constitution, Tenth Progress Report (The Family)	Recommended amending Article 41.2.1 to read: "The State recognises that by reason of family life within the home, a parent gives to the State a support without which the common good cannot be achieved." And amending Article 41.2.2 to read: "The State shall, therefore, endeavour to ensure that both parents shall not be obliged by economic necessity to work outside the home to the neglect of their parental duties."
2008	UN Human Rights Council (ICCPR)	"The State party should take steps to initiate a change of Article 41.2 of the Constitution with a view to including a gender-neutral wording in the article."
2013	Second report of the Constitutional Convention	11% of members of the Constitutional Convention felt Article 41.2 should be maintained in its current form. If changing it, then 88% preferred amending Article 41.2 and 12% were in favour of deleting it. If amending, 98% voted for making it gender neutral to include other carers in the home, while 62% wanted to include carers beyond the home. The Convention was in favour of an obligation on the State to "provide a reasonable level of support".

2013	Report of the Task Force on the Implementation of the Second report of the Convention on the Constitution	<p>Option 1: Replace Article 41.2.1 and 41.2.2 with, “The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home as may be determined by law.”</p> <p>Option 2: Replace Article 41.2.1 and 41.2.2 with, “The State recognises that home and family life gives to society a support without which the common good cannot be achieved.” Add new Article 45.4.3 (general guidance for the Oireachtas): “The State shall endeavour to ensure that persons caring for others in the home and in the wider community receive support in recognition of the contribution they make to society”.</p> <p>Option 3: delete Article 41.2 (not recommended by the Task Force).</p>
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Meaning of Articles 41 and 42

Articles 41 and 42 of the Constitution guarantee to the family certain inalienable and imprescriptible rights - rights that "cannot (generally) be given away, taken away or lost".¹ It is within these provisions on the family that the long controversial text on the role of 'women in the home' can be found. Article 41.2 states:

41.2.1 In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

41.2.2 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

Article 41.2 recognises the specific contribution of women in the home, and obliges the State to 'endeavour' to support mothers not to have to work outside the home. It is certainly of its time and connects to a broader vision set out in Articles 41 and 42 of "the central role of the marital family in Irish society".²

Irish family law has now moved on from the narrow definition of the martial family originally contained in the Constitution, and there appears to be little desire to retain Article 41.2 in its current form. It has been noted that the language contained in the provision is outdated. As TCD legal scholar Alan Brady puts it: "rereading the text of Article 41.2 continues to be a powerful experience; the language is arresting: the use of the generic 'woman' without any definite or indefinite article; 'her place' with its overtones of subservience".³

Much of the debate has focused on how best to amend (rather than repeal) Article 41.2 in order to make it gender neutral and to secure recognition of the contribution of care work to society. Key areas for discussion have been whether the recognition of care work should extend to care work beyond the home, and the extent to which the Constitution could, or should provide for financial support for such work.

¹ Ryan, F. W., (2008) *Constitutional Law: Second edition*, Thomson Round Hall: Dublin.

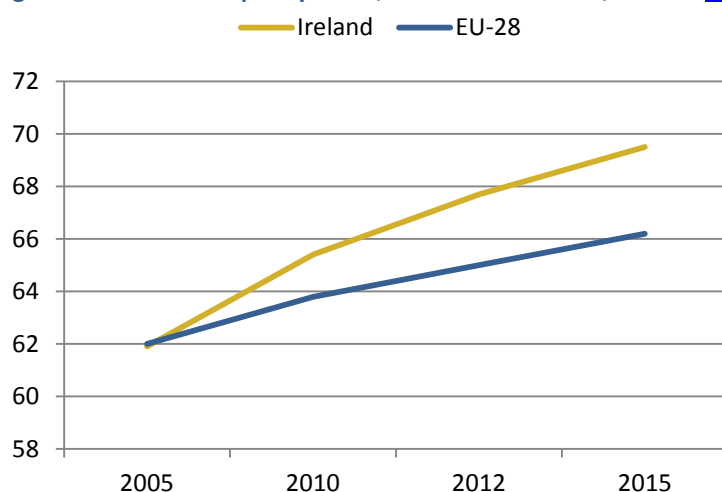
² Crowley, L., (forthcoming), 'Sheltering the homemaker in Irish family law – Ireland's failure to evolve with the shifting social and family norms', in: Brinig, M. (ed.), *International Survey of Family Law 2018*, Intersentia.

³ Brady, A., (forthcoming) 'Gender and the Irish Constitution: Article 41.2, symbolism, and the limitation of the Courts' approach to substantive gender inequality', in: Black, L., and Dunne, P., (eds) *Law and Gender in Modern Ireland: Critique and Reform*, Hart Publishing.

Gender Equality in Ireland today

While substantial progress has been made towards greater gender equality in Ireland, as Brady points out, “even a cursory look at the statistics in this area shows a high degree of substantive inequality of economic and social power between men and women in Ireland”.⁴ According to the United Nations Development Programme (UNDP) Ireland does relatively well on gender equality, and in 2015 was ranked 26th in the world in terms of gender inequality.⁵ In the same year, EU Gender Equality Index ranked Ireland 8th in the EU.⁶ The EU Gender Equality Index presents a composite score which encompasses a broad range of indicators in areas such as: work, knowledge, power, violence, money, time and health. As Figure 1 demonstrates, Ireland’s score in the EU Gender Equality Index has improved progressively since 2005; however, that does not mean that Ireland has solved the deep-seated challenges of gender inequality.

Figure 1: EU Gender Equality Index, Ireland 2005 - 2015, Source: [European Institute for Gender Equality](#)



As the EU Gender Equality Index captures, gender equality manifests across a broad range of social spheres. In Ireland, women experience inequality in relation to power and representation, employment, care responsibilities, and experiences of violence and rape. The Central Statistics Office (CSO) produces regular data about women and men in Ireland.⁷ In 2016, the average labour force participation rate for women was 51.5% and for men it was 67.8%. Women worked on average 31.7 hours per week and men worked 39.7 hours.

⁴ Brady, A., (forthcoming) ‘Gender and the Irish Constitution: Article 41.2, symbolism, and the limitation of the Courts’ approach to substantive gender inequality’, in: Black, L., and Dunne, P., (eds) *Law and Gender in Modern Ireland: Critique and Reform*, Hart Publishing.

⁵ UNDP (2016) Human Development Report, available at: http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf (accessed on 15.06.2018).

⁶ European Institute for Gender Equality EU Gender Equality Index, available at: <http://eige.europa.eu/gender-equality-index/2015/countries-comparison> (accessed on 15.06.2018).

⁷ Central Statistics Office (2016) *Women and Men in Ireland 2016*, available at: <https://www.cso.ie/en/releasesandpublications/ep/p-wamii/womenandmeninireland2016/> (accessed 15.05.2018)

In terms of political representation, in 2016, fewer than one in four TDs were women (22.2%). Of particular relevance to the debate on Article 41.2, there were 445,500 women looking after home/family, compared to just 9,200 men.

While substantial differences remain, as the EU Gender Equality Index suggests there has been progress in recent decades. Figure 2 uses Quarterly National Household Survey (QNHS) data to demonstrate changes in labour market participation rates, and the rates for those recorded as engaging in home duties. Figure 3 demonstrates that there are increasing numbers of men recorded as looking after the home and family, but this is still a tiny proportion in comparison to women. Women continue to carry out the vast majority of caring work in the home in Ireland today.

Figure 2: Women and Men in work and engaged in home duties, 1989-2017 (thousand): Source: CSO, [QNHS](#)

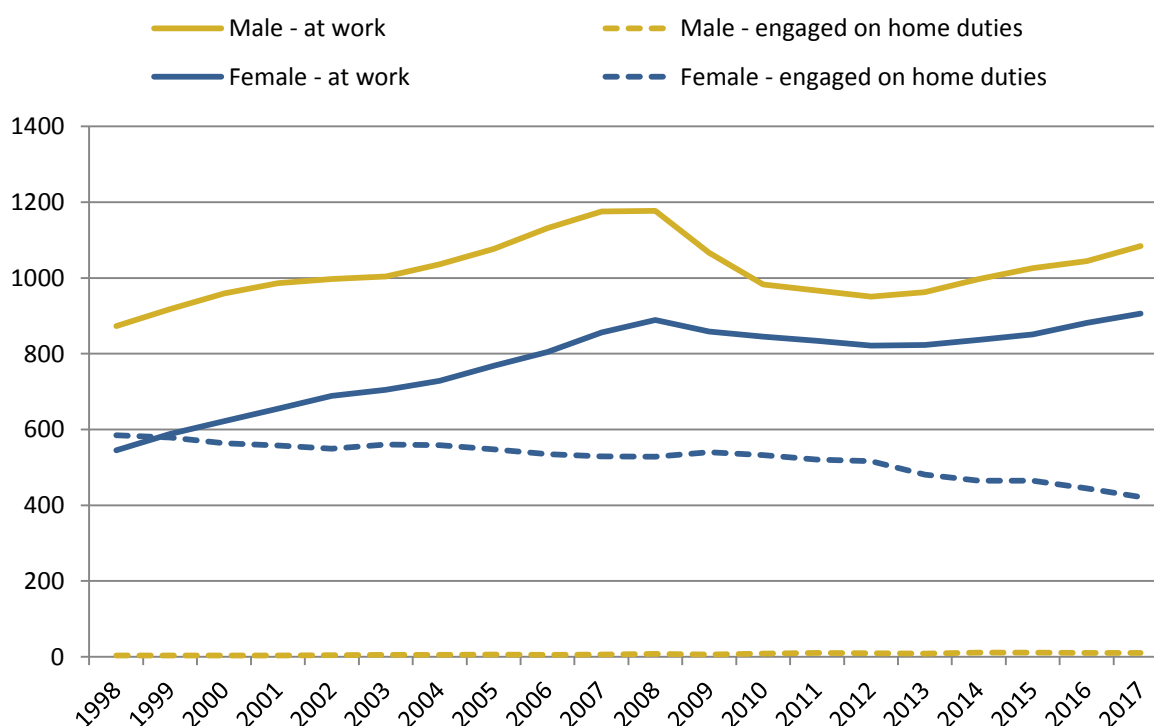
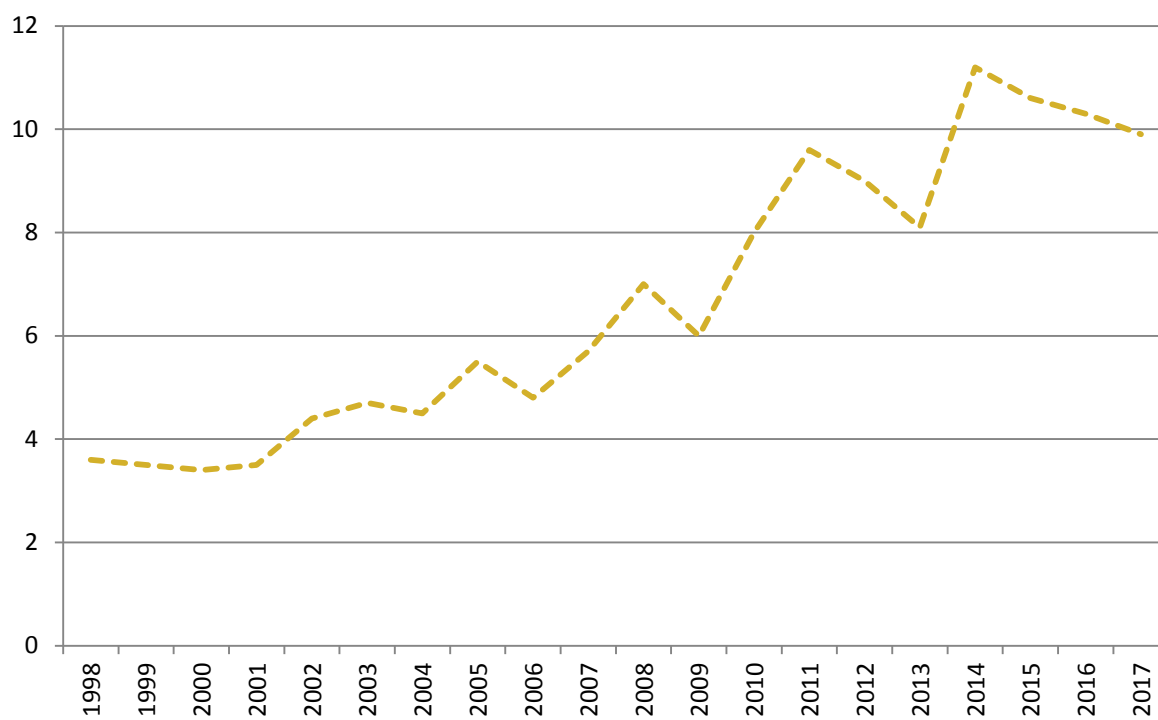


Figure 3: Men engaged in home duties, 1989-2017 (thousand): Source: CSO, [QNHS](#)



History of Article 41.2

Undoubtedly in 1937, Article 41.2 was of its time. However, even at the time of the adoption of the Constitution, this provision was one of its most controversial elements. According to Judge Gerard Hogan:

“the Constitution’s treatment of women was a matter of almost immediate controversy following publication, and indeed, remains so to this day. This was the single biggest policy issue which dominated much of the debate at the time both inside and outside the Dáil.”⁸

Concern at the time centred on fears that this Article could be used to justify gender discrimination in employment, and that it would exclude women’s life outside the home from constitutional protection.⁹ Hanna Sheehy Skeffington wrote that the new Constitution was based on “a Fascist Model, in which women would be relegated to permanent inferiority, their avocations and choice of callings limited because of an implied invalidism as the weaker sex”.¹⁰ While opposition was strong, nonetheless, it was a minority view, and as UCC legal academic Louise Crowley describes it “this view of the role of women in Irish family life reflects a traditional view embraced by Irish society at the time of the drafting of the Constitution”.¹¹

Historians have noted that while there were undoubtedly significant influences from Catholic social teaching, at the time this provision was not unique. Several European constitutions had similar provisions. According to Beaumont, “the Irish free State was not the only country in Europe which identified and enthusiastically endorsed women’s domestic role”.¹² Cahillane, in a forthcoming publication, documents related articles in the contemporaneous constitutions of Poland, Estonia, Kingdom of the Serbs, Croats and Slovenes, Spain, and Portugal, as well as the Weimar republic in Germany. For example, Article 126 of the Czechoslovak Constitution of 1920 states that, “marriage, the family and motherhood shall be under the special protection of the law”.¹³

⁸ Hogan, G., (2002) *The origins of the Irish Constitution 1928-1941*, Royal Irish Academy: Dublin, p. 520.

