

**SUBMISSION TO THE CITIZENS ASSEMBLY ON THE 8TH
AMENDMENT TO THE IRISH CONSTITUTION (ARTICLE 40.3.3) AND
ASSOCIATED MATTERS**

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1. THE LAW ON ABORTION IN IRELAND

The law on abortion in Ireland primarily comprises Article 40.3.3 of the Constitution, the Protection of Life During Pregnancy Act 2013, the Access to Information (Services outside the State for Termination of Pregnancy) Act 1995, and relevant case law. In his paper to the Citizens Assembly, Dr Eoin Carolan outlined the law as it stands, therefore in this section I offer only a concise summary of important elements of the law on abortion in Ireland. The key points are as follows:

- The Constitution recognises “the unborn” has having a right to life (Article 40.3.3).
- The Constitution recognises a pregnant woman (“the mother”) as having an equal right to life to that of the unborn (Article 40.3.3)
- The Constitution obliges the state to protect and vindicate these equal rights “as far as practicable” (Article 40.3.3).
- The state is not required to do what is “futile” to protect either right (*Attorney General v. X* [1992] I.R. 1; *PP v HSE* [2014] IEHC 622).
- The constitutional protection of the right to life of the unborn means that abortion is only available where there is a real and substantial risk to the life, rather than the health, of the pregnant woman, which can only be averted by termination of the pregnancy, and the unborn life is not yet viable (*Attorney General v X* [1992] 1 IR 1). Where viability has been reached, but there is a real and substantial risk to the pregnant woman’s life, the pregnancy would be terminated by another means (e.g. early delivery). This was illustrated by the case studies used by Professor Higgins in his submission to the Citizens Assembly.
- The general prohibition on abortion applies to all forms of abortion; it makes no distinction between surgical and medical abortion (the ‘abortion pill’). Section 22 of the Protection of Life During Pregnancy Act 2013 makes it a criminal offence “to intentionally destroy unborn human life”.
- The practical operation of the constitutional law on abortion is now governed by the Protection of Life During Pregnancy Act 2013, the operation of which was addressed in the submissions of Dr Carolan and Prof. Higgins to the Assembly.
- The existence of a fatal foetal abnormality is not relevant to a determination under the Protection of Life During Pregnancy Act 2013. This only allows abortion in cases of real and substantial risk to the life of the pregnant woman.
- The constitutional right to access abortion is very limited, but does not distinguish between the different sources of risk to the life of the pregnant woman (e.g. a risk of suicide *versus* a risk of death from a disease). In other words, the constitutional right to access abortion applies equally whether the risk to life emanates from a physical condition or a risk of suicide (*Attorney General v X* [1992] 1IR 1). However, the Protection of Life During Pregnancy

Act 2013 differentiates between the two, and imposes additional procedural requirements where a woman claims her life is in danger because of a risk of suicide (section 9) compared to a risk from physical illness (section 7).

- Regardless of whether there is a risk to her life relating to the pregnancy or not, all pregnant women have a constitutional right to travel outside of the state to access abortion (Article 40.3.3).
- Regardless of whether there is a risk to her life relating to the pregnancy or not, all pregnant women have a constitutional right to information relating to abortion (Article 40.3.3). Information provided must be non-directional in respect of abortion, although information providers are not legally prohibited from being directional in respect of other options (e.g. proceeding with pregnancy, opting for adoption etc) (Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995, s. 5).
- Medical practitioners may not refer a woman for abortion services in another jurisdiction (Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995, s. 8).
- Medical professionals are entitled to exercise conscientious objection to being involved in abortion-related procedures and abortion care under the 2013 Act *except* in cases of emergency (Protection of Life During Pregnancy Act 2013, s. 17).
- It is a criminal offence for anyone to provide or access abortion within this jurisdiction outside of s.s. 7, 8 and 9 of the 2013 Act (Protection of Life During Pregnancy Act 2013, s. 22). This includes women who access and take abortion pills in Ireland.

