



L&RS Note

Article 41.2 of the Constitution: Women in the Home

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Abstract

This *L&RS Note* aims to support Members of the Oireachtas in debating the anticipated Bill to hold a referendum on Article 41.2 of the Constitution. It does so by providing background analysis of gender inequality in Ireland, analysing the history of Article 41.2, and by considering recent proposals to repeal or amend the Article. The *Note* pays particular attention to the limited practical impact of Article 41.2 and considers the symbolic value of amending or repealing it. The *Note* analyses the outcomes of the Constitutional Convention's consideration of Article 41.2 and provides an overview of the proposed steps set out by the subsequent Government Task Force.

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Summary

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. 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 proved 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 proved 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:

- The first was 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.
- The second option would 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.
- The third option was 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 has 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.

A summary of the key reports and recommendations on Article 41.2 of the Constitution is outlined in Table 1 overleaf.

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

Date	Report	Recommendation
1937	Constitution of Ireland	<p>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”.</p> <p>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”.</p>
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>

Introduction

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 Article 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 marital 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, 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.

The purpose of this *L&RS Note* is to support Members of the Oireachtas in their discussion of the forthcoming Bill to hold a referendum to change Article 41.2 of the Constitution. It will do this by considering the situation of gender equality in Ireland today, providing an overview of the history of Article 41.2 and considering its impact on Irish law and society. The *Note* will then consider the proposals for reform since the 1993 report of the Commission on the Status of Women, and the conclusions of the Constitutional Convention and subsequent Government Task Force. The *Note* goes on to describe the process for amending the Constitution, and introduces recent research by the L&RS into reasons why referenda fail.

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

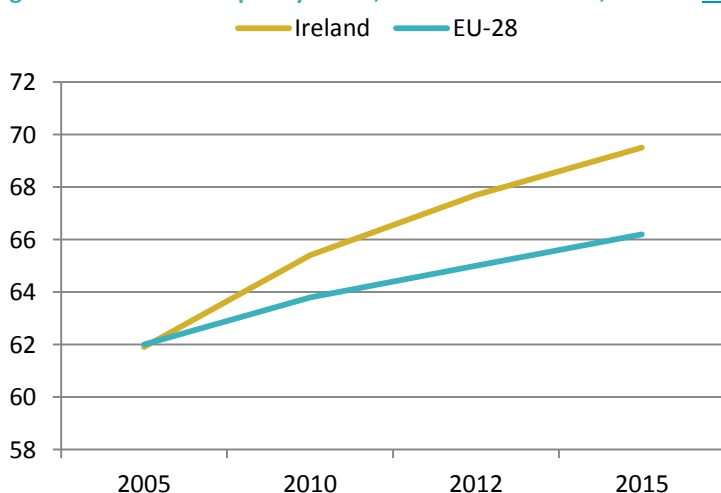
² Crowley, L., (forthcoming), ‘Sheltering the homemaker in Irish family law – Ireland’s failure to evolve with the shifting social and family norms’, in: Brinig, M. (ed.), *International Survey of Family Law 2018*, Intersentia.

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. 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.

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)