⁹ Presentation by Professor Siobhan Mullally to the Convention on the Constitution, contained in: The Convention on the Constitution (2013) *Second Report of the Convention on the Constitution*, available at: http://opac.oireachtas.ie/AWDData/Library3/Role_of_Women_report_101817.pdf (accessed on 15.05.2018).

¹⁰ Cited in: Beaumont, C., (1997) Women, citizenship and Catholicism in the Irish free State, 1922-1948, in: *Women’s History Review*, 6:4, 563-585.

¹¹ Crowley, L., (forthcoming), ‘Sheltering the homemaker in Irish family law – Ireland’s failure to evolve with the shifting social and family norms’, in: Brinig, M. (ed.), *International Survey of Family Law 2018*, Intersentia, p. 5.

¹² Beaumont, C., (1997) Women, citizenship and Catholicism in the Irish free State, 1922-1948, in: *Women’s History Review*, 6:4, 563-585, p 570.

¹³ Quoted in: Cahillane, L., (forthcoming) ‘Revisiting Article 41.2’, in: *Dublin University Law Journal*.

While such a provision was not unique to the social teachings of the Catholic faith, historians are clear about the Catholic influence on the development of the Constitution generally, and Article 41.2 specifically. This approach was reflected in a series of legislative developments introduced in the run up to the adoption of the Constitution, including law concerning employment and birth control.¹⁴ Historians have particularly acknowledged the role of Archbishop John Charles McQuaid. Cahillane recalls that McQuaid strongly defended the draft article against criticisms by women's groups, he wrote that this Article endeavours to ensure: "not that women will be prevented from engaging in this or that career, but a certain class of women, namely Mothers, will not be forced by pressure of need to engage in work as to neglect their proper home duties".¹⁵ It is worth noting that Article 45 of the Constitution, which provides for directive principles of social policy, recognises the equal right of men and women to earn a livelihood (Article 45.2.i).

De Valera also staunchly defended Article 41.2. Historians have suggested that his views were informed by his own experiences of his mother working outside the home.¹⁶ De Valera appears to have been surprised by the criticism of the provision in Dáil debates, and while he did clarify that the Article was intended to protect mothers, he refused to change the language to reflect this emphasis. De Valera said in the Dáil:

"I would like to know from any women's organisation or from any woman what is wrong in saying that we should strive for a social system which will be such as will not compel women to go out and work."¹⁷

By the time that the first official draft of the Constitution appeared in 1937, the wording of Article 41.2 was published in its current form, and while there were other changes to the draft constitution, Article 41.2 remained unchanged.

Cahillane notes that, during the debates on the draft constitution, there was brief discussion of the potential practical implications of the provision, in the form of financial assistance to mothers; however, "the question was not answered to any great degree of satisfaction".¹⁸ De Valera repeated that the State should endeavour to support women financially; however no specifics were described for what this might mean in practice. This vagueness appears to have

¹⁴ Beaumont, C., (1997) Women, citizenship and Catholicism in the Irish free State, 1922-1948, in: *Women's History Review*, 6:4, 563-585.

¹⁵ Private papers, quoted in: Cahillane, L., (forthcoming) 'Revisiting Article 41.2', in: *Dublin University Law Journal*.

¹⁶ According to Beaumont, "In a speech defending the draft Constitution he (De Valera) commented that 'the State pledges itself to have special care for the family. Everyone knows there is little chance of having a home in the real sense if there is not woman in it, the woman is really the home-maker'", see: Beaumont, C., (1997) Women, citizenship and Catholicism in the Irish free State, 1922-1948, in: *Women's History Review*, 6:4, 563-585. p 578.

¹⁷ Cahillane, L., (forthcoming) 'Revisiting Article 41.2', in: *Dublin University Law Journal*.

¹⁸ Cahillane, L., (forthcoming) 'Revisiting Article 41.2', in: *Dublin University Law Journal*.

been prescient of the fact that in practice Article 41.2 has had relatively little value.

Practical effect of Article 41.2

Professor Yvonne Scannell has argued that there are two possible interpretations of Article 41.2: the first is that it was intended to acknowledge and value the work of women in the home; the other is that it supported a patriarchal assumption that women should be in the home, and thereby denies them a right to work.¹⁹ However, as it turned out, the Article had little impact on either possibility. As Cahillane writes, “there have only been a handful of cases in which the provision has been of any relevance and it has never truly been tested as to its usefulness as a protective guarantee for women”.²⁰

Article 41.2 has been used in litigation for two reasons: the first is to allow for gender discrimination; the second is to recognise work done in the home. According to Professor Gerry Whyte, Article 41.2 has been cited by the courts on four occasions “to justify gender discrimination”.²¹ Whyte concludes that, in *Dennehy v Minister for Social Welfare* (1984) and *Lowth v Minister for Social Welfare* (1994 and 1998), Article 41.2 was used to show that preferential social welfare treatment for deserted wives was not contrary to equality in Article 40.2. In two other cases, unsuccessful attempts were made to use Article 41.2 to justify an exemption of women from jury service (*de Búrca v Attorney General*, 1976) and to justify discrimination against widowers in relation to eligibility to adopt (*O’G v Attorney General*, 1985).²²

Beyond allowing for gender discrimination, Article 41.2 has been used in several cases which relate to recognising the non-financial contribution of a woman to the home. In *BL v ML* (1989) Judge Barr argued that Article 41.2 gave the wife shared ownership of the family home. The case explored the contradiction that while the women’s place in the home was prioritised by the Constitution in effect (at the time) women had no claim on the family home where they had not made a financial contribution to the purchase or upkeep of the home.²³ However, the Supreme Court took the view that Justice Barr’s assessment veered into law-making, and relied instead on property law to reject the woman’s claim on the family home, and the consequence was, according to Cahillane, “that Article

¹⁹ Scannell, Y., (1988) ‘The Constitution and the role of women’, in Farrell (ed.), *De Valera’s Constitution*, Gill and MacMillan: Dublin.

²⁰ Cahillane, L., (forthcoming) ‘Revisiting Article 41.2’, in: *Dublin University Law Journal*.

²¹ Whyte, G., ‘Amending the clause on the role of women in the home’, presentation to the Constitutional Convention, in: the Convention on the Constitution (2013) *Second Report of the Convention on the Constitution*, available at: http://opac.oireachtas.ie/AWDData/Library3/Role_of_Women_report_101817.pdf (accessed on 15.05.2018).

²² Whyte, G., ‘Amending the clause on the role of women in the home’, presentation to the Constitutional Convention, in: the Convention on the Constitution (2013) *Second Report of the Convention on the Constitution*, available at: http://opac.oireachtas.ie/AWDData/Library3/Role_of_Women_report_101817.pdf (accessed on 15.05.2018).

²³ This Article has not been used to justify shared ownership of the family home. While recognition of women’s right to ownership of the family home is now recognised in family law legislation, it was not Article 41.2 which has facilitated a claim on the home.

41.2 was now effectively meaningless and no further litigation was taken directly on the provision".²⁴ According to Brady, this Supreme Court judgment was:

"the worst of both worlds; the symbolism of Article 41.2 is endorsed in a manner which entrenches the existing economic disparities between men and women within the family; symbolic inequality gets judicial endorsement and substantive inequality gets judicial protection."²⁵

In more recent years, there have been attempts to provide a contemporary interpretation of the provision. In *Sinnott v Minister for Education* (2001), Judge Denham noted that Article 41.2 did not exclude women from other roles but rather "is a recognition of the work performed by women in the home".²⁶ Judges Walsh and McCarthy speculated that Article 41.2 could apply to unmarried mothers. In *DT v CT* (2002), Supreme Court judges Denham and Murray cited Article 41.2.1 in considering how care work is taken into account in divorce. In this case, Judge Murray sought to extend Article 41.2 to cover fathers, in a gender neutral interpretation of the Article, saying:

"the Constitution ... is to be interpreted as a contemporary document. The duties and obligations of spouses are mutual and, without elaborating further since nothing turns on the point in this case, it seems to me that [the Constitution] implicitly recognises similarly the value of a man's contribution in the home as a parent."²⁷

University of Limerick academic Laura Cahillane suggests that it is unfortunate there has never been a case using Article 41.2 and addressing the situation of women who are forced into employment out of economic necessity; she speculates that *BL v ML* would have dissuaded any potential litigant.²⁸ Moreover, it is unlikely that the Courts would have sought to encroach on the role of the Oireachtas in relation to obliging financial support to mothers, as Whyte points out:

"tax and welfare matters affect public expenditure, and that decisions on public expenditure are regarded as the preserve of

²⁴ Cahillane, L., (forthcoming) 'Revisiting Article 41.2', in: *Dublin University Law Journal*.

²⁵ Brady, A., (forthcoming) 'Gender and the Irish Constitution: Article 41.2, symbolism, and the limitation of the Courts' approach to substantive gender inequality', in: Black, L., and Dunne, P., (eds) *Law and Gender in Modern Ireland: Critique and Reform*, Hart Publishing.

²⁶ Whyte, G., 'Amending the clause on the role of women in the home', presentation to the Constitutional Convention, in: the Convention on the Constitution (2013) *Second Report of the Convention on the Constitution*, available at: http://opac.oireachtas.ie/AWDData/Library3/Role_of_Women_report_101817.pdf (accessed on 15.05.2018).

²⁷ Quoted in: Whyte, G., 'Amending the clause on the role of women in the home', presentation to the Constitutional Convention, in: the Convention on the Constitution (2013) *Second Report of the Convention on the Constitution*, available at: http://opac.oireachtas.ie/AWDData/Library3/Role_of_Women_report_101817.pdf (accessed on 15.05.2018).

²⁸ Cahillane, L., (forthcoming) 'Revisiting Article 41.2', in: *Dublin University Law Journal*.

the Oireachtas and the executive, it is unlikely that the courts would use Article 41.2.2 to impose additional financial obligations on the State to support mothers in the home.”²⁹

Noting that there was never a judicial challenge to the marriage ban, Brady suggests that “the effect of Article 41.2 may be as important for the cases *that were not taken* as for those that were” (emphasis added).³⁰ Legally, Article 41.2 is more of a symbolic instrument than a practical one, and the case for amending or repealing it has similarly been rooted in its symbolic value, as a reflection of cultural norms.

In addition to the potential legal impact of Article 41.2, commentators have also pointed to its broader policy impact. According to academic Patricia Kennedy the dominant Catholic social teaching reflected in Article 41.2 was institutionalised in the tax and welfare system until the 1980s.³¹ This approach was reflected in the 1929 bar on employment of married women in the public service, the exclusion of married women from social insurance schemes, and the payment of lower benefits to married women than to non-married women. While it may be difficult to attribute direct causal effect between Article 41.2 and the emergence of policies designed to reinforce “the traditional division of labour by sex within the family”.³² it seems reasonable to conclude that Article 41.2 contributed to a context in which such policies were designed and sustained for decades. While Irish State policy may no longer be explicitly designed to support such traditional roles, as we have seen labour market participation and division of unpaid labour in the home remain key sites of gender inequality in Ireland today.

The contemporary debate has focused on how, as a society, Ireland values the unpaid work done by those who look after the home and family. Diverse stakeholders have argued that the work of women and men in the home is not valued, despite the economic and social value of this work. One manifestation of this discussion has focused on the individualisation of tax credits. Tax individualisation was introduced to promote participation of women in the labour market; however, some argue that the individualisation of tax credits has meant that two income families derive greater benefit from tax credits than one income

²⁹ Whyte, G., ‘Amending the clause on the role of women in the home’, presentation to the Constitutional Convention, in: the Convention on the Constitution (2013) *Second Report of the Convention on the Constitution*, available at: http://opac.oireachtas.ie/AWDData/Library3/Role_of_Women_report_101817.pdf (accessed on 15.05.2018).

³⁰ Brady, A., (forthcoming) ‘Gender and the Irish Constitution: Article 41.2, symbolism, and the limitation of the Courts’ approach to substantive gender inequality’, in: Black, L., and Dunne, P., (eds) *Law and Gender in Modern Ireland: Critique and Reform*, Hart Publishing.

³¹ Kennedy, P., (1999) ‘Women and social policy’, in: Kiely et al., (eds) *Irish social policy in context*, University College of Dublin Press: Dublin, p. 244.

³² Kennedy, P., (1999) ‘Women and social policy’, in: Kiely et al., (eds) *Irish social policy in context*, University College of Dublin Press: Dublin, p. 260.

families, and therefore that this approach discourages parents of young children from caring for their children at home.³³

³³ Iona Institute (2013) Pre-budget submission on tax individualisation, available at: <https://ionainstitute.ie/pre-budget-submission-on-tax-individualisation-by-the-iona-institute/> (accessed 20.06.2018),

Proposals for Reform

There is widespread acceptance that regardless of the efforts of the courts to interpret Article 41.2 in a modern light, this provision is an outdated construct. Article 41.2 has been the subject of numerous recommendations that it should be repealed or amended. Table 1 summarises the key bodies that have considered Article 41.2, and highlights their proposed reforms. There has been near consensus, amongst the various bodies and reports, that the Article should be amended, rather than repealed, so that it would play a symbolic role in valuing care work.

In addition to official reports and commentary, summarised in Table 1, multiple bodies and stakeholders have called for changes to Article 41.2. In its 2015 submission to the UN Committee on the Elimination of Discrimination against Women (CEDAW), the Irish Human Rights and Equality Commission stated that: “the IHREC regrets that Article 41.2 of the Irish Constitution continues to perpetuate stereotypical attitudes towards the role of women in Irish society despite repeated calls at both the national and international level to amend or remove it”.³⁴ Indeed numerous NGO submissions to CEDAW, as well as in other commentary, have called for a clear timeframe for a referendum on Article 41.2.

While it could be argued, particularly in light of the case law discussed above, that the current Article 41.2 is ‘harmless’, commentators have suggested that the persistent reality of gender inequality provides impetus to the ongoing resistance to Article 41.2. In other words, precisely because Ireland continues to face challenges in addressing gender equality, Article 41.2 remains a visible and symbolic representation of inequality and therefore repealing or amending it plays a part in a wider project of gender equality. Therefore, despite the absence of evidence of significant legal impact, the case for changing Article 41.2 extends to both the significance of its symbolic legal-political value, as well as the ongoing efforts to address gender equality in Ireland.

Convention on the Constitution

The Convention on the Constitution was established in 2012 to discuss proposed amendments to the Constitution of Ireland. Membership of the Convention comprised of 66 randomly selected citizens, 33 parliamentarians and an independent Chairman. The Government was committed to responding to the recommendations of the Convention within four months of the publication of its reports. The Convention held its second plenary on 16th and 17th February 2013

³⁴ IHREC (2015), Submission to UN Committee on the Elimination of all forms of Discrimination against Women, List of Issues Prior to Reporting on Ireland’s Combined 6th and 7th Report under CEDAW, available at: https://www.ihrec.ie/download/pdf/ihrec_submission_to_cedaw_loipr_2015.pdf (accessed on 15.05.2018).

at which it considered Article 41.2. The Convention published its second report in May 2013, and the report was debated in the Houses of the Oireachtas in the following October. The Minister subsequently established a Task Force on Implementation of the Recommendations of the Second Report.

