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It is widely agreed that Article 41.2 is outdated, discriminatory, and undesirable at least in its present form.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 41.2.1in 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