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

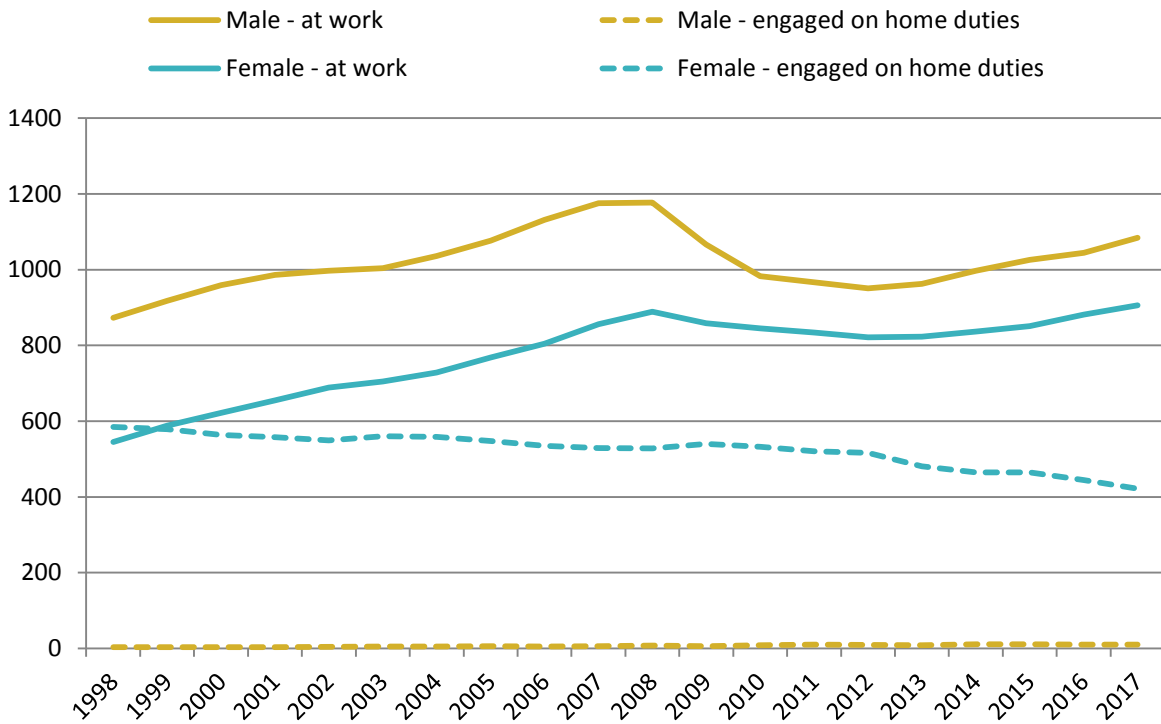
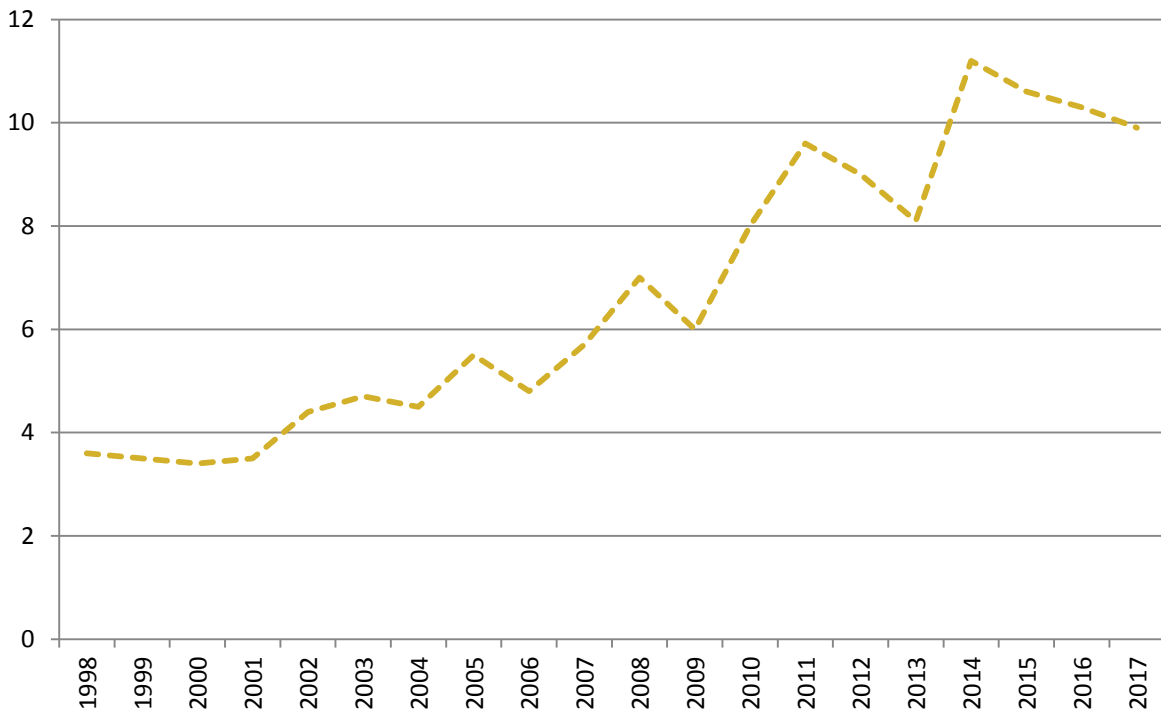


Figure 3: Men engaged in home duties, 1989-2017 (thousand): Source: CSO, QNHS



History of Article 41.2

*The past is a foreign country; they do things differently there.*⁸

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 former TCD Professor Gerry 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.*⁹

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.¹⁰ 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".¹¹ 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".¹²

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 woman's domestic role".¹³ 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".¹⁴

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.¹⁵ 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

⁸ Harley (1953) *The Go-Between*, Hamish Hamilton: England.

⁹ Hogan, G., (2002) *The origins of the Irish Constitution 1928-1941*, Royal Irish Academy: Dublin, p. 520.

¹⁰ 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).

¹¹ 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.

¹² 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.

¹³ 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.