The second report of the Convention concluded that:

“A majority of the Convention members favoured a change to the Constitution to amend the clause and, if making such a change, a majority recommended that it should be gender-neutral to include other carers in the home and that it should also include carers beyond the home. The Convention also recommended that the State should offer a ‘reasonable level of support’ to ensure that carers ‘shall not be obliged by economic necessity to engage in labour’”.³⁵

Following external presentations and in-depth discussion, the members of the Convention voted on a number of key questions. Table 2 summarises the outcomes of these votes on Article 41.2. The Convention also recommended the Constitution be amended to include an explicit provision on gender equality.

Table 2: Constitutional Convention decisions on Article 41.2

Question	Yes	No	No opinion
Should the clause (Article 41.2) be left as it is	11%	88%	1%
	Delete	Amend /Modify	No opinion
If the clause were to be changed would you delete it or amend/modify it in some way	12%	88%	0%
If changing, what change would you support?	Yes	No	No opinion
Make it gender-neutral to include other carers in the home.	98%	2%	0%
Do you want to include carers beyond the home?	62%	31%	7%

While the majority of the members of the Convention wanted to amend, rather than repeal or keep, Article 41.2, there were alternative minority views. One in ten of Convention members voted to keep Article 41.2 in its current form, and “the reasoning for this was that women do in fact have a unique role in terms of

³⁵ Convention on the Constitution (2013) *Second Report of the Convention on the Constitution*, available at: http://opac.oireachtas.ie/AWDData/Library3/Role_of_Women_report_101817.pdf (accessed on 15.05.2018).

childbearing and child rearing that cannot be replaced”.³⁶ An alternative argument for retaining Article 41.2 (not highlighted in the report of the Convention), could be that given the efforts of the Supreme Court to interrupt the provision in a gender neutral way that it does already offer an inclusive recognition of care work in the home, and is therefore worth retaining (see view of Judge Murray in *DT v CT* discussed above). A second minority view at the Convention was that the Article should simply be deleted; 12% voted to delete the provision because “it has no place in a modern 21st century Ireland”.³⁷

The members of the Convention also voted on what level of obligation should be placed on the State to ensure that carers are not obliged by economic necessity to engage in work outside the home. They were presented with five options on a scale which ranged from will ‘endeavour to support’ to ‘shall support’. There was a diversity of perspectives on this issue, and the overall result on a 5 point scale was 3.22, suggesting that while the members of the Convention did not propose to mandate specific State support they were in favour of a reasonable level of State support.

Report of the Task Force

The then Minister for Justice and Equality, Alan Shatter, T.D., delivered the Government’s response to the Convention’s Second Report in the Dáil on 10 October 2013.³⁸ The Government accepted the Convention’s first recommendation on the need to amend the language in Article 41.2 of the Constitution on the role of women in the home, and the Minister noted that including a reference to carers in the Constitution required further reflection and consultation. To that end, the Minister established a Task Force of Department of Justice and Equality officials to consider the recommendations of the Convention on the Constitution in more depth. The role of the Task Force included considering the most appropriate wording to be presented in a referendum *and* to consider the cost implications of any such change.

In its October 2016 report, the Task Force presented the Government with three possible options. These options are summarised in Figure 4. **Option one** is to replace the existing Article 41.2.1 and 41.2.2 with a text which would recognise the support that home and family life gives to society and the contribution of

³⁶ Convention on the Constitution (2013) *Second Report of the Convention on the Constitution*, available at: http://opac.oireachtas.ie/AWDData/Library3/Role_of_Women_report_101817.pdf (accessed on 15.05.2018).

³⁷ Convention on the Constitution (2013) *Second Report of the Convention on the Constitution*, available at: http://opac.oireachtas.ie/AWDData/Library3/Role_of_Women_report_101817.pdf (accessed on 15.05.2018).

³⁸ Dáil Éireann debate (10.10.2013, *Second Report of the Convention on the Constitution*, available at: <https://www.oireachtas.ie/en/debates/debate/dail/2013-10-10/11/?highlight%5B0%5D=second&highlight%5B1%5D=report&highlight%5B2%5D=convention> (accessed 24.05.2018).

carers in the home. This option provides a commitment that the State would endeavour to support carers, while ensuring that the Government and the Oireachtas remains responsible for the allocation of public funds. This approach draws back from prescribing State support for carers (which should be determined by law). This approach would capture the broad range of caring relationships found within the home, but does not make provision for carers outside the home.

Option two would replace Article 41.2.1 and 41.2.2 with a provision which would recognise the support that home and family life gives society, and the contribution made by carers within the home. This would be complemented by a new Article 45.4.3 (Article 45 contains the general guidance for the Oireachtas on social policy),³⁹ which would set out a commitment to endeavour to ensure support for those carers both in the home and in the wider community. By taking the approach of including a broader commitment to the role of carers in Article 45, this approach respects "the role of the Government and the Oireachtas to decide on the allocation of public funds".⁴⁰ This approach would not commit the State to any specific level of support for carers.

Option three presented by the Task Force is to delete Article 41.2 entirely. The Task Force noted that the Convention on the Constitution had rejected the option of simple deletion and concluded that:

"The simple deletion of Article 41.2 would depart from the approaches of the Review Group and the All-Party Committee in that it would leave no provision in the Constitution to explicitly acknowledge the value of work in the home. With these considerations in mind, this option is not put forward for further consideration."⁴¹

The Task Force concluded that options one and two provide the means for modernising the Constitution, "while at the same time respecting the role of the Government in deciding how funds are allocated".⁴²

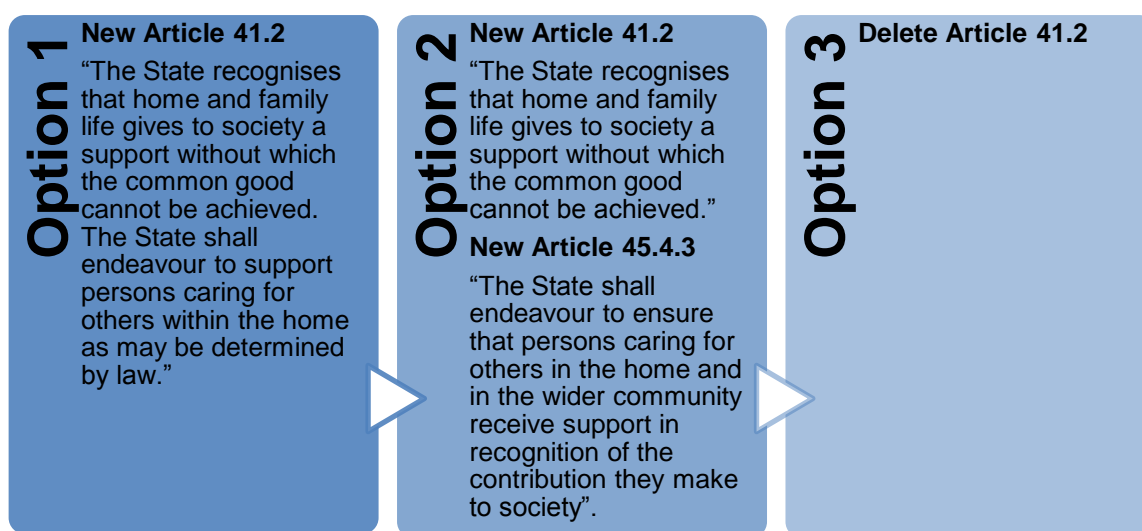
³⁹ Article 45 outlines a number of broad principles of social and economic policy. Its provisions are, however, intended solely "for the general guidance of the Oireachtas", and "shall not be cognisable by any Court under any of the provisions of this Constitution" (preamble to Article 45).

⁴⁰ Report of the Task Force on Implementation of the Recommendations of the Second Report of the Convention on the Constitution (October 2016), available at: http://www.justice.ie/en/JELR/TaskForceReport_Impl-2nd-Rpt-Conv-Constit.pdf/Files/TaskForceReport_Impl-2nd-Rpt-Conv-Constit.pdf (accessed on 15.05.2018), p. 15.

⁴¹ While there has been little recent debate about the implications of simply removing the provision, one commentator has suggested that the potentially negative consequence of deleting Article 41.2 entirely would be that it would remove the Constitutional protection for those doing care work, with the potential consequence that everyone could be targeted in public policy for 'employment activation', see Holland, K. in: The Irish Times, 26 August 2016, available at: <https://www.irishtimes.com/news/ireland/irish-news/give-me-a-crash-course-in-women-in-the-home-1.2769592> (accessed on 28.05.2018).

⁴² Report of the Task Force on Implementation of the Recommendations of the Second Report of the Convention on the Constitution (October 2016), available at: http://www.justice.ie/en/JELR/TaskForceReport_Impl-2nd-Rpt-Conv-Constit.pdf/Files/TaskForceReport_Impl-2nd-Rpt-Conv-Constit.pdf (accessed on 15.05.2018), p. 17.

Figure 4: Overview of the options presented to Government by the Task Force on implementation of the recommendations of the second report of the Convention on the Constitution



Cahillane proposes that there is a **fourth option** which was not presented by the Task Force, unsurprisingly, given its remit to consider the potential cost implications of any changes. She defines this option as, “we can recognise that care-work in the home is of such importance that the State will ensure those who choose this role will be sufficiently supported in economic terms”.⁴³ She suggests that such a provision would need to be limited to carers in the home and not care workers generally. This approach would mandate State support for those undertaking caring responsibilities in the home.

Several commentators have suggested that whichever amendment is made to the Constitution, its value is largely symbolic, and it is unlikely to make a direct difference in the lives of carers in or outside the home. Despite proposing a fourth option, Cahillane concludes that while the approach of the Task Force represents a reasonable course of action, its value is symbolic and it is unlikely to result in any real change (though she acknowledges that such a conclusion should not exclude the possibility of the Supreme Court deciding otherwise). Brady points out that one of the most obvious limitations of proposals for a gender neutral Article 41.2 is that the courts have already interpreted it in this way (see view of Judge Murray in *DT v CT* discussed above). A further limitation is that there is little evidence to suggest from case law that the Supreme Court is likely to place a positive obligation for financial support on the State even where there is an explicitly constitutional protection. As Whyte concludes:

⁴³ Cahillane, L., (forthcoming) ‘Revisiting Article 41.2’, in: *Dublin University Law Journal*.

"Given that tax and social welfare matters directly affect public expenditure, and that decisions on public expenditure are regarded as the preserve of the Oireachtas and the executive, it is unlikely that the courts would use Article 41.2.2 to impose additional financial obligations on the State to support mothers in the home."⁴⁴

Despite these limitations, there is widespread agreement that the current wording does not reflect the values and ambitions of modern Ireland, and that changing the Article 41.2 would give further energy to efforts to address gender inequality.

⁴⁴ Whyte quoted in: Hosford, P., (2017) 'The Irish Constitution still makes reference to woman's place in the home', in: *The Journal* (8 March 2017), available at: <http://www.thejournal.ie/irish-constitution-womans-place-3275347-Mar2017/> (accessed on 28.05.2018).

Committee hearings

The Committee held public hearings with stakeholders on the General Scheme on the 19th and 26th of September 2018, during which there was a general consensus that Article 41.2 was outdated, sexist and in need of change. In the course of those deliberations, a number of key issues and themes emerged, which are laid out broadly in accordance with three options:

- To delete Article 41.2 simpliciter;
- To replace the current Article with an alternative wording that recognises the vital contribution of carers to our society; or
- To delete Article 41.2 and place a provision on caring into Article 45 – which contains directive principles of social policy

Case for deleting Article 41.2 simpliciter

Addressing the Committee on the 19th of September 2018, the Minister for Justice and Equality, Deputy Charles Flanagan, outlined the Government's reasoning behind its proposal to delete Article 41.2 from the Constitution. He argued, in the first instance, that this was primarily an issue of gender equality, and that this could be lost sight of if we instead focused upon the aspect of the discussion relating to carers and caring: "... to conflate an issue of women's equality with that of caring bears out something of a stereotype that a woman's role is primarily that of a carer, so it was precisely to remove this stereotype once and for all that the Government wished to ask the people whether Article 41.2 should be deleted from our Bunreacht."

From a legal perspective, the Minister added that he had been very much influenced by the experience of the eighth amendment to the Constitution, and the recent referendum to repeal it. He had received strong legal advice that deleting Article 41.2 carried the fewest risks:

"The Constitution is not a proxy government or indeed a piece of legislation. It is our foundational legal framework. It does not work if we insert overly prescriptive provisions with it. These may either become outdated quickly or fail to address the range of needs that they were intended to address. Furthermore, the courts may over time interpret the provisions differently than anticipated...

... I am aware that some people are of the view that the Supreme Court will interpret the Constitution in a way that accords with the aspirations of those people. Many eminent lawyers point

out that the Supreme Court's approaches to constitutional interpretation can evolve over time, cannot be predicted with certainty. They favour the simple deletion of Article 41.2 believing that complex policy matters should be tackled by the Government and the Oireachtas."

The Minister stressed that, whilst arguing for a simple deletion that would address the gender equality aspect of the debate, rather than enshrine rights for carers, he fully recognised the vital contribution made to our society by parents and carers. However, it does not necessarily follow, in his view, that enshrining a provision in the Constitution is the most effective way to advance and protect the rights of carers. It would be a real challenge to frame a constitutional provision that captures the full diversity of carers and caring situations. For example, Article 41.2 could be modified to make it gender neutral and to recognise the contribution of fathers as well as mothers – but then the role of non-marital families would be excluded.

The Government's preferred approach, therefore, is for the issue of care to be given separate and distinct consideration, and to be referred to a citizens' assembly. The Minister also suggested that, given the complexity of carer needs and situations, legislation agreed in the Houses of the Oireachtas would be a more appropriate means of addressing those needs than a new constitutional provision.

Dr. Laura Cahillane of the University of Limerick, speaking from a legal perspective rather than personal preference, stated that an amended Article providing symbolic recognition would be of very limited value in the Constitution, and that the Government proposal of deleting Article 41.2 would remove the risk of any unintended legal consequences. While something is in the Constitution, there is always the possibility of an unexpected or unintended interpretation by the courts. In the event of a simple deletion, she recommended that there also be an accompanying legislative address of the rights and needs of carers, based upon a process of public consultation:

"Those who have worked with carers and those in civil society organisations may well present a different view but, as a lawyer, I do not see the impact of a symbolic provision. One can easily achieve the same legislatively. One can insert much more detail and there can be much more discussion on a legislative provision. If the Government decided to go for straightforward deletion, it should do so in the context of a promise that this would also be dealt with on a legislative basis. That is where the Citizens' Assembly idea, or at least a public consultation on this, is important so that we look at what is necessary in terms of statutory rights for carers."