2. AREAS OF UNCERTAINTY IN THE LAW OF ABORTION IN IRELAND

There are at least four significant areas of continuing uncertainty in respect of the constitutional position on abortion under Article 40.3.3 of the Constitution:

First, there is no definitive definition of “the unborn” for the purposes of the 8th Amendment generally, but following *Roche v Roche* [2009] IESC 82 it likely means an embryo post-implantation. (See also the submission of Dr Carolan). This understanding is reflected in the Protection of Life During Pregnancy Act 2013, Section 2 of which defines “‘unborn’, in relation to a human life...[as] such a life during the period of time commencing after implantation in the womb of a woman and ending on the complete emergence of the life from the body of the woman”.

Second, depending on when the “unborn” is said to exist for constitutional purposes, there may be some uncertainty about the constitutional permissibility of some forms of contraception, in particular emergency contraception that some argue prevents implantation (although whether it does or not continues to be disputed).

Third, it is not known whether the Constitution permits abortion in cases of fatal foetal abnormality. There are strong arguments that it does (because the state is not obliged to do that which is futile to preserve foetal life) and that it does not (because the fatal foetal abnormality does not alone create a real and substantial risk to the life of the pregnant woman). In the absence of a Supreme Court decision precisely on this issue, we do not know with certainty whether permitting abortion in cases of FFA would be constitutionally permissible at this time.

Fourth, it is not known whether the foetus *only* has a right to life under the Constitution, or whether the foetus has a broader range of constitutional rights under the Constitution per se. There are conflicting decisions from the High Court on this. An appeal from *IRM v Minister for Justice, Equality and Law Reform* [2016] IEHC 478 (in which Humphreys J. found that the ‘unborn’ has a wider range of constitutional rights than the right to life under Article 40.3.3) is now pending before the Supreme Court in which it is anticipated this matter will be resolved.

3. THE SIGNIFICANCE OF THE *CONSTITUTIONAL* REGULATION OF ABORTION IN IRELAND

Constitutions clarify the boundaries within which the state may operate. These boundaries are absolute. In other words, if the state were to legislate in a manner that went beyond what the Constitution allowed, that legislation would be liable to being struck down (i.e. invalidated) by the Supreme Court. Similarly, if the state does not give effect to a right that is protected in the Constitution, one can sue the state in order to compel it do so.

In the context of the 8th Amendment this has significant implications, such as:

- Even if there were a political appetite to do so, the state could not legislate in a manner that goes beyond what the Constitution permits. Any such legislation would be unconstitutional. Thus, for example, the Constitution as currently understood does not allow for the Oireachtas to pass a law allowing for abortion in situations of a risk to the health of a pregnant woman where that risk falls below the threshold of a “real and substantial risk to the life” of the pregnant woman. In other words, the Constitution acts as an absolute barrier to legislative change to liberalise abortion law to allow for greater reproductive autonomy for women; this could only be done pursuant to appropriate constitutional change.
- Logic dictates that under the existing constitutional law, the abortion pill could be licenced for use and prescription by medical practitioners but *only* where there is a real and substantial risk to the life of the pregnant woman, because

medical abortions have the same effect as surgical abortions. More extensive access to the abortion pill would require amendment of the Constitution.

- If it were found that the foetus enjoys a range of constitutional rights, and not just the right to life under Article 40.3.3, that might be used as a basis to require the state to do or not to do certain things, such as preventing deportation of a parent of the foetus, where the foetus would be an Irish citizen when born and thus has a prospective right to enjoy family life with the prospective deportee (this was the issue in *IRM v Minister for Justice, Equality and Law Reform* [2016] IEHC 478). Thus, if “the unborn” has rights beyond Article 40.3.3 this has implications for the mechanisms of constitutional reform that might be required in order to liberalise abortion law in Ireland.

Options for constitutional reform are outlined in Section 5 of this submission.

4. WOMEN IN IRELAND AND ACCESS TO ABORTION

Due to the constitutional restrictions on abortion, and on abortion law reform, the vast majority of women in Ireland who do not wish to continue with their pregnancy, and who have the means to do so, access abortion either by travelling abroad (usually to England & Wales) or by illegally accessing the abortion pill for the purposes of medical abortion. This section outlines some key facts and figures relating to this, for the purposes of illustrating the burdens of the constitutional *status quo* for women in Ireland who do not wish to continue with their pregnancies.

We do not know the exact number of women in Ireland who access abortion, the means by which they access it, or the reasons for their decisions to have an abortion. We also do not know the number of women in Ireland who continue with pregnancies they do not want because of their inability to access abortion, although it is thought that women who are poorer, who have substantial caring responsibilities, who are in violent relationships without access to travel or sometimes money and communication, who are in direct provision, and who are younger are likely to often fall into this category. Notwithstanding the general lack of information, there are some apposite statistics and facts that I bring to the attention of the Assembly here. The most recent set of statistics for England and Wales are provided in the Department of Health (DOH), *Abortion Statistics, England and Wales: 2015* (2016).

Methods of Abortion in England & Wales

Most abortions in England and Wales are now medical abortions, i.e. they involve the taking of pills that effectively induce a miscarriage. The main medical method is through the use of the drug mifepristone (RU486/Mifegyne). The surgical methods are vacuum aspiration (recommended for gestation periods of up to 15 weeks), and

dilation & evacuation (D&E) (recommended for gestation periods of 15 weeks or more).

The Department of Health statistics do not outline the method chosen for women resident in the Republic of Ireland. However, for women resident in England & Wales, the following is the general picture of method of abortions in 2015: 55% of abortions in 2015 were medical, of the other c. 45% of abortions, vacuum aspiration accounted for 40% and D&E for 5%.

For abortions at or beyond 22 weeks feticide is the recommended procedure in England & Wales. This stops the heartbeat following which the foetus is delivered. This can either take place before the procedure, or as part of the procedure. Prior to the procedure medication is administered to prepare the cervix, and throughout the woman is provided with very strong pain relief. This is the usual approach in cases of fatal foetal abnormality (FFA) where diagnoses are often relatively late into the pregnancy. Cases of FFA can also introduce other particular needs for women. In particular, women may want to hold their baby, or have fetal remains tested. For women who want to hold their babies, surgical abortion is not suitable; instead a medical abortion would be preferred. This takes place over multiple days (the medication to prepare the cervix is usually administered the day before the feticide and procedure itself). The procedure itself takes up to 24 hours. The consultation for women from Ireland before such a procedure usually also involves discussion of whether fetal testing is desired, but women from Ireland must usually have that testing done in the UK as a private patient. The consultation often also involves discussion of the fetal remains, what the parent(s) want to happen with them, and whether ultra sounds or handprints are desired.

Statistics from the Department of Health (UK)

Abortion is available in England and Wales under the Abortion Act 1967 (as amended). This requires two doctors to certify that a woman meets certain criteria in order to access abortion, except in cases of emergency where the double-certification is not required.

Section 1 of the 1967 Act provides as follows:

- (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
 - (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
 - (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
 - (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

In 2015, 3451 women with addresses in the Republic of Ireland accessed abortion under the Abortion Act 1967. Their age ranges were as follows: <16 years: 18 (1%), 16-17: 58 (2%), 18-19: 187 (5%), 20-24: 832 (24%), 25-29: 768 (22%), 30-34: 693 (20%), 35-39: 603 (17%), 40+: 292 (8%).