¹⁴ Quoted in: Cahillane, L., (forthcoming) 'Revisiting Article 41.2', in: *Dublin University Law Journal*.

¹⁵ Beaumont, C., (1997) Women, citizenship and Catholicism in the Irish free State, 1922-1948, in: *Women's History Review*, 6:4, 563-585.

pressure of need to engage in work as to neglect their proper home duties”.¹⁶ 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 the Article 41.2. Historians have suggested that his views were informed by his own experiences of his mother working outside the home.¹⁷ 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.*¹⁸

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”.¹⁹ 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 been prescient of the fact that in practice Article 41.2 has had relatively little value.

¹⁶ Private papers, quoted in: Cahillane, L., (forthcoming) ‘Revisiting Article 41.2’, in: *Dublin University Law Journal*.

¹⁷ 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.

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

¹⁹ Cahillane, L., (forthcoming) ‘Revisiting Article 41.2’, in: *Dublin University Law Journal*.

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.²⁰ 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”.²¹

Article 41.2 has been used in litigation for two reasons; the first is to allow for gender discrimination and 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”.²² 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).²³

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.²⁴ 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 41.2 was now effectively meaningless and no further litigation was taken directly on the provision”.²⁵ 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.*²⁶

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

²⁰ Scannell, Y., (1988) ‘The Constitution and the role of women’, in Farrell (ed.), *De Valera’s Constitution*, Gill and MacMillan: Dublin.

²¹ Cahillane, L., (forthcoming) ‘Revisiting Article 41.2’, in: *Dublin University Law Journal*.

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 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).

²⁴ 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.

²⁵ Cahillane, L., (forthcoming) ‘Revisiting Article 41.2’, in: *Dublin University Law Journal*.

²⁶ 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.

exclude women from other roles but rather “is a recognition of the work performed by women in the home”.²⁷ 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.*²⁸

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 litigate.²⁹ 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 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.*³⁰

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).³¹ 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.³² 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

²⁷ 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 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).

²⁹ Cahillane, L., (forthcoming) ‘Revisiting Article 41.2’, in: *Dublin University Law Journal*.

³⁰ 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).

³¹ 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.

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. 244.

reinforce “the traditional division of labour by sex within the family”.³³ 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 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 families, and therefore that this approach discourages parents of young children from caring for their children at home.³⁴

³³ 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.

³⁴ 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”.³⁵ 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 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’.*³⁶

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

³⁵ 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).

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

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 childbearing and child rearing that cannot be replaced”.³⁷ 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 interpret 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”.³⁸

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 2013.³⁹ 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.

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 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).

³⁹ 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).

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 *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),⁴⁰ 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”.⁴¹ 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.*⁴²

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”.⁴³

⁴⁰ 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).

⁴¹ Report of the Task Force on Implementation of the Recommendations of the Second Report of the Convention on the Constitution (October 2016), available at:

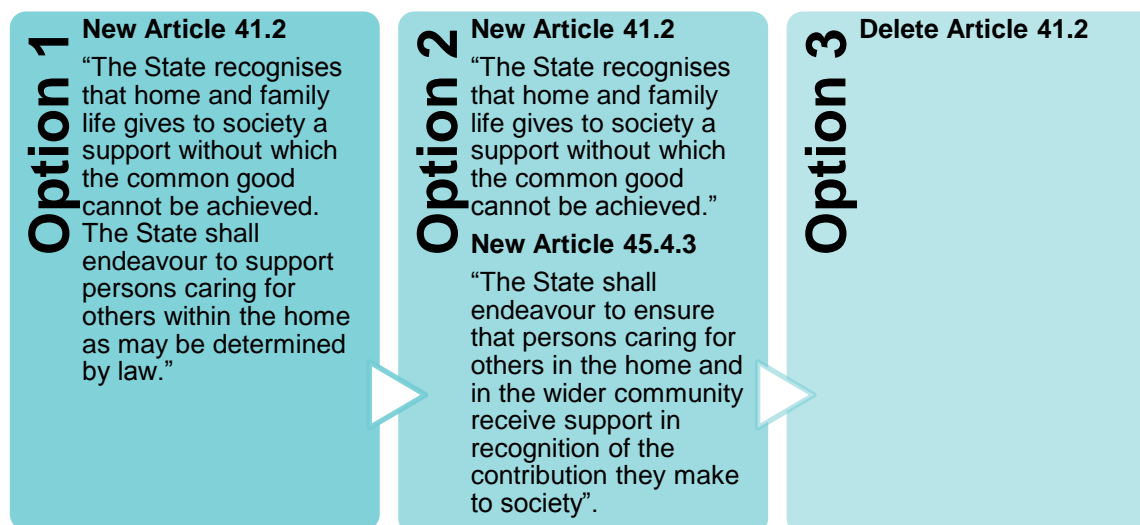
http://www.justice.ie/en/JELR/TaskForceReport_Impl-2nd-Rpt-Conv-Constit.pdf/Files/TaskForceReport_Impl-2nd-Rpt-Conv-Constit.pdf (accessed on 15.05.2018), p. 15.