Addressing the Committee on the 26th of September 2018, Ms. Justice Catherine McGuinness outlined the possible difficulties with amending the Article, and submitted that the Government proposal of deleting it *simpliciter* would be the legally cleanest way of proceeding. There is a problem with regard to the definition of the word “carers”, in that it is a broad concept, which might therefore give rise to subsequent legal difficulties:

“However much we regard carers, before we embark on constitutional change, we must examine what we really want to get and how we would avoid unforeseen later difficulties and problems. One has only to consider the history of the eighth amendment, plus the proposed 12th amendment, which did not pass; the 13th amendment; the 14th amendment; and finally the need for repeal, to understand what happens when one tries to change the Constitution without being extremely careful about what exactly we are saying and what it means ... The difficulty about framing a wording to assist carers is that we can fall between the Scylla of an anodyne aspiration and the Charybdis of an over-complex attempted direction of the legislature that creates later problems.

... In summary, if we have decided that we are moving to take away Article 41.2, we should delete it *simpliciter* ... If the will of the Oireachtas is to seek a referendum to benefit carers or to have a gender-balanced article, we should frame an article and think carefully with good advice about what wording we could have to avoid difficulties and to try to ensure it would be effective.”

Ms. McGuinness further suggested that, whilst recognising the vital role of carers and the need for more supports for carers of all kinds, consideration must be given to how that could be best achieved. Most assistance for carers would involve decisions on public expenditure, and one does not readily achieve anything from statements in the Constitution that require public expenditure. The courts rightly regard these decisions as the preserve of the Oireachtas and the Government. One must ask, therefore, whether the inclusion of a reference to carers in the Constitution would merely amount to a pious aspiration. The provision of real and meaningful assistance to carers would require legislative action as well.

Doctor Helen Russell of the Economic and Social Research Institute also stressed the importance of a legislative approach, regardless of the future status of Article 42.1. She submitted that whilst the removal of the outdated stereotyping contained in the Article is an important symbolic move in terms of gender equality, “Our research also underlines the importance of a series of incremental legislative and policy changes that aimed to remove barriers to women’s entry to the labour market and reduce gender inequalities in employment and access to resources. These supports remain necessary so that women can exercise their

right to equal participation in public life while recognising and valuing contributions to care work.

Case for amending Article 41.2: Symbolic recognition v concrete socioeconomic rights

Many of the stakeholders who presented to the Committee indicated a preference for amending Article 41.2, on the grounds that some form of recognition was of vital importance to those working as carers. There was a difference of opinion, however, between those preferring a more symbolic type of recognition, and those who wished to go further and entrench meaningful socio-economic rights in Article 41.2, upon which individuals could rely and seek to have enforced by the courts if necessary.

This debate was encapsulated by Dr Cahillane in her contribution:

“If it is decided to replace the provision rather than simply repeal it, essentially two options are available. The first option is to insert a replacement provision along the lines suggested by the Department of Justice and Equality’s taskforce. This would include gender neutral language acknowledging the important role played by carers in the home and a sentence to the effect that the State would endeavour to support such persons. This type of language would not automatically create any socioeconomic rights for carers and would avoid financial consequences for the State ... The second option would be to aim to create a constitutional right by replacing the existing provision with a stronger version, which would be gender neutral but which would commit the State to supporting the work of carers in the home in economic terms ... This could be achieved by wording such as “the State shall ensure that persons caring for others in the home will be supported.””

Dr Cahillane added that it would be unusual to tie the hands of the Government in this way, and that according to normal separation of powers theory, it is the Executive that determines matters of budgetary policy. However, we already have one existing socioeconomic right clearly set out in the Constitution – the right to free primary education. Ultimately, the people are the true masters of the Constitution, and there would be no constitutional bar to creating such an economic right were it approved by the people in a referendum.

Appearing before the Committee on the 19th of September, the Irish Human Rights and Equality Commission (represented by Ms. Emily Logan, Professor Siobhán Mullally and Mr. Frank Conaty) raised concerns with Article 41.2 in its current format, stating that it perpetuates stereotypical attitudes towards women and is incompatible with Ireland’s international human rights obligations.

Notwithstanding this, however, Ms. Logan contended that Article 41.2 has at its core a recognition that work in the home has an immense benefit for society. In today's world, we would understand this more widely as care work both in the home and beyond. It is important to give recognition to this public good:

"The Commission therefore believes that amending Article 41.2 to render it gender neutral and wider in scope, rather than deleting it simpliciter, is a means towards preserving, and expanding this important recognition of an important public good in our fundamental law ... [H]owever ... in choosing such wording, regard must be had to the wide range of family relationships that are recognised in the State's developing law and social policy, as well as in the context of international law."

While the Commission expressed support for an amendment to Article 41.2 that would provide a symbolic recognition of the value of the role played by carers, it also advocates a stronger amendment that would provide for explicit socioeconomic supports. It would be open to the idea of a deliberative process to consider the issue more broadly, including a debate on the protection of economic, social and culture rights, both in the Constitution and elsewhere.

Ms. Orla O'Connor of the National Women's Council of Ireland (hereafter "the NWCI"), addressing the Committee on the 19th of September, stated that it would also favour an amendment to Article 41.2 that recognises the value of care work in Irish society, which is essential to the common good and performs vital social and economic functions.

Due to the complexity of the issue and the vast number of challenges that would warrant deliberation, Ms. O'Connor emphasised the need for a deliberative process and national conversation prior to a referendum:

"The NWCI considers that the role of affective care in the achievement of equality should be recognised and supported through a combination of constitutional, legislative and policy change. We know social change can have complex personal impacts that deserve consideration and respect. We need time for a public conversation that considers any proposed new wording and any accompanying legislation. We believe this process needs to begin immediately so we can proceed with holding the referendum in 2019. We ask the Committee to recommend to the Government that a public conversation is established to consider a combination of constitutional and legislative change options that recognise the importance of care in its full form and that enough time and resources are provided to help the public understand and discuss the proposed changes and their implications. We ask for this to happen before a referendum is held. We have not suggested in our submission a particular form for the public consultation but it could

be along the lines of how the Citizens' Assembly dealt with the eighth amendment."

Addressing the Committee on the 26th of September, the Irish Countrywomen's Association (hereafter "the ICA") supported the position of the NWCI that this issue warrants an active and wide-ranging debate, with a focus on the intent of the wording relating to care and nurture and how that intent can best be articulated in the 21st century. The ICA believes that the current wording in the Constitution has been interpreted in a narrow and restrictive way, and it wishes to see a more rights-based approach which ensures that nurture and care is resourced, supported and valued.

Ms. Pauline O'Reilly of the Stay-at-Home Parents Association Ireland spoke of the significance of a constitutional provision over-and-above legislative change: "When we go into the polling station as people who are carers and have been carers and mark an "X" beside a "Yes" or a "No" on that ballot paper, we are all attempting to assert our values. It is not a piece of legislation. It is something more visceral, and it is important to remember that the Constitution is a document that represents the people's voice. That includes carers." She argued that care work should be recognised in the Constitution, as opposed to just in legislation. Governments enacting legislation are often concerned with short-term economic activity and budgetary concerns. The Constitution, on the other hand, should reflect higher values. The Stay-at-Home Parents Association also supports the approach of the NWCI:

"[W]e are calling for an amendment to Article 41.2 that is compassionate, including the removal of the paternalistic and sexist language that we can all agree is offensive and the inclusion of a recognition that nurturing is important to who we are as a nation. We mean that in the broadest possible sense of community. We respectfully question the idea that deletion is simpler. Life is not always simple and it exists on the margins of economic activity far too often. We feel this is a unique opportunity to express ourselves as people and if further examination is required to do this, then that is important work and can be done before any referendum takes place."

In their opening statement, Family Carers Ireland expressed the need for an amendment to Article 41.2 that recognised the importance of care work, whilst re-wording the reference to 'family life' to include the wide range of family relationships and situations that exist today. Mr. John Dunne highlighted the international dimension to the debate, and the fact that Ireland is quite unusual in not specifying a constitutional framework around the respective roles of the State and the community in the provision of care. His organisation believes that the overwhelming consensus in Ireland would support a constitutional provision that recognised the family's primary role in the provision of care and the State's

self-interested responsibility to support families in performing this role, as well as acting as the provider of last resort where a family was unwilling or unable to perform the role properly.

Mr Dunne explained why his organisation does not support the Government proposal of repeal *simpliciter*, arguing that, whilst this was being presented as the safest option, deliberately and publicly repudiating the role of family care in the home constitutes a much greater risk to society and public policy in the medium term:

“Ireland faces a significant and rapidly growing demographic challenge. There has been a 36% increase in our older population and a 63% increase in people living with a disability over the past decade. One in ten people living in Ireland is providing some level of family care. With the demographic changes that we are expecting, this figure will need to increase to one in five by 2030 if our existing policies and systems are to be sustainable. How will this happen without a clear social contract between the State and family carers?”

He also rejected the argument that a symbolic-type provision in the Constitution would be of no real value. In the view of Mr Dunne, it is not anodyne to have an actual recognition of the role of carers in the Constitution. Moreover, it is in keeping with the Government’s national carer’s strategy, the first principle of which is recognition: “That is something that carers value very much. They find themselves battling constantly against the system for what they need ... if they at least felt recognition in that ongoing struggle for what they are doing, it would be of some consolation to them.”

Finally, Mr Dunne challenged the argument that a new constitutional provision could open the floodgates to legal challenges and undermine the traditional role of the legislature in determining matters of public expenditure. He submitted that the existing Article 41.2 has included the formula “shall [...] endeavour to support” for 80 years, and has not acted as a magnet for successful litigation or judicial subversion of the separation of powers. In the event of a challenge under a new provision containing a similar obligation, it would be a reasonable defence for the State to simply point out that it spends approximately €2.5 billion annually on its existing endeavours to support family carers through schemes that are defined in statute.

Case for amending Article 41.2 and adding new provision to Article 45

Article 45 of the Constitution provides general, non-prescriptive, advice to Government about the direction of social policy. The Minister for Justice and Equality pointed out that the option of deleting Article 41.2 and placing a provision on caring into Article 45 was considered in detail, and extensive legal advice showed that a new provision was likely to have little value due to Article 45 being non-justiciable.

Dr Cahillane suggested that if the purpose of any proposed Constitutional amendment was to insert a merely symbolic provision in relation to carers, without creating concrete socioeconomic rights, it may be better placed in Article 45, precisely because it is non-justiciable:

“If the aim of the provision were to be to have a constitutional symbol that would encourage the creation of legislative rights, perhaps a better location for the provision would be in Article 45, which contains the directive principles of social policy. These are non-justiciable, which means they cannot be made the subject of a court action and thus rights do not automatically arise from them. This would make it clear that the aim was symbolic and it would also avoid any question around restrictions regarding the marital family in Article 41. If the provision were left in Article 41, which is the section of the family, there would always be a question mark over whether a judicial interpretation would be given that would impose an economic obligation to the State. This is not very likely, given the words “endeavour to support” and the fact that carer supports are already provided for to a certain extent.”

Family Carers Ireland rejected the idea of inserting a provision into Article 45, as it believes that it is appropriate to frame the State’s role as a “duty of imperfect obligation”. Moving the provision on caring and carers to Article 45, however, would effectively downgrade it to a mere “guiding principle”.

Conclusions

There was universal consensus amongst both witnesses and Members of the Committee that Article 41.2 of the Constitution as currently drafted is sexist and paternalistic, and has no place in the Ireland of the 21st century. There is no reasonable argument or justification for retaining the current provision.

The question, therefore, is not whether to delete the Article, but whether it should be deleted simpliciter or replaced with an alternative wording that is more appropriate to the present day and that reflects the value and recognition we wish to place on the role of carers in our society, not just in the traditional family home setting, but more broadly.

Some support was expressed for the proposal of the Government, as articulated before the Committee by the Minister for Justice and Equality, to delete Article 41.2 simpliciter. It was argued in favour of this option that it brings legal certainty. When a provision is inserted into the Constitution, there is always the possibility of an unexpected or even unintended interpretation from the Courts. It was noted that the concepts of “carer” or caring cannot be easily defined, and this could give rise to subsequent legal difficulties. The experience of the eighth amendment of the Constitution, and its subsequent repeal, was cited as an example of how constitutional provisions and amendments can give rise to unforeseen later difficulties and problems.

However, the majority of the stakeholders who presented, as well as Members of the Committee, indicated a preference for amending rather than deleting Article 41.2 and replacing it with an alternative wording, on the grounds that it is important that we recognise the value of care work in Irish society, which is essential to the common good and performs vital social and economic functions.

There was a difference of opinion, however, between those preferring a more symbolic type of recognition, and those who wished to go further and entrench meaningful socio-economic rights in Article 41.2, upon which individuals could rely and seek to have enforced by the courts if necessary. The second option could be achieved by wording such as ‘the State shall ensure that persons caring for others in the home will be sufficiently supported...’ Such a wording would commit the State to supporting the work of carers in the home in economic terms, thus creating a concrete constitutional right. Others warned, however, that this could potentially open the floodgates to litigation against the State, and undermine the traditional separation of powers whereby the ability to determine matters of public expenditure rests with the Oireachtas and the elected Government, not the courts.

Speakers from various sides of the debate made the point that regardless of what approach is taken towards Article 41.2, both achieving gender equality and recognising and supporting the work of carers requires a holistic approach that combines constitutional, legislative and policy change.

Recommendations

The Members of the Committee are in full agreement that Article 41.2 of the Constitution as currently worded is not acceptable. The view of the majority is that, rather than be deleted simpliciter, it should be replaced with a new provision that recognises the contributions made by family life and carers to our society. Of the various possible recommendations canvassed in the course of the hearings, two received the broadest range of support amongst the Members:

Option A

Some Members favour replacing Article 41.2 with an alternative provision containing more appropriate, gender-neutral language, which acknowledges the support that home and family life gives to society, and the importance of the role played by carers, whilst ensuring that the Government and the Oireachtas remain responsible for the allocation of public funds.

They recommend implementing the first option outlined by the Department of Justice and Equality's taskforce in 2016 (and similar to the wording proposed by the Constitution Review Group in 1996), to replace the existing Article 41.2 with the following:

"The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home as may be determined by law."

Option B

Other Members support the view expressed by a number of stakeholders in the course of the hearings that these complex issues require time for public engagement, and a conversation that considers a range of constitutional, legislative and policy options in this area. They believe that the prospect of a referendum on Article 41.2 offers an opportunity for a broader discussion on the role of care work; the rights and needs of carers, including financial supports; whether the value of care work to our society requires recognition in the Constitution; and if so, the form that recognition should take – whether it should be more symbolic in nature, or enshrine concrete socio-economic rights.

They therefore call upon the Government, before proceeding with a referendum in 2019, to establish and engage in a public consultation process – an obvious possible model being how the Citizens' Assembly addressed the issues around the eighth amendment.

Appendix 1 – Committee Membership

Joint Committee on Justice and Equality

Deputies



Caoimhghín Ó Caoláin TD
(SF) [Chair]



Colm Brophy TD
(FG)



Jack Chambers TD
(FF)



Clare Daly TD
(I4C)



Peter Fitzpatrick TD
(IND)



Jim O'Callaghan TD
(FF)



Mick Wallace TD
(I4C)

Senators



Frances Black
(CEG)



Lorraine Clifford-Lee
(FF)



Martin Conway
(FG)



Niall Ó Donnghaile
(SF)

Notes:

1. Deputies nominated by the Dáil Committee of Selection and appointed by Order of the Dáil on 16th June 2016.
2. Senators nominated by the Seanad Committee of Selection and appointed by Order of the Seanad on 20th July 2016.

Appendix 2 - Orders of Reference

a) Scope and Context of Activities of Committees *(derived from Standing Orders – DSO 84, SSO 70)*

- 1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;
- 2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil/and or Seanad;
- 3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993;
- 4) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 111A; and

The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

- (i) a member of the Government or a Minister of State, or
- (ii) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

- 5) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.

b) Functions of Departmental Committees (derived from Standing Orders – DSO 84A and SSO 70A)

(1) The Select Committee shall consider and report to the Dáil on-

- (a) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and
- (b) European Union matters within the remit of the relevant Department or Departments.

(2) The Select Committee may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.

(3) Without prejudice to the generality of paragraph (1), the Select Committee shall consider, in respect of the relevant Department or Departments, such—

- (a) Bills,
- (b) proposals contained in any motion, including any motion within the meaning of Standing Order 187,
- (c) Estimates for Public Services, and
- (d) other matters

as shall be referred to the Select Committee by the Dáil, and

- (e) Annual Output Statements including performance, efficiency and effectiveness in the use of public moneys, and
- (f) such Value for Money and Policy Reviews as the Select Committee may select.

(4) Without prejudice to the generality of paragraph (1), the Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:

- (a) matters of policy and governance for which the Minister is officially responsible,
- (b) public affairs administered by the Department,
- (c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
- (d) Government policy and governance in respect of bodies under the aegis of the Department,
- (e) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,

- (f) the general scheme or draft heads of any Bill
- (g) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,
- (h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
- (i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
- (j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (d) and (e) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and
- (k) such other matters as may be referred to it by the Dáil from time to time.

(5) Without prejudice to the generality of paragraph (1), the Joint Committee shall consider, in respect of the relevant Department or Departments—

- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,
- (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
- (c) non-legislative documents published by any EU institution in relation to EU policy matters, and
- (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.

(6) Where the Select Committee has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.

(7) The following may attend meetings of the Select or Joint Committee, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:

- (a) members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
- (b) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
- (c) at the invitation of the Committee, other members of the European Parliament.

(8) The Joint Committee may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department or Departments, consider—

- (a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and
- (b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 111F apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.

c) Powers of Committees (derived from Standing Orders – DSO 85, 114 and 116 and SSO 71, 107 and 109)

The Joint Committee has:-

(1) power to take oral and written evidence and to print and publish from time to time minutes of such evidence taken in public before the Select Committee together with such related documents as the Select Committee thinks fit;

(2) power to invite and accept oral presentations and written submissions from interested persons or bodies;

(3) power to appoint sub-Committees and to refer to such sub-Committees any matter comprehended by its orders of reference and to delegate any of its powers to such sub-Committees, including power to report directly to the Dáil;

(4) power to draft recommendations for legislative change and for new legislation;

(4A) power to examine any statutory instrument, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009, and to recommend, where it considers that such action is warranted, whether the instrument should be annulled or amended;

(4B) for the purposes of paragraph (4A), power to require any Government Department or instrument-making authority concerned to submit a Memorandum to the Select Committee explaining any statutory instrument under consideration or to attend a meeting of the Select Committee for the purpose of explaining any such statutory instrument: Provided that such Department or authority may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil;

(5) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss policy for which he or she is officially responsible: Provided that a member of the Government or Minister of

State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such policy;

(6) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss proposed primary or secondary legislation (prior to such legislation being published) for which he or she is officially responsible: Provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such proposed legislation;

(6A) power to require that a member of the Government or Minister of State shall attend before the Select Committee and provide, in private session if so requested by the member of the Government or Minister of State, oral briefings in advance of meetings of the relevant EU Council of Ministers to enable the Select Committee to make known its views: Provided that the Committee may also require such attendance following such meetings;

(6B) power to require that the Chairperson designate of a body or agency under the aegis of a Department shall, prior to his or her appointment, attend before the Select Committee to discuss his or her strategic priorities for the role;

(6C) power to require that a member of the Government or Minister of State who is officially responsible for the implementation of an Act shall attend before a Select Committee in relation to the consideration of a report under Standing Order 164A;

(7) subject to any constraints otherwise prescribed by law, power to require that principal office-holders in bodies in the State which are partly or wholly funded by the State or which are established or appointed by members of the Government or by the Oireachtas shall attend meetings of the Committee, as appropriate, to discuss issues for which they are officially responsible: Provided that such an office-holder may decline to attend for stated reasons given in writing to the Committee, which may report thereon to the Dáil;

(8) power to engage, subject to the consent of the Houses of the Oireachtas Commission, the services of persons with specialist or technical knowledge, to assist it or any of its sub-Committees in considering particular matters; and

(9) power to undertake travel, subject to—

(a) such recommendations as may be made by the Working Group of Committee Chairmen under DSO 108(2)(a) and SSO 104(2); and

(b) the consent of the Houses of the Oireachtas Commission, and normal accounting procedures.

(10) In accordance with Articles 6 and 8 of Protocol No. 2 to the Treaty on European Union and the Treaty on the Functioning of the European Union

(Protocol on the Application of the Principles of Subsidiarity and Proportionality) as applied by sections 7(3) and 7(4) of the European Union Act 2009, the Committee has the power to-

consider whether any act of an institution of the European Union infringes the principle of subsidiarity (DSO 116; SSO 109); and

form a reasoned opinion that a draft legislative act (within the meaning of Article 3 of the said Protocol) does not comply with the principle of subsidiarity (DSO 114 and SSO 107).

Appendix 3 – Witnesses and Official Report

19 September 2018

- Minister for Justice and Equality;
- The Irish Human Rights and Equality Commission;
- The National Women’s Council of Ireland; and
- Dr. Laura Cahillane, School of Law, University of Limerick.

[Official Report](#)

26 September 2018

- Ms. Justice Catherine McGuinness;
- The Economic and Social Research Institute;
- Family Carers Ireland;
- The Irish Countrywomen’s Association (ICA);and
- The Stay-at-Home Parents Association Ireland.

[Official Report](#)

Appendix 4 – Opening Statements

Presentation by Mr Charlie Flanagan TD, Minister for Justice and Equality, to the Joint Oireachtas Committee on Justice and Equality at the pre-legislative consideration of the General Scheme of the Thirty-Eighth Amendment of the Constitution Bill

Chairperson, Members of the Committee,

Thank you for the invitation to participate on this pre-legislative consideration of the General Scheme of the Thirty-Eighth Amendment of the Constitution Bill.

As you know, I had hoped that we would be able to hold a referendum this year on a fundamental issue of women's equality, namely women's right to participate equally with men in the public sphere. What better way to commemorate the centenary of women getting the right to vote than to remove the final obstacle in the Constitution which suggests that the place of women is rightly in the private sphere?

However, as a democrat, I cede to the Committee and your decision to have hearings on the Government's proposal and other issues. I welcome the opportunity to address you. I am here as Minister for Justice and Equality but I also have the experience of being a member of the Constitutional Convention that examined Article 41.2 and made proposals in that regard. And that process has informed my approach, along with much else.

The Government decided on 5 July that its approach to the referendum question would be to ask the people whether Article 41.2 should be deleted from the Constitution. It developed its approach to the referendum on the basis of very careful and detailed consideration of the issue. The referendum question was discussed twice by the Cabinet and previously by Cabinet Committee B. The Government decided on the option to recommend deletion of Article 41.2 for sound reasons.

Firstly, the issue at the heart of Article 41.2 is one of gender equality, namely whether or not our Constitution states or implies that women have the same rights and freedoms as men in our society. I regret that the focus on women's equality was lost almost from the start, particularly in an era where there seems to be such a public appetite out there for engagement on issues that particularly affect women. In this regard and from a legal perspective, I was heavily influenced by the lessons of the referendum to repeal the Eighth amendment and I'll come back to that issue again.

I feel that gender equality, an important issue, was pushed aside almost immediately by an alternative concentration on carers. The issue of caring is indeed important and I will come to that shortly. However, the fact that many commentators did not consider it sufficiently important to have a debate on an issue of women's equality is itself telling. It suggests that women's issues remain of secondary importance and there is still some reluctance to accord gender equality the importance it deserves in public discourse. That is not a message that I think that we should be conveying to young women and girls in our society. The future of our society rests on their capabilities as much as it does on young men.

Secondly, to conflate an issue of women's equality with that of caring bears out the stereotype that a woman's role is primarily that of carer. It was precisely to remove this

stereotype once and for all that the Government wished to ask the people whether or not Article 41.2 should be deleted from the Constitution. Many carers are women but many carers are men. So caring is not primarily a gender equality issue.

Thirdly, our legal advice was that deleting Article 41.2 carried fewest risks. The experience with the Eighth Amendment is fresh in our minds. The mess, heartache and societal division created by the Eighth Amendment reminds us how difficult it is to draft constitutional amendments that will stand the test of time. The Constitution is not a proxy government or indeed a piece of legislation. It is our foundational legal framework. It does not work if we insert overly prescriptive provisions with it. These may either become outdated quickly or fail to address the range of needs that they were intended to address. Furthermore, the courts may over time interpret the provisions differently than anticipated. The High Court's decision in the case taken by my colleague, Minister Zappone against the Revenue Commissioners, seeking recognition of her marriage, shows that we cannot always predict with certainty how the Courts will interpret the Constitution. It was that ruling ultimately which necessitated the marriage equality referendum. I am aware that some people are of the view that the Supreme Court will interpret the Constitution in a way that accords with the aspirations of those people. Many eminent lawyers point out that Supreme Court's approaches to constitutional interpretation can evolve over time, cannot be predicted with certainty. They favour the simple deletion of Article 41.2 believing that complex policy matters should be tackled by the Government and the Oireachtas.

I am conscious that the Convention on the Constitution and the Taskforce chaired by the Department of Justice and Equality recommended that Article 41.2 be removed from the Constitution and replaced with provisions enshrining rights for carers. I myself was a member of that Convention and I have some reservations about the depth of analysis regarding some of the recommendations. However, the Convention made its recommendations and these were the starting point for the work of an inter-departmental committee chaired by the Department of Justice and Equality. The Committee examined the Convention's recommendations as well as those of the subsequent Taskforce. As I've said, the Convention did not examine this issue in great detail. It was when we began to test each of the options proposed that the complexities of effective constitutional change became apparent.

I fully recognise the vital contribution made by parents and carers day after day, hour after hour and I meet and indeed seek to help many carers in my capacity as a TD. I recognise that caring work can be arduous and unrelenting. I know that the negative impact on many carers can be profound. However, it does not necessarily follow that enshrining a provision in the Constitution is necessarily the most effective way to advance and protect the rights of carers. I have discussed this issue at length with my colleague, Minister Doherty, who of course, has policy responsibilities in this area. Carers are highly diverse. They may include parents, children, grandparents, grandchildren, siblings, relatives, friends, neighbours, professional carers, childminders, nurses, social workers, doctors. Some are undertaking caring work on a full-time basis. Some perform a caring role on a part-time or intermittent basis. Some undertake the caring role themselves. Others pay professional carers to perform specific tasks. Some are paid for their work. Others are unpaid. What kind of constitutional provision would capture the diversity of carers and of care situations?

After prolonged discussions it became abundantly clear to the Government that the issue of care warrants consideration in its own right. That is why the Government has decided that this issue should be referred to a Citizens' Assembly. We have to understand precisely what carers need before we jump to the conclusion that the Constitution is the best route.

My colleague, Minister Doherty is best placed to speak to you in detail about the State's support for carers but I can say that the combined expenditure on Carers Allowance, Domiciliary Care Allowance and Carer's Support Grant in 2018 will be €1.15 billion. The Government introduced two weeks of paternity leave in 2016 and is currently considering the option of introducing paid parental leave for parents. Government policy supports care - we have not needed a specific constitutional provision to allocate this level of spending to care-related needs. Equally, in view of the complexity of care needs and situations, it is clear to me that legislation agreed by these Houses would be the more appropriate route.

The inter-departmental committee tasked with recommending specific options for this referendum considered the possibility of modifying Article 41.2 to make it gender neutral so that the contribution of fathers as well as mothers would be recognised. However, the difficulty was that non-marital families would have been excluded. 38% of children were born into non-marital families in 2017. When the Government examined this issue, we decided against a proposal which would exclude the contribution of unmarried mothers and fathers.

Some people have proposed other options for example, inserting a new provision on caring into Article 45. We also sought extensive legal advice on that proposal, however, the advice stood that the lessons of the two previous referendums suggested that it was not good practice to insert new language into the Constitution. Moreover, an addition to Article 45 would be of very questionable value given the non-justiciable nature of the Article.

As I've said, our experience with the Eighth Amendment reminds us that constitutional change is highly complex and the implications over time unpredictable. Our approach has been to propose a clear question to the people of Ireland. In this way, the people can be clear as to the likely implications of their decision.

The Government believes that we owe it to the women of Ireland to propose that the referendum should focus on the issue of gender equality and on removing a provision that seeks to define women's place as solely being in the home carrying out duties.

It was my hope that this referendum would facilitate and encourage real civic engagement with the important issue of gender equality and the work that remains to be done to remove the structural and cultural barriers that continue to discriminate against women in this country. As Minister for Justice and Equality, this was my starting point.

While the Government is working to advance gender equality, I want to see greater engagement by all sectors of society on this important issue. As we move into the second century of female suffrage, our Constitution, which does not seek to define the place of men, should not seek to define the place of women. A woman's place is where she wants it to be.

ENDS

**Opening Statement by Chief Commissioner Emily Logan, Irish
Human Rights
and Equality Commission**

My thanks to the Chair and to the members of the Committee for your invitation to appear here today.

I am here with my fellow Commissioners, Professor Siobhán Mullaly and Frank Conaty. We welcome the opportunity to share the views of the Irish Human Rights and Equality Commission on this important matter.

As members of the Committee will be aware, the Irish Human Rights and Equality Commission is Ireland's National Human Rights Institution and Equality Body. We were established as a statutory body in 2014, and enjoy full institutional independence, a range of statutory powers for which we account directly to the Oireachtas.

A further aspect of the Commission's statutory role is to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to make recommendations on measures to strengthen, protect and uphold human rights and equality in the State.

It is in this context that the Commission prepared its policy paper on Article 41.2 of Bunreacht na hÉireann in June of this year, which has been circulated to members, as well as to the Minister for Justice and Equality, in advance of today's discussion.

The question of advancing gender equality in the state has been a particular focus of the Commission since our establishment in 2014. The Commission has repeatedly raised concerns that in its current format, Article 41.2 perpetuates stereotypical attitudes towards the role of women

in Irish society, and embeds a value system in our constitutional framework that serves to undermine gender equality.

The Commission is also of the view that Article 41.2 is not compatible with Ireland's international human rights obligations. There have been repeated calls by United Nations treaty monitoring bodies for Ireland to remove or amend the provision, most recently by the UN Committee on the Elimination of All Forms of Discrimination against Women, which last year urged Ireland to 'to remove the stereotypical language on the role of women in the home' from the Constitution.

In approaching how we may address the gender stereotyping currently enshrined in the Constitution, it is important to bear in mind that this debate is not taking place in isolation. Rather, it is part of a critical consideration of how the State defines, recognises and supports 'the public good'. This includes the debate about the protection of economic, social and cultural rights, including in the Constitution. The Citizens' Assembly, and the Constitutional Convention before it, have been crucial in providing an innovative means of carrying out this exploration.

Article 41.2 is at the heart of this discussion of 'the public good'. It has at its core, a recognition of what Ms Justice Denham called an 'immense benefit for society' – that is, work in the home, or what we may wish today to more widely understand as care work both in the home, and beyond. The Article's assumptions of who carries out this work and where, and indeed what this work entails, may be outmoded, but at its heart is a clear recognition of a public good.

The Commission therefore believes that amending Article 41.2 to render it gender neutral and wider in scope, rather than deleting it *simpliciter*, is a means towards preserving, and expanding this important recognition of an important public good in our fundamental law.

A crucial feature of Article 41.2 is its placement within the rubric of the constitutional protection of the family. In line with aiming for gender neutrality within Article 41.2, the Commission broadly supports recommendations to replace references to 'women' and 'mothers' with a reference to 'family life'. However, the Commission is of the view that in choosing such wording, regard must be had to the wide range of family relationships that are recognised in the state's developing law and social policy, as well as in the context of international human rights law.

A wider conception of 'family life' encompasses a wider range of caring relationships than parenting alone, including beyond the family home. The Commission believes that it is possible, and desirable, to amend Article 41.2 to recognise and support care work within this wider understanding of 'family life'.

(There is, of course, a wider discussion to be had on the Constitutional understanding of family under *Article 41.3*. However, this is perhaps a discussion for another day.)

Ireland is in the process of transformation. Our population is ageing, our families are smaller, and often come in diverse forms. In many ways our current national conversation is seeking to understand how we can ensure our fundamental law catches up, in order to be more reflective of our society. The Commission believes that an opportunity exists to approach reform of Article 41.2 not only as an exercise in removing an archaic reference, also as a means of introducing a compassionate, generous recognition of the public good realised within Ireland's diverse families and in caring roles.

I would like to thank the Committee again for the invitation to appear today, and would be happy, along with my fellow Commissioners, to further discuss the detail of our paper, and the wider human rights and equality questions arising from this topic.

Joint Committee on Justice and Equality

Pre-legislative scrutiny on 38th Amendment of the Constitution (Role of Women)

Bill

Opening Statement 19th September 2018

Dr Laura Cahillane

Main Question to consider

The main question for members of the Oireachtas to consider is what the purpose of the provision should be. This was a major downfall of the current provision – it was never clear whether it was intended to be purely symbolic or whether concrete rights flow from it and because it was never really challenged from that perspective in the courts, it has been effectively useless in law. As far as I am concerned, there is no reasonable argument for keeping the current provision; the gendered and paternalistic language is an obvious problem but also the likelihood that because of its history the provision will never have any effect in law at this stage. Furthermore, it is an embarrassment that in this day and age such insulting language appears in our Constitution. So, the question is not whether the existing provision should be repealed, it is whether repeal simpliciter or a replacement would be more appropriate and this is where the issue of purpose comes in.

If it was decided to replace the provision, rather than simply repeal it, then there are essentially two options.

Option 1 – symbolic acknowledgment and guide to the Oireachtas [No constitutional rights]

The first option would be to insert a replacement provision along the lines proposed by the Department of Justice taskforce which would include gender neutral language, acknowledging the important role played by carers in the home and a sentence to the effect that the State would 'endeavour to support' such persons. This language would not automatically create any socio-economic rights for carers and thus financial consequences for the State. However, in terms of the purpose of the provision, it would be necessary to decide what the true aim of this type of replacement would be. Would it be simply to include an important symbolic nod, purely to acknowledge the crucial role of carers and the work they do in the home and possibly use the provision as a motivation to encourage the Oireachtas to pass new legislation in this area to create stronger statutory rights?

A symbolic provision in the Constitution is of limited value, since it wouldn't create a concrete constitutional right. However, some civil society groups have argued that it can be useful, when trying to encourage governments to support legislation on a particular issue, to be able to point to a particular constitutional provision as encouragement for the reform – even if the Constitution does not actively demand it.

If this was to be the aim of the provision, perhaps a better location for the provision would be in Article 45 which contains the directive principles of social policy, which are non-justiciable. This means they cannot be made the subject of a court action and thus rights do not automatically arise. This would make it clear that the aim was symbolic. If the provision was left in Article 41 – which is the section on the family – there would always be a question mark over whether a judicial interpretation would be given which would impose an economic obligation on the State to ensure carers are sufficiently supported. I should note this is not very likely, given the words 'endeavour to support' and the fact that supports like carer's allowance etc are already provided for in legislation but the possibility remains.

Option 2 – concrete economic rights under Article 41

The second option would be to replace the provision with a stronger version of the current provision, which would also be gender neutral but which would commit the State to supporting the work of carers in the home in economic terms, thus creating a concrete constitutional right. This could be achieved by wording such as 'the State shall ensure that persons caring for others in the home will be sufficiently supported...'

It is relatively unusual to tie the hands of the Government in matters of budgetary policy in this way but it is not unheard of. We already have an existing socio-economic right to free primary education in the Constitution which also imposes a financial burden on the State. It would be possible to amend the Constitution to provide for further such rights. Despite the fact that it is unusual under the normal separation of powers division, there is no issue with constitutionality since the people are the true masters of the Constitution and there appears to be no limitations to their power to amend. Thus there is no constitutional bar to creating an economic right in the Constitution.

Essentially therefore it comes down to the issue of purpose. Do we wish to replace the provision with one which would be more cosmetically attractive and could be used to influence legislation or do we want to go further and to replace it with a strong provision which would provide a constitutional right to ensure that carers are sufficiently supported but which would involve a restriction in the budgetary power of the Executive and could have significant financial implications?

Third option - Repeal simpliciter

Of course there is always a third option – that which was originally proposed by the Government – to remove the provision and not replace it. This is certainly the easier option as far as the Government is concerned because while something is in the Constitution, there is always the possibility of an unexpected or even unintended interpretation from the Courts. The Attorney General and constitutional experts can give opinions but ultimately the Constitution means what the Courts say it means and so until you have a conclusive opinion from the Courts you can never be absolutely certain of the effect any particular provision will have. Thus removing the provision and not replacing it, removes the risk that any replacement provision will ever have any unexpected legal effect.

The question is: do the members of the Oireachtas want to create a new provision which would have a legal effect?

Opening Statement to the Joint Oireachtas Committee on Justice and Equality

19th September 2018

Introduction

Thank you to the Committee for inviting the National Women's Council of Ireland to speak about the referendum on Article 41.2 – commonly referred to as the article on 'women in the home'. NWCI is the national women's representative organisation, representing over 190 member organisations across Ireland. We also want to sincerely thank the Committee for deciding to provide the time for pre legislative scrutiny and to discuss the issues surrounding the proposed referendum, we firmly believe that this was necessary and will stand to us all in deciding how to approach changes to Article 41.2 in the best interests of women and society.

Over the years we have consulted with our members on Constitutional matters including Article 41.2. More generally, NWCI has advocated for a new constitution for a modern Ireland which is centred on equality and rights of people in Ireland.

Considered Change

We are learning as a society, time and time again, how critical it is to listen to the voices and experiences of women. When we ignore their experiences we do so at an enormous cost to both women and our society. A successful referendum on Article 41.2, firstly must be based on a participative and deliberative process for women and men.

If we do not allow enough time for a transparent, participative and respectful process that recognises people's complex identities and feelings, there is a danger of it becoming divisive - between people dedicated to working in the home and those who work inside and outside the home; divisive between those who do unpaid work that contributes to society and those who do paid work; and divisive between families and between women and men who work in the home.

A public conversation is necessary so that the referendum debate can be informed and the issues surrounding the article can be explored and concrete proposals developed which the Government can act on and be held to account. We need a clear pathway with real outcomes for women, informed by public discussion.

Recent referendums have offered us a shared path as citizens through participation in the debate and through casting our vote. Through the Constitutional Convention

and Citizens Assembly we have developed sophisticated models of consultation and deliberation where both expert and personal testimony can be heard. It will be absolutely critical in this public discussion that the experiences of women in all our diversity are heard.

Article 41.2

Article 41.2, which refers to a woman's 'life in the home' and 'duties in the home', is undoubtedly sexist and discriminatory.

1° 'In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.'

2° 'The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.'

The text is an embodiment of the idea of women as subjected to the duties decided upon by men.

In practice, Article 41.2 has been little more than symbolic. Its placement in the Constitution should have led to recognition of the value of the contribution women make through unpaid care work in our society. However, it has faced minimal judicial scrutiny. It has had little or no impact on the positive formulation of social policy or improving the position of women. For example, it provided the Constitutional and cultural background for the marriage bar and its detrimental impact on women's choices, employment and economic independence, the legacy of which we are still dealing with today. In practice Article 41.2 has not supported the home or family, it has merely diminished women.

Previous recommendations on Article 41.2

The UN body tasked with examining and upholding women's rights globally, Committee for the Elimination of Discrimination Against Women (CEDAW), has repeatedly criticised Ireland's retention of Article 41.2 in its current form. They expressed concern at the persistence of traditional, stereotypical views of the social roles and responsibilities of women and men in the family and in society at large. CEDAW suggests that the male-oriented language be replaced with gender-sensitive language to convey the concept of gender equality more clearly.⁴⁵

The Article has been reviewed extensively in the past. In 1996 Constitution Review Group, 1997 First progress report of the All-Party Oireachtas Committee on the Constitution, 2006 Tenth Progress Report of the All-Party Oireachtas Committee on

⁴⁵ Committee on the Elimination of Discrimination Against Women, Thirty-Third Session, Concluding Comments: Ireland CEDAW/C/IRL/CO/4-5 at paras. 24-25.

the Constitution, 2013 the Constitutional Convention, 2016 Government Task Force - all of whom except the 2nd Commission on the Status of Women in 1993 recommended that the article be amended or replaced to recognise some form of care.

When the members of the 2013 Constitutional Convention voted to express their view - 88% said it shouldn't be left as it is and 88% choose to amend or modify, only 12% favoured a straight deletion.

The most recent government task force recommended options for the insertion of language regarding care and also recommended an option to place new text in Article 45.

Views of NWCI members

Over the years NWCI has consulted widely with our members. It is clear from all our conversations with our members that everyone is agreed that there is no place for discrimination in our Constitution. It was opposed in 1937 by women activists and feminists and it has no place in today's Ireland. From our consultations there is no disagreement regarding the sexist language in Article 41.2. On this matter, everyone agrees. However once we move on from the sexist language and the positioning of women in the home, our discussions around Article 41.2 move quickly to the complex choices and challenges that many of us face every day.

These issues relate to our understanding of family and home, the roles of women and men, economic supports for parents and work life balance and the contribution of care and carers. Views expressed by our members on the article also quickly move to the need for adequate provision of supports and time to care and to be cared for, both inside and outside the home. There is also a very strong argument that those receiving care need to be recognised and valued to the same extent as those providing care. So the discussion on this Article is complex and it connects to a broad range of issues that need to be considered when proposing a referendum.

The issue of care is central to women's equality and we recognise the complexity of issues when we discuss the area of care. In all the discussions on Article 41.2 NWCI has advocated for the need to recognise and to value Care in our society. Care work is essential to the common good: it performs vital social and economic functions.⁴⁶ Recognition and valuing of *affective care* is fundamental to full equality for women. *Affective care* refers to human dependence and interdependence, and the right to give and receive love and care.⁴⁷

One of the key challenges is that while there has been a significant increase in women's participation in the labour market, this has not been balanced by any

⁴⁶ Engster, D. 'Rethinking Care Theory: The Practice of Caring and the Obligation to Care' (2005) 20 *Hypatia* 50: 63-64, cited in Brady, Alan. *The Constitution, Gender and Reform: Improving the Position of Women in the Irish Constitution*, Dublin, NWCI, 2012, p. 41

⁴⁷ Baker, J., Lynch, K., Cantillon, S. and Walsh, J., *Equality from Theory to Action*, London, Macmillan, 2004

increase in the contribution of men to domestic or care work. Nor has there been an adequate state response through recognition of, or investment in, care work.

We are concerned that the current discussion on care and Article 41.2 is being narrowed to a consideration of ‘carers’ which is only one aspect of Care and *Affective equality* and could lead to what the Taoiseach has referred to as a hierarchy of rights which is not the intention of NWCI.

NWCI members are also very conscious of the context of Article 41.2. Article 41 includes a definition of the family which does not reflect the reality of families in Ireland nor the diversity of family life. It presumes a male breadwinner, two parent household where ‘woman’ stays at home and does not take into account the reality of the many LGBT families and one parent families.

Conclusion

NWCI consider that the role of *affective care* in the achievement of equality should be recognised and supported through a combination of constitutional, legislative and policy change.

We know social change can have complex, personal impacts that deserve consideration and respect. We need time for a public conversation that considers any proposed new wording, any accompanying legislation or policy commitments. We believe that this process needs to begin immediately so that we can proceed with the referendum in May 2019 with the local and European elections.

We ask the Committee

- to establish a public consultation to consider a combination of constitutional and legislative change that recognises the importance of care.
- to ensure that enough time and resources are provided to help the public understand the proposed changes and their implications before any referendum.

Joint Committee on Justice and Equality

Re: 38th Amendment of the Constitution (Role of Women) Bill

Submission by the Hon. Mrs. Catherine McGuinness – former judge.

I am honoured to be asked by the Joint Committee on Justice and Equality to make a submission to this Committee on the issues connected with the above proposed legislation. To begin with I should clarify that I am not making this submission on behalf of any group. I speak merely as an individual with some knowledge of the law and the Constitution, and with experience over many years of attempts to amend the Constitution, whether successful or not.

I hope that my short analysis of the present proposals that are before this Committee may be of some assistance.

As the Committee knows, official and unofficial groups and committees over the years have criticised Article 41.2 of the Constitution and have sought either its deletion or its amendment.

At the time of the drafting of the Constitution, prior to its enactment by the people, women's groups and leading individual women opposed the inclusion of such an article. It is clear that this opposition continues even more strongly today. My personal view is that Article 41.2 should be deleted.

It is necessary to look at the effect of this Article over the years since its enactment. It has probably had a negative effect on women who chose to work outside the home, encouraging such discriminatory effects as the "marriage bar", which lasted until 1973, and a general discriminatory attitude to women's life beyond the role of motherhood – whether the individual women had children or not. Did the Article provide positive

protection for the woman who remained in the home and cared for her children? Certainly not in law or in practice. This was clear in the leading case on the Article, *L v L* in 1989. I should point out that in this case I acted for the plaintiff, who was a wife and mother who had more than fully concentrated on her "duties in the home". The Supreme Court in that case held that under Article 41.2 her work as a home-maker did not give her any right to a share in the ownership of the family home.

It is widely agreed that Article 41.2 is outdated, discriminatory, and undesirable at least in its present form. It is proposed that a referendum should seek to amend the Constitution to deal with this situation. Should such a referendum seek simply to delete the Article? Should it seek to amend the Article in particular to include fathers and their place within the home and family?

Should change be recommended to include provision of recognition and protection of carers in general?

It seems to me that the suggestion of widening the Article to include fathers has distinct difficulties. I accept fully, and it is my own experience, that fathers today play a crucial, practical and effective role in the care of their children. But if fathers are included in Article 41.2.1 in recognition their role what is to be done with Article 41.2.2? Are fathers also to be "protected" from work outside the home? The second part of the Article is in fact the part that has been effective over the years. If the first part is left alone it remains as simply a happy-sounding vague statement.

Should the Article be amended to include a recognition of the work of carers in general? Again I fully recognise and appreciate the vital role that is played by carers, and indeed I feel that they certainly should have greater appreciation and support. The groups that represent carers can best articulate the need for this. But one must ask firstly would a proposed inclusion in the Constitution achieve what is needed, or would it, like the present Article 41.2.1, be something of a "pious aspiration"? Given that most assistance for carers would involve decisions on public expenditure and that decisions on public expenditure are rightly regarded as the preserve of the Oireachtas and the executive, could the courts use

a new Article on carers to any effect? Would such an Article really result in real legislative progress in the short term?

Any framing of Constitutional wording needs great care if the change is to have real effect and in order to avoid unforeseen later difficulties and problems. One has only to consider the history of the Eighth Amendment – plus the proposed Twelfth Amendment, the Thirteenth Amendment, the Fourteenth Amendment and finally the need for repeal – to appreciate the wording difficulties that can ensue. In the case of the amendment that introduced a law of divorce in 1996 the central provision was surrounded with detailed provisions, which in the main were introduced for understandable political reasons. When we now look at the restrictions imposed we can see that necessary reform is not possible without a further referendum and further constitutional, rather than legislative, change. The difficulty about framing a wording to assist carers is that we can fall between the Scylla of an anodyne aspiration and the Charybdis of an over-complex attempted direction of the legislature that creates later problems. There is also the difficulty, which is sure to arise at least at a later stage, of a definition of the term Carers.

In summary, my view would be that our first and relatively achievable task is a simple deletion of Article 41.2. If the will of the Committee, and of the Oireachtas, is to introduce some form of constitutional protection for carers, my view is that this should be done, after careful analysis of the possible wording, by an entirely separate new Article.

Catherine McGuinness

Statement to the Joint Committee on Justice and Equality, September 26th, 2018.

Professor Helen Russell and Dr Frances McGinnity, ESRI.

Let me begin by thanking the committee for the invitation to the ESRI to appear today. I am Helen Russell, Deputy Head of the social research division at the institute, and I am joined by my colleague, Dr Frances McGinnity. Together we lead research on equality at the Institute.

In our submission we will highlight a number of ESRI studies, which shed light on gender roles and the distribution of paid work and care in Irish society, and how these have changed over time. The evidence shows that there is a clear mismatch between the role of women as framed in the Constitution and the reality of women's lives in the twenty-first century.

The role of the Institute is to provide an evidence-base for policy, rather than to advocate for a particular position and it is in that capacity that we appear before the committee. Our research highlights the need to assess the impact of current and future policy and legislation on gender inequalities in paid and unpaid work. It also reveals some of the complexities in the definition of care and unpaid work that would need to be addressed in the case of replacement wording.

We focus on three issues

- how the role of women in Ireland in paid employment has changed
- the measurement and distribution of care and unpaid work
- and the nature of policy support for combining paid work and caring for young children in comparative perspective

1. The changing position of women in the Irish labour market

In a recent overview we document women's changing position in the labour market over 50 years.⁴⁸ Census figures for the early years of the State show

⁴⁸ Russell, H., McGinnity, F. & O'Connell (2017) Gender Equality in the Irish Labour Market 1966-2016: Unfinished Business? *Economic and Social Review*, Vol. 48, No. 4. pp 393-418

very low levels of female employment, especially among married women, although these figures undercounted women's work on family farms and their participation in part-time employment. Women's employment increased gradually over the 60s, 70s and 80s as a number of barriers were successively removed, such as the marriage bar and the introduction of equal pay legislation. Women's educational qualifications also increased, so that by 1995 young women's entry into third level education surpassed that of men's for the first time.⁴⁹

The pace of change in women's employment accelerated even further in the 1990s and 2000s. This period encompassed both significant policy development (such as extensions to maternity leave, the introduction of parental leave, and the move towards more individualisation of the tax system) and an upsurge in demand for labour during the Celtic Tiger.

Women responded to these changes in the policy and labour market context with a large and swift movement into the labour market. The employment rate of women rose from 36 per cent in 1990 to 60 per cent in 2016. Even during the recession, female participation in the labour market remained at a high level though there was an increase in involuntary part-time work and unemployment. While the gender gap in employment rates has narrowed considerably, gender differences persist in pay and the hours of work, with one third of women working part-time, compared to 13 per cent of men. The gender pay gap has stuck at around 15%. In both cases, gender inequalities in care and domestic work play a role, for example with time out of the labour market for caring contributing to gender pay disparities.

The increase in employment and labour market participation of women has been widespread across the population, including among the mothers of young children. In the Growing Up in Ireland Study we find that just over half of mothers are in employment when the child turns three, and almost 60 per cent by the time the child is aged 5. Though OECD figures show that the rate of employment among mothers of pre-school and school-age children in Ireland is below the OECD average (Figure 1).

⁴⁹ ESRI School Leavers Surveys.

This evidence suggests that many women do enter employment when afforded the opportunity, though significant gender differences persist in the Irish labour market.

2. The gender division of caring and unpaid work

Has there been a corresponding shift in men and women's involvement in unpaid work? Is this what some have called "Stalled revolution"? In other words, that women's changing role in the labour market has not been matched by a similar shift in men's role in the home. There is significantly less information on this side of the equation reflecting the lack of visibility and under-valuing of care work.

One of the first issues to be considered is how broadly unpaid or non-market work should be defined. From a gender equality perspective, the distribution of domestic work such as cooking and housework is extremely important and therefore in our research, and indeed the international literature on gender equality we include this alongside caring. This definitional issue would have to be considered in any replacement of Article 41.2.

Time-use surveys are seen as the gold standard for measuring non-market work. In Ireland there has been only one, which we carried out at the ESRI in 2005 with support from the Department of Justice and Equality. The survey showed that the quantity of this work is very substantial indeed and that its distribution is strongly gendered. On average women did 4 hours 56 minutes of unpaid work per day, while men did 1 hour 54 minutes per day.⁵⁰ Within this, women spent an average of two and a half hours per day on care, and men spent 39 minutes. This includes both care for adults and children, though a much greater proportion of the population were caring for children than adults. When combined with paid work (and commuting) women were working on average 40 minutes longer per day than men.

⁵⁰ McGinnity, F. and Russell, H. (2008) *Gender Inequalities in Time Use: The Distribution of Caring, Housework and Employment Among Women and Men in Ireland*. Dublin: Equality Authority/ESRI.

Comparison of time-use data across Europe show that Irish women spend a considerably higher amount on time on these activities than women in the OECD countries.⁵¹

Data on the distribution of care work from a European wide survey allows for some comparison over time. It shows that in 2016, 44 per cent of women and 25 per cent of men in Ireland were involved in care work on a daily basis. These figures were virtually unchanged since 2003.⁵² The survey suggests that gender difference in participation in housework in Ireland declined over the same period though the gap remains wide.⁵³

This research highlights the scale of care and unpaid work and the importance of the making visible and valuing these activities from a gender equality perspective. One step towards highlighting unpaid work is to measure it regularly, by collecting time-use surveys like other countries do. This would allow for an economic valuation of care work.

3. How do policy supports for combining work and care in Ireland compare to elsewhere in Europe?

In this section we focus on supports for those with childcare responsibilities, as this is where our research has centred.

Childcare

Historically there has been a very low level of state investment in childcare in Ireland and the system is largely market based with a high level of private provision combined with community provision but no direct state provision. Investment and policy development was in part curtailed by political ambiguity about the merits of supporting mothers to enter employment and argument that policy should be neutral as regards providing support for mothers caring for children in the home and those combining care and employment. "Childcare support" was defined in successive governments as cash benefits to parents -

⁵¹ OECD Gender Data Portal based on the OECD Time-Use database: www.oecd.org/gender/data.

⁵² These figures come from the European Quality of Life Survey, which been carried out every four years since 2003. Analysis of this survey forms part of a forthcoming study on care work as part of an ESRI and IHREC programme of research.

⁵³ In 2016 88% of women were involved in these tasks on a daily basis compared to 47% of men, a ratio of 1.85 to 1, In 2003 the ratio was 2 to 1.

either child benefit or for a brief period the Early Childcare Supplement - with few supports to address the cost, quality or supply of childcare.

There has been a significant increase in investment in childcare over the last decade, including the introduction of the ECCE and the affordable childcare scheme, which represent a clear shift in policy intent and focus. Nevertheless families face a high burden of costs. OECD research shows that the cost for formal childcare for pre-school children in Ireland was second highest for lone parents and third highest for couple households in OECD countries. Our own study showed that parents are paying an average of 12% of disposable household income for childcare costs of one three year old child⁵⁴. The study also clearly demonstrated that the amount mothers pay for childcare affects how much paid employment they do, and that higher costs are associated with a subsequent reduction in women's paid work hours. The response to childcare costs was strongest in low-income families.

A further finding of the study was the considerable involvement of relatives, particularly grandparents in providing care for pre-school children in Ireland. At three years of age 23 per cent of children that were in non-parental care were being looked after by a relative. In 55 per cent of cases the relative was unpaid but in 45 per cent of cases this was paid care. This highlights the blurred boundaries between care inside/outside the home and paid versus unpaid caring.

Parental leave and maternity leave

Family leave linked to the birth of a child has an important role to play in facilitating time for parents to care for young children.⁵⁵ Provision for parents takes the form of maternity leave, paternity leave and parental leave.

Mothers' employment patterns in the early years are very sensitive to the length of paid leave. The duration of maternity leave – 26 weeks paid leave and 16 weeks unpaid leave – now compares reasonably well to other European countries, though the relatively low maximum threshold means that the replacement rate for maternity benefit in Ireland falls well below the level found

⁵⁴ Russell, H., McGinnity, F., Fahey, É. and Kenny, O. (2018) *Maternal employment and the cost of childcare In Ireland*. Research Series No. 73. Dublin: ESRI.

⁵⁵ OECD (2007) *Babies and Bosses: Reconciling Work and Family Life. A Synthesis of Findings for OECD countries*. Paris: OECD.

in a number of comparable EU countries.⁵⁶ Parental leave for both parents has been extended to 18 weeks per child but is unpaid; fathers' entitlement to paid leave is confined to two weeks of paternity leave.

Across Europe there has been a trend towards a blurring of the differences between maternity, paternity and parental leaves, and when the amount and value of paid leave are combined, Ireland falls in the lowest of three groups of 43 countries, and well below the highest performing countries.

The comparative evidence suggests that where fathers take parental leave this can lead to greater sharing of care for children by gender, and that take-up for fathers is strongly related to payment. Take-up of unpaid parental leave is very low among fathers in Ireland.⁵⁷

This evidence suggests that combining work and caring of young children remains challenging and there still significant gaps in supports in Ireland.

Conclusion

In conclusion, the research we have drawn on highlights the very significant changes in gender roles in Ireland but also the continued relevance of gender inequalities in the public and private sphere. Care and unpaid work have been consistently under-valued, yet the scale of this endeavour is substantial.

The removal the outdated gender stereotyping contained in Article 41.2 is an important symbolic move in terms of gender equality, a point which is recognised by a wide range of bodies including the Department of Justice, IHREC, NWCI, as well as international agencies such as the UN Committee for the Elimination of Discrimination Against Women. The research does not speak directly to whether or not this should be replaced by another form of text. It does highlight a small part of the complexity that faces individuals and families in balancing paid work, housework and care needs, which change over their life-course. It also presents some of the issues that are involved in defining care and

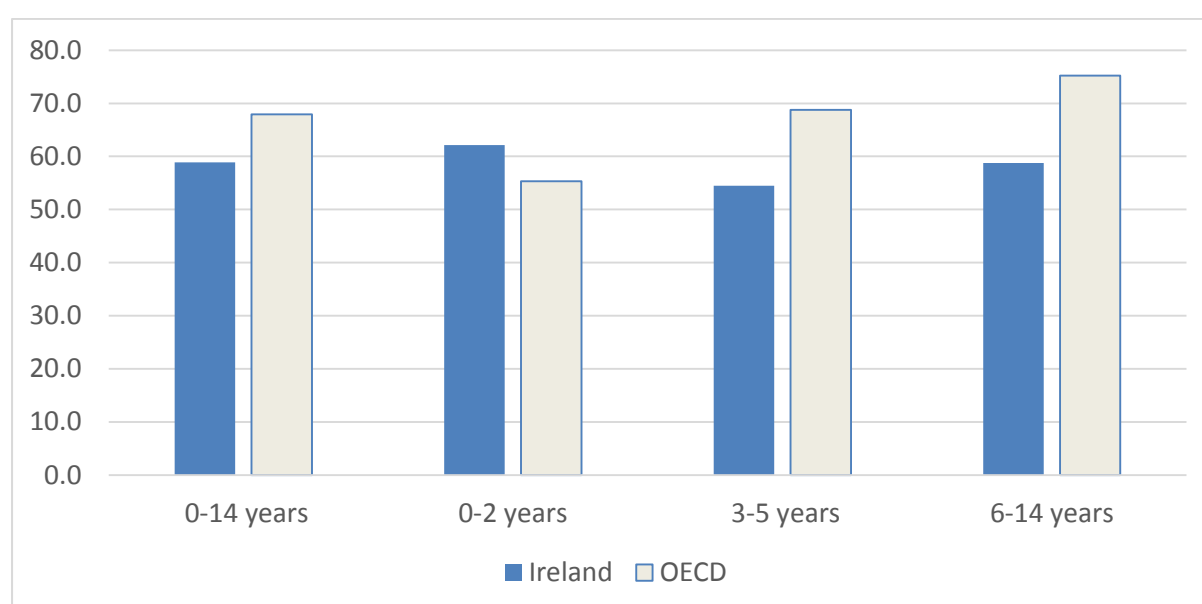
⁵⁶ Blum, S., Koslowski, A., Macht, A. and Moss, P. (2018). *International Review of Leave Policies and Related Research 2018*. International Network on Leave Policies and Research.

⁵⁷ By 9 months, around 12% of fathers who responded in the *Growing Up in Ireland* study had taken parental leave, and the majority (74%) of those who did take leave took 2 weeks or less.

non-market work that would arise in the framing and interpretation of alternative wording.

Our research also underlines the importance of a series of incremental legislative and policy changes that aimed to remove barriers to women's entry to the labour market and consequently to reduce gender inequalities in employment and in access to resources. These supports remain necessary so that women can exercise their right to equal participation in public life, while at the same time contributions to care work are recognised and valued.

Figure 1: Maternal Employment Rates by Age of Youngest Child, 2013



Source: OECD 2015.



Pre-legislative scrutiny of the general scheme of the 38th Amendment of the Constitution Bill

Thank you for the opportunity to present to you today on this important topic.

Family Carers Ireland (FCI) is a national charity that for 26 years has worked to improve supports, services and recognition for anyone living with the challenges of caring for a family member or friend who is ill, frail, disabled or has mental health difficulties. We have over 4,000 members and operate 20 Carer Resource Centres and almost 100 active Community Groups throughout the country. We also provide in-home respite and homecare throughout the country as an approved HSE provider. This submission is based on our experience of supporting and advocating for Ireland's 355,000 family carers (*CSO Health Survey 2016*).

On the issue of the 38th Amendment of the Constitution of Article 41.2 Family Carers Ireland does not support the proposal for repeal simpliciter. We do support the overwhelming consensus that the article should be reworded to make it gender neutral. We also agree with the IHREC that the new wording should reference 'family life' and that such reference should be understood as including a wide range of family relationships and include situations where families do not live in the same home. Finally, and most importantly, we believe that the replacement Article 41.2 should make the recognition and support for unpaid care in the home that is implicit in the current wording explicit in the new wording.

Framing this issue in an international context:

- (i) Ireland is typical of every country in the world in that its health and social care system is predicated on complementary care and support provided through an extended family system; however
- (ii) it is quite unusual in not specifying a constitutional framework around the respective roles of the state and the community in the provision of care.

Family Carers Ireland believes that the overwhelming consensus in Ireland would support a constitutional provision that recognises the family's primary role in provision of care and the state's (self-interested) responsibility to support families in performing this role as well as acting

as the provider of last resort where a family is unwilling or unable to perform the role properly.

Our overall preference would be based on the relevant provision (article 67) in the Portuguese constitution (Appendix 1) but we acknowledge that this would not sit comfortably within the current structure of Bunreacht na hÉireann. Therefore we commend the wording proposed by the Constitution Review Group 1996 to the committee and the government i.e. delete 41.2 and replace it with the following:

“The state recognises that family life gives to society a support without which the common good cannot be achieved. The state shall endeavour to support persons caring for others within the home.”

We would reject the suggestion that the second sentence be moved to Article 45 as we believe it is appropriate to frame the state’s role as a “duty of imperfect obligation” rather than a “guiding principle”. We also believe that this approach is more in keeping with the government’s own national carer strategy (2012).

The existing article 41.2 has included the formula “shall .. endeavour to support” for 80 years and has hardly acted as a magnet for successful litigation or judicial subversion of the separation of powers. Indeed, in the event of a challenge under the proposed wording it would seem reasonable for the state to point out that it spends about €2.5 billion annually on its existing endeavours to support family carers through schemes that are defined in statute. We could be critical of the adequacy and effectiveness of some of this expenditure, particularly the arbitrary pattern of its delivery (a postcode lottery) and the fact that care in the home saves the state well in excess of €10 billion per year, but I struggle to see how any court might conclude that it did not represent a material “endeavour” in most circumstances.

Others have already pointed out in this committee that judiciable rights in the constitution are not absolute. What I haven’t noted in the considerations so far is the point that a right does not have to be enumerated in the constitution to be guaranteed by it. If the government is really worried about unknown risks I venture they are more controlled around the wording we are recommending than they would be around a series of requests to the Supreme Court to affirm one or more unspecified (and therefore potentially unqualified) ‘rights’.

Deletion simpliciter has been described as the “pathway with the fewest risks” and the “safest way forward” – we would argue that deliberately and publicly repudiating the contribution of family care in the home constitutes a much greater risk to society and public policy in the medium term. Ireland faces a significant and rapidly growing demographic challenge – there has been a 36% increase in our older population and a 63% increase in people living with a disability over the past decade. Currently one in 10 people living in Ireland are providing some level of family care – with these demographic changes that figure will need to have increased to 1 in 5 by 2030 if our existing policies are to be sustainable. How will this happen without a clear ‘social contract’ between the state and family carers?

In recent years it has not been unusual to hear leading government figures speak of building “an Ireland which is the best place in the world in which to live, work and grow old”. Where is that ambition hiding in talk of running away from “unintended consequences” in regard to modernising Article 41.2? Do we want to take the pathway of less risk or the right pathway? We should be thinking in terms of “intended consequences” – and these should be to recognise and support care in the home.

Article 67: Family

- 1.** As a fundamental element in society, the family shall possess the right to protection by society and the state and to the effective implementation of all the conditions needed to enable family members to achieve personal fulfilment.
- 2.** In order to protect the family, the state shall particularly be charged with:
 - a.** Promoting the social and economic independence of family units;
 - b.** Promoting the creation of, and guaranteeing access to, a national network of crèches and other social facilities designed to support the family, together with a policy for the elderly;
 - c.** Cooperating with parents in relation to their children's education;
 - d.** With respect for individual freedom, guaranteeing the right to family planning by promoting the information and access to the methods and means required therefore, and organising such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned;
 - e.** Regulating assisted conception in such a way as to safeguard the dignity of the human person;
 - f.** Regulating taxes and social benefits in line with family costs;
 - g.** After first consulting the associations that represent the family, drawing up and implementing a global and integrated family policy;
 - h.** By concerting the various sectoral policies, promoting the reconciliation of professional and family life.

Joint Oireachtas Committee on Justice and Equality

September 26th 2018

38th Amendment of the Constitution (Role of Women) Bill 2018

Presentation on behalf of the Irish Countrywomen's Association

*Ms Joan Canning, Federation President – Dublin and Ms Hilda Roche, Federation President – Wicklow
– Members of the ICA National Advisory Committee*

1. The ICA welcomes the opportunity to make this presentation and to contribute to the discussion on the proposed amendment to the Constitution addressing Article 41.2. On behalf of the National Executive Board, my colleague and I will outline the observations of the ICA in this matter. We hope this will assist the Committee in its recommendations, and in the most effective next steps, to ensure that the Irish Constitution will be reflective of Irish society generally, and of the role of women in Ireland in the 21st century. I will deal with points 1 –4 and my colleague with the remaining points.
2. The ICA is a well known and respected organisation in Ireland and has had a significant role since its foundation in 1910. In more than a century, the Association has been a vital support to women who gained personally, emotionally and vocationally in being part of a community based, but nationally representative, women's organisation. Our communities and our families benefitted from the personal development which we all experienced, and from the Association's attention to all aspects of women's lives.
3. The ICA has been a lead voice in campaigning for change to benefit women individually, as well as to enhance family life and that of the wider community. We are a founding member of the National Women's Council of Ireland (NWCi) and a member of the Associated Country Women of the World (ACWW), and active in both.
4. It is with this background and track record that we make the following observations on the matter at hand – Article 41.2 and its focus on a woman's 'life in the home' and 'duties in the home':
5. In the first instance we support the position of the National Women's Council of Ireland that this matter warrants an active and wide-ranging debate, with a focus on the intent of the wording in relation to care and nurture and how that intent can best be articulated in the 21st Century.

6. We believe that the wording in the Constitution has been interpreted in a narrow and restrictive way, rather than facilitating a rights-based approach, ensuring that the value of nurture and care would be resourced, supported and valued.
7. We take the view that as it stands, the wording confined women to the role of unpaid homemakers, although even in the 1930s this hardly reflected the reality of many women's lives. Whether in farming, family businesses, or other work, then as now thousands of women were also critical to the economic survival of families. The fact is that identifying women in their role in the home served to provide the basis for discriminations such as the Marriage Ban and differential wage rates for women and men. We reject any intent or interpretation that fails to recognise women as equal citizens and contributors to our society.
8. Today we increasingly recognise the diverse roles of men and women within our families. We also have a much greater understanding of the shared and mutually enhancing roles of men and women in the caring responsibilities, whether of children or older relations, and in supporting healthy communities. At the level of the family, care responsibilities involve huge strain. We have not managed to create the correct infrastructure, or an appropriate way of thinking about these realities as equally important economic sustainability and development.
9. These are just a few observations that we believe are relevant to a debate which should focus on care and nurture as a social necessity and an essential good. We would hope that a national conversation would pose many questions and provide a real opportunity to consider questions such as these:
 - Does the Constitution require a statement which endorses and underpins the value of families and perhaps communities, as central to support, care, nurture and the development of us all?
 - What difference do we want to make and what is required to realise that difference?
 - How do we reflect the importance of men and women in the intergenerational care 'contract' – and is the Constitution the starting point?
 - Do we need to be even more explicit about the equality of all citizens and the multiple roles that we all carry and have potential to achieve?

Go raibh maith agaibh as ucht éisteacht linn

Joint Oireachtas Committee on Justice and Equality

Opening Address

Stay-At-Home Parents Association Ireland

Date: 26.09.2018

Spokespersons: Pauline O'Reilly and Catherine Walsh

We want to thank the Committee for the invitation to speak here today. Being seen goes to the heart of what we will say and therefore it was an important step for us to receive that recognition.

When we mark an X beside a Yes or a No on a referendum ballot paper, each person is attempting to assert their values. It is not a piece of legislation; it is something more visceral and it is important to remember that the constitution is a document that represents the people's voice.

We call for

Today we are calling for an amendment to Article 41.2 that is compassionate, including a removal of the paternalistic and sexist language that we can all agree is offensive but the inclusion of a recognition that nurturing and caring is important to who we are.

We would respectfully question the idea that deletion is simpler. Life is not always simple and it exists in the margins of economic activity far too often. This is a unique opportunity to express ourselves as a people and if further examination is required in order to do this then this is important work.

Equality

We want to touch firstly on the argument that removing this provision demonstrates equality for women, because this seems to have been key to the Minister's motion.

We firmly believe that liberation of women is being conflated with economic activity for women rather than looking at equality within the home and the workforce. Sometimes as a society we think of care work as something that holds us back, but in fact it is the lack of support and recognition that holds us back. Whether we work outside of the home full-time, part-time or not at all, caring still happens and we know that currently women carry out most of the care. We would like to see a more equal contribution from all genders and believe that by elevating the status of care work, including within our Constitution, this can be achieved. Even within the paid workforce women carry

out the majority of care work, such as in creches, and these roles are amongst the lowest paid. We ask 'Who are we that we do not see the value of being with children and vulnerable adults?'

When we voted yes on May 25th, we were voting not only for the choice to end pregnancies, but also to being supported with the continuation of pregnancies and for parenthood.

Practical considerations

We do not want to set ourselves against anyone and are fearful that a referendum that offers deletion versus retention would do this.

With tax individualisation in 2000 and the reduction in supports for lone parents who care at home we have seen inroads into the support for families. Although Article 41.2 has never been challenged, even as it stands, it could be argued that certain minimal supports such as Child Benefit and Home Carer's Tax Credit could be dented more easily if it were removed without amendment and this will weigh heavily on our members when it comes time to vote.

Who are we

We are a relatively new organisation formed out of a common feeling of isolation and a lack of a voice. There are no trade unions for those who work in the home and no statutory bodies that have been established to support our unpaid labour but we are a huge section of the population, past and present.

What does caring mean? There is the physical and mental labour that it entails, but there is also the time away from paid employment. It always means providing for those that do not earn an income and therefore financially it is a very difficult position for most. We don't have time to go in to a discussion on childcare, but we were formed to ensure that we receive support as the state moves forward to provide for greater access to childcare outside of the home.

From the outset we have been firm in our belief that all families should be supported equally, whether engaged in paid or unpaid work, whether headed by lone parents, married or cohabiting couples, including the LGBT+ community. We are secular and want to be recognised for our diversity in an ever changing society.

You may have heard that more women would work outside of the home if childcare was affordable and this article is often linked to this issue. The fact that we need more childcare is true and is a discussion for another day but paid employment is almost never the cheaper option and yet the [CSO report on Childcare from 2016](#) shows that only 38% use non parental childcare, therefore the majority in Ireland do not use any form of childcare outside of the home. They were also asked if they were content with the form of childcare used and 83% said yes.

Add to this figure of 62% all of those who are cared for and those who care on a non-full time basis, on maternity leave and every single waking moment outside of paid employment.

While we seek to put forward the position of parents caring for children, we believe that the care of older persons and vulnerable adults is equally important and in many cases is carried out by the same people. We also want to recognise the valuable contribution socially and culturally that the children and adults who are being cared make to society.

Closing remarks

The reason that we do not believe that this can be dealt with solely outside of the Constitution is that governments are often concerned with short-term economic activity and fundamentally we want the government to take note that paid labour market activation is not the only goal of our society. We all want time with our families first and foremost, whatever their shape.