



## Public Consultation: Citizens' Assembly on Gender Equality

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### INTRODUCTION

On 01 February 2019, we held a workshop with a group of activists, artists and academics to consider whether Article 41.2 of the Constitution could be reimagined. Although much feminist analysis of this Article assumes that it is best removed from the Constitution, or lightly rewritten to be gender neutral, we wanted to ask whether it could be re-imagined altogether, as the constitutional foundation of a new Irish legal engagement with issues of gender. This workshop used Article 41.2 to engage with a broader legal issue: what feminist constitutional change can look like in Ireland, and what processes, and types of conversation, can allow that change to emerge.

The workshop was structured to facilitate deep conversation about women's shared experiences and aspirations for constitutional change in Ireland. Although all three of us are legal scholars, we did not write or propose constitutional solutions for later discussion by other members of the group. We did not privilege precedent over other, less legalistic, readings of the text. Instead, we were interested to see what kinds of proposal could emerge organically, from participants' plural knowledge, experience and expertise. We sought to collaborate with, rather than direct, the other group members in their formulation of an alternative constitutional text.

### CONTEXT

Some feminists argue that 41.2 is one of a series of sexist and religious constitutional provisions that should be removed from our law. Others argue that the home, and feminised work within it, deserve constitutional protection, and that a replacement for 41.2 could help to support campaigns for reproductive justice, access to housing and freedom from institutionalisation. Taking place in parallel to this debate about 'repeal or replace' is a debate about citizens' participation in constitutional change. Feminists have reason to think about the legal and political limitations of constitutional reform, which has not always served people at the margins.

Prior to the workshop participants were supplied with materials including a podcast and briefing document outlining how Article 41.2 has been interpreted and used by Courts, NGO and Statutory Body Publications related to Article 41.2 and academic publications. They were also supplied with a series of prompts for further reflection.

Women played little role in generating the 1937 Constitution. Building on feminist legal method, we wanted to see what could happen if participants were freed up to imagine themselves as authors of constitutional text. Lawyers who participated in the group did not make detailed presentations on the law, and only discussed relevant law if explicitly asked. We acknowledge that activists, artists and workers have experiences of, and knowledge of law, which do not need to be mediated by professional interpretation in order to contribute effectively to constitutional discourse. We encouraged members to share ideas for a new constitutional text that were not unduly restricted by existing mainstream interpretations of Article 41.2 as it is currently drafted.

### WHO PARTICIPATED?

Participants were mostly women and came from across a broad spectrum of knowledge and experience related to Article 41.2. This included those working in academia, the arts and the voluntary sector across issues of poverty and housing rights historical injustice, migration and direct provision, LGBT issues, disability, and

reproductive rights. Several practicing and academic lawyers also participated. Some participants were members of political parties, but did not participate as representatives of those parties. A list of participants' names is available on request.

## **DISCUSSION**

Participants were asked to consider the text of Article 41.2 as it is currently drafted. This document is a summary of that discussion, which centred on three critical themes: woman, neglect and home. Feminists addressed these themes in 1937: they are not new, and they remain alive in women's political consciousness. Participants emphasised the symbolic reach and weight of the Article's text, and the messages that it sends to women. In general, participants were enthusiastic about the Constitution's recognition of home and care, but critical of the restrictive form that these concepts have taken under existing Irish law. Rather than support women's rights, Article 41.2 seems to act as a block to their development.

### **Woman**

We discussed how the text essentialises women as homemakers, and by extension, as mothers and carers. Today, as in 1937, women do the majority of paid and unpaid home-based care work in Ireland. The diversity of women's experiences is forgotten, and women who are excluded from the home, the family, or certain reproductive experiences, also seem to be excluded from the text. The move from 'woman' to 'mother' within this Article is seamless. Women are automatically care-givers. All women are mothers, or mothers-in-waiting. Similarly, the Article slips easily from 'life' to 'duty', as if women's lives are completely exhausted by their duties to their children and the others they care for.