For the purposes of statistics, the legal grounds above are further refined into seven grounds, and these indicate the bases upon which women with addresses in Ireland¹ accessed abortion in England & Wales during 2015:

Ground	Description	Number	Percentage
A	Continuing pregnancy involves risk to life greater than if terminated; no term limit	0	0
B	Termination necessary to prevent grave permanent injury to woman's physical or mental health; no term limit	0	0
C	Continuing pregnancy involves greater risk to mental or physical health of woman than termination; no more than 24 weeks	3,316	96
D	Continuing pregnancy involves greater risk of injury to physical or mental health of woman's existing children; no more than 24 weeks	0	0
E	Substantial risk that if born child would suffer from physical or mental "abnormalities as to be seriously handicapped"; no term limit	135	4
F	Save life of pregnant woman (emergency)	0	0
G	Prevent grave injury to physical or mental health of pregnancy woman (emergency)	0	0

Most women with addresses in Ireland accessed abortion relatively early in pregnancy. The time-scales are as follows:

Period of gestation	Number	Percentage
3-9 weeks	2,374	69%
10-12 weeks	564	16%
13-19 weeks	401	12%
20+ weeks	112	3%

¹ Throughout figures relate to women with addresses in the Republic of Ireland; women in Northern Ireland are counted for the DOH report as a separate dataset and are not considered here.

However, compared with women resident in England and Wales, women resident in Ireland accessed abortion slightly later in pregnancy. For women who reside in England and Wales the total number of abortions in 2015 was 185,824. 92% of abortions were carried out under 13 weeks, 80% under 10 weeks. This reflects the Department of Health policy that “women who are legally entitled to an abortion should have access to the procedure as soon as possible. Evidence shows that the risk of complications increases the later the gestation” (p. 14). Abortions where the gestation was 24 weeks or over accounted for 0.1% of the total (i.e. 230 such abortions in 2015). 55% of abortions were medical abortions (i.e. used the abortion pill). 2% of abortions were carried out under Ground E (i.e. that the child would be born “seriously handicapped”).

Practicalities of Accessing Abortion in England & Wales for Women resident in Ireland

Accessing an abortion in England & Wales can be relatively complicated. Some women have the resources (financial and otherwise) to make an appointment with an abortion provider themselves, and to make all relevant arrangements. The Abortion Support Network, based in London, provides financial support to women who need it in order to access abortion, and also runs a network of volunteers throughout the UK who provide accommodation, shelter, and local transportation to women. They receive no funding or other support from the Irish government.

The major providers have special web pages dedicated to women living in the Republic of Ireland who wish to access abortion care in their facilities. They make particular arrangements (such as letting people have their consultation and procedure on the same day) in order to reduce the burdens on women accessing abortion from Ireland. They also often offer reduced fees to women from Ireland.

Appointments are usually made by telephone, and BPAS and Marie Stopes are the most commonly used providers.

BPAS (British Pregnancy Advisory Service)

BPAS provides medical abortion (i.e. using the abortion pill) up to 10 weeks gestation. This can be done in one day, although it requires consultation, first pill, and then second pill and will take the entire day. They recommend that people do not travel until the pregnancy “has passed” (usually within four hours of the second medication having been taken). Medical abortions are also provided for people between 10 and 20 weeks of gestation, but they can require an injection into the womb as well as the abortion pill. This requires at least two visits and sometimes an overnight stay.

Because surgical abortions only require one visit to the clinic they can be the most practical option for women travelling from Ireland. They are available through BPAS:

vacuum aspiration is provided up to 15 weeks (local anesthetic up to 12 weeks; sedation if necessary 12-15 weeks). A D&E is available between 15 and 24 weeks gestation. Until 19 weeks sedation is used, after 19 weeks a general anesthetic is used. When the pregnancy is of 20 weeks gestation or more, multiple visits and an overnight stay may be required. For people travelling from Ireland, BPAS tries to arrange for the treatment to be done in one day (including consultation).

In cases of fetal abnormality, BPAS offers both medical and surgical abortion up to 24 weeks. According to the website: “The Royal College of Obstetricians and Gynaecologists recommends that following the decision to end a pregnancy due to fetal anomaly, women should be offered the choice of both medical and surgical methods. We realise that this is not possible in Ireland but our experienced and caring staff can do this for you in the UK.”