⁴² 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).

⁴³ 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”.⁴⁴ 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 explicit constitutional protection. As Whyte concludes,

*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 to impose additional financial obligations on the State to support mothers in the home.*⁴⁵

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

⁴⁵ 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).

Referenda and the role of the Referendum Commission

According to Brady, the active use of referenda under Articles 46 and 47 of the Constitution has given the Irish electorate an ongoing relationship with their constitution.⁴⁶ The procedure for amending the Constitution is specified in Article 46 of the Constitution.

Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people (Article 46.2).

If a majority of the votes cast are in favour of the amendment, the Bill will be signed into law by the President.

The Referendum Commission is an independent body that explains the subject matter of referendum proposals, and promotes public awareness of a referendum and encourages the electorate to vote:

- It is open to the Minister for Housing, Planning and Local Government to appoint a Commission any time a referendum is to be held.
- A Referendum Commission consists of a Chairperson and four ordinary members.
- The Chairperson, who is nominated by the Chief Justice, must be a former Supreme Court judge or a serving or former High Court judge.
- The four ordinary members are the Comptroller and Auditor General; the Ombudsman; the Clerk of the Dáil; and the Clerk of the Seanad.
- The Minister for Housing, Planning and Local Government establishes a Referendum Commission by making an Order under Section 2 of the Referendum Act 1998.⁴⁷
- In the case of a constitutional referendum, the Minister may establish a Referendum Commission on or after (but not before) the date on which a Constitution Amendment Bill is initiated in Dáil Éireann.⁴⁸

A recent *L&RS Note* has analysed the outcomes of referendums and draws out several reasons why referendums have failed.⁴⁹

⁴⁶ 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.

⁴⁷ *Referendum Act 1998*, available at: <http://www.irishstatutebook.ie/eli/1998/act/1/enacted/en/html> (accessed on 18.06.2018). For a full analysis of referendums and the Constitution see: Hogan, G. W., & Whyte, G. F., (2006, 4th edition) *J M Kelly: The Irish Constitution*, Tottel publishing: Dublin.

⁴⁸ Citizens Information, 'Referendum Commission', available at: www.citizensinformation.ie/en/government_in_ireland/elections_and_referenda/referenda/referendum_commission.html (14.06.2018).

⁴⁹ Lynch (2018) *Explaining the outcome of rejected referendums*, L&RS Notes, available at: https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2018/2018-03-07_l-rs-note-explaining-the-outcome-of-rejected-referendums_en.pdf (accessed on 18.06.2018).

Conclusion

This *L&RS Note* is intended to inform the upcoming debate on the Bill to amend the Constitution in relation to Article 41.2. As such, the *Note* has considered the history of Article 41.2, and its implications for Irish law and society since 1937. This discussion was contextualised by highlighting the ongoing and persistent challenge of gender inequality in Ireland today. There is widespread agreement that Article 41.2 of the Constitution represents an outdated version of Irish society, and that despite efforts by the Supreme Court to interpret it through a contemporary lens that the best course of action is to amend the Constitution to reflect the aspirations of modern Ireland. In considering the outcomes of the Constitutional Convention, as well as a range of earlier report, the Department of Justice Task Force presented three options in 2016: to amend to include a gender neutral reference to care in the home; to supplement a gender neutral reference to care in the home with a general provision on care in the community in Article 45; and to delete the provision. The Task Force considered that the first and second options provided the means to modernise the Constitution, while respecting the role of Government in allocating public funds. In so doing, the Task Force was in agreement with a broad range of reports which have recommended amending the Constitution, rather than simply deleting Article 41.2. However several academic commentators have suggested that if the objective is to improve the Constitution without adding to it, then “perhaps deleting it from the Constitution would be more appropriate”.⁵⁰

Regardless of how 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. Cahillane concludes the a referendum offers the opportunity to consider, as a society, whether we believe that as a social good children should have a stable care influence at home, and if we should financially support such a function.⁵¹

⁵⁰ Cahillane, L., (forthcoming) ‘Revisiting Article 41.2’, in: *Dublin University Law Journal*.

⁵¹ Cahillane, L., (forthcoming) ‘Revisiting Article 41.2’, in: *Dublin University Law Journal*.



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