We also recognised that constitutional discourse on Article 41.2 hides those who receive care, even as it stereotypes those who give it. Disabled adults, for example are often denied autonomy in respect of the forms of care they can access. Vulnerability is denigrated when care is conflated with stigmatised dependency and is not recognised as an essential dimension of the good life.

### **Neglect of Duty**

Article 41.2 establishes a relationship between this woman and the state. By her life within the home, she gives to the state in ways which secure the 'common good'. The necessary implication is that women who do not pursue the right kind of life within the home may undermine the 'common good'.

While woman gives something essential to the state, the state, on the other hand, need only provide for her if 'economic necessity' means that she 'neglects' her duties within that home. The Constitution could recognise and offer protection against poverty but does not do so. There is no entitlement to socio-economic support under Article 41.2; instead there is a double-edged possibility of state provision, conditioned by women's failure. The life within the home is supposedly valued, while venturing outside the home is associated with neglect. This constitutional structure is at odds with international conventions which the state has ratified, including CEDAW and the CRPD.

### **Home**

The text also reinforces a public-private divide. Within the home is 'life' and 'duty', which is distinguished from women's 'labour' outside the home. Outside the home is 'economic' activity; the economic value of care is thereby disregarded.

Read in this way, the home is also a space of isolation rather than a shared space of agency. Each woman is enclosed in her own 'home', separated from other women.

Article 43 safeguards the right to 'ownership of private property', which derives from man's 'rational being'. But there is no equivalent protection of the home, even though home is assumed to be fundamental to womanhood under the Constitution. Ownership of private property might be used to provide a home, but for

those who do not own property, the state has no general positive obligation to provide a good home or adequate social welfare. Article 45 – the Directive Principles on Social Policy – leaves most questions of social provision at the discretion of the Oireachtas. Women absolve the state of the duty to provide essential care but receive no rights in return.

Article 41.2 also seems to assume that ‘home’ is a private and familial space. However, at the time the Article was drafted, ‘home’ was also an institutional term. Women in Ireland live with the consequences of abuses in those homes. Institutional “homes”, such as “mother and baby homes” and “county homes”, were places where motherhood – particularly unmarried motherhood - was punished, not protected. Many people in Ireland live the after-effects of those “homes” today. Aspects of their experience are repeated in contemporary patterns of institutionalisation; in direct provision, in the oppression of homeless families, in prisons, and in the refusal to fund appropriate housing to Travellers.

## OUTCOME

The group did not come to a conclusive decision on whether to repeal or replace Article 4.12. However, working together, we devised a number of radical suggestions for a new constitutional provision. Article 41.2 could be re-written to (i) guarantee access to a home (ii) acknowledge and help to address the prior injuries of institutionalisation and (iii) centre meaningful recognition of care, without falling back on older hierarchies and expectations. A draft text encompassing these aims is below. No Irish lawyer will fail to notice the difficulties of squaring such a demanding text with the remainder of the Constitution, or with its wider traditions of interpretation. At the same time, however, this text is a call to re-examine the fundamental assumption that the work of care can be disregarded, while the Constitution concentrates on more important matters.

The state affirms the fundamental right of everyone to a lifelong home that is safe, secure, accessible, stable and private. In particular, the state acknowledges that access to a home is an essential dimension of reproductive justice.

The state shall endeavour to ensure that everyone has access to a home in a safe community, and to the income necessary to a dignified life within that home. Ireland itself is a home, and the state aspires to make it welcoming to all, and a refuge for all.

The state recognises that motherhood should not be women’s sole conduit to public resources or respect. It acknowledges that state constructions of motherhood have been used to oppress women who sought sexual pleasure and self-determination, and to deny women and their children the opportunity to enjoy one another’s care. The state acknowledges this injustice and pledges that it shall not be repeated.

The state acknowledges that care is the essence of the common good. The desire to be cared for, and to be able to care for others, is fundamental to humanity. The state acknowledges that care is a form of labour, and must be freely given and received. Care is not the duty of any one social group. Accordingly, the state rejects the privatisation of vulnerability, and guarantees to support care in all of its interdependent dimensions.