ABORTION SERVICES			
Client Fees - Euros/Sterling	Initial Consultation	Treatment Price	Total
Pregnancy Testing	FREE		FREE
Abortion			
Abortion pill under 10 weeks	€90/£65	€420/£350	€510/£415
Surgical under 14 weeks	€90/£65	€470/£370	€560/£435
Surgical 14 - 18 weeks	€90/£65	€750/£610	€840/£675
19 - 24 weeks	€90/£65	€1550/£1350	€1640/£1415
CONTRACEPTION SERVICES			Total
Emergency Hormonal Contraception Levonelle			€10/£10
Emergency Hormonal Contraception ellaOne			€20/£15
Depo Provera supply and inject			€40/£30
Jaydess			€130/£110
Mirena or Contraceptive Implant			€190/£150
Mirena, Jaydess or Contraceptive Implant removal			€120/£100
IUCD supply and fit			€80/£60
IUCD fit only			€50/£40
NuvaRing Contraceptive vaginal ring (3 months supply)			€60/£50
Patch (EVRA)			€30/£25

The costs of abortion care in BPAS are significant, but the website indicates that “Irish women travelling for their abortion treatment with BPAS are given a discounted fee because of the extra expenses they face”. In addition, if a woman has had pre-abortion counseling with the IFPA, Well Woman, Femplus, One Family, Cork Sexual Health, or here2help there is no consultation fee (normally £65/€90). The cost of abortion care in BPAS is as shown in this chart, taken from its website.

BPAS are located in Birmingham, Liverpool, and London.

Marie Stopes

Marie Stopes provides much the same treatment as BPAS in 70 locations throughout the UK. It provides specific information for women travelling from Ireland, and a freephone number for people calling from the Republic of Ireland to access information, advice and a booking service. They also provide an online booking and enquiry service. They require that anyone at 18 weeks or more gestation is accompanied, and provide particular advice on travelling, which can help women from Ireland to assess their options for method of abortion care. They provide a free taxi transfer from airport or ferry port for women travelling from Ireland.

Abortion Treatment Type	Consultation *	Treatment Price	Total Cost
Medical abortion (abortion pill(s)), Up to 9 weeks	€45 £35	€465 £390	€510 £425
Surgical under 14 weeks (with sedation or non-anaesthetic)	€45 £35	€515 £435	€560 £470
Surgical under 14 weeks (with GA^)	€45 £35	€535 £450	€580 £485

Surgical 14 weeks to 19 weeks (additional GA^ available)	€45 £35	€795 £665	€840 £700
Surgical 19 to 24 weeks (GA^ included)	€45 £35	€1625 £1360	€1670 £1395
GA^ - General Anaesthetic (optional until 19 weeks)			€20 £20

Accessing abortion in cases of Fatal Foetal Abnormality (FFA)

In later diagnoses of FFA, the medical and surgical abortion options provided by BPAS and Marie Stopes may not be appropriate or available. Later cases and cases of increased complexity will often involve women traveling to the Liverpool Women’s Hospital, where there is a specialist care capacity for such cases. Very little information is publically available; women generally ring the hospital and are talked through options and processes there. Often women receive some assistance from Irish clinics (e.g. IFPA) but the fact that it is an offence for any medical practitioner based in Ireland to refer a woman for abortion in another jurisdiction severely limits the assistance that can be offered (s. 8(1), Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995).

Accessing Medical Abortion without travelling outside of Ireland

Medical abortion involves taking pills (usually 2) to induce a miscarriage. These pills are not licensed for sale or use in Ireland, however it is possible to attempt to import the abortion pill. The abortion pill can be bought through a number of different websites, the two most prominent of which are Women on Web and Women help Women. In addition, BPAS has now launched a free-phone helpline for women in Ireland who have bought the abortion pill online and want to talk to someone about it, or have any questions as they are administering it.

The exact scale of the use of abortion pills in Ireland is unknown, but between 2010 and 2012 Women on Web shipped abortion pills to 1642 women in Ireland, and 5,600 women in Ireland tried to buy abortion pills from Women on Web in a five year period of January 2010-December 2015. For 79% of these gestation was reported as 7 weeks or under, 44% had not used contraception, 54.3% had used contraception that failed, and 1.7% had been raped.

The most common reasons given were: cannot cope with a child at this point in my life (62.1%), do not have the money to raise a child (43.5%), too young to have a child (15.3%), want to finish school (14.8%), too old to have a child (4.6%), and health problems (1.5%).

94.2% of people reported that they felt grateful Women on Web was able to provide them with abortion pills, with 34.6% of people having had difficulty in paying the donation of €70. This gives some indication of the extent to which the costs of

abortion as outlined above represent a challenge to people in Ireland. 97.2% of people said that at-home termination of pregnancy had been the right choice for them.²

5. OPTIONS FOR CONSTITUTIONAL REFORM

Given the nature of, and constraints emanating from, the current constitutional position (outlined in Sections 1 and 3 above), constitutional reform is fundamental to any attempts to ensure meaningful reform of the law on abortion in Ireland. In this section, a number of options for constitutional law reform are outlined, together with the arguments that might be levied for and against each option.

The importance of constitutional design

Questions of constitutional design are important, and proposed constitutional texts should be carefully considered.

The implications and interpretation of the 8th Amendment, outlined in 1 and 2 above, have served greatly to limit women's reproductive autonomy and ability to refuse consent (HSE, National Consent Policy (2014), p. 41). These were not the inevitable outcomes of the 8th Amendment, which is worded in such a way that much more regard for women's autonomy was possible. For example, the commitment to vindicate the right to life of the unborn "as far as practicable" may be interpreted as permitting abortion where it is desired in cases where the foetus was certain to die before or shortly after birth. Similarly, the constitutional text does not clearly require the extremely restrictive abortion information regime that currently exists under the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995, or the general criminalisation of abortion. However, a sustained and effective process of litigation resulted in Article 40.3.3 being subjected to an extremely restrictive interpretation, which allows for the termination of pregnancies by abortion in Ireland only in the very restricted circumstances outlined at 1 above.³

In addition, Article 40.3.3 does not conform to the usual principle of 'chrononomy' in constitutional design, i.e. the principle that constitutions should be capable of reflecting the past, governing the present, and adapting to the future. The 8th Amendment tied the hands of the Oireachtas by introducing an absolute barrier to meaningful reform of abortion law in Ireland, regardless of changing political, social, medical or other circumstances. While it is in the nature of a constitution to place limits on the ability of the state to exercise its power, this should be done to the extent

² Aiken, Gomperts & Trussell, "Experiences and characteristics of women seeking and completing at-home medical termination of pregnancy through online telemedicine in Ireland and Northern Ireland: a population-based analysis", *forthcoming in British Journal of Obstetrics & Gynecology* (2016).

³ A comprehensive account of the constitutional *status quo* and this litigation is available in Fiona de Londras, "Constitutionalizing Fetal Rights: A Salutory Tale from Ireland" (2015) 22(2) *Michigan Journal of Gender and the Law* 243-289.

possible without stymying parliament in undertaking its proper role (governance), or allowing it to abdicate responsibility for taking difficult political decisions (by pointing to the Constitution as tying its hands).

Furthermore, to the extent possible, where constitutional change is being undertaken it should be done in a manner that ensures Ireland can comply with its international obligations, including obligations under international human rights law treaties that have been ratified by the Irish state such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

Option 1: Repeal Article 40.3.3 without Replacement

On the face of it, the simplest option is to simply remove Article 40.3.3 and not replace it. This would remove any explicit mention of the right to life of the unborn from the text of the Constitution and, some argue, would ‘deconstitutionalise’ the question of abortion. However, there are some concerns about such an approach.

A. Foetal rights may still be protected by the Constitution

Although the constitutional right to life of the foetus was expressly introduced by the 8th Amendment, there have been some judicial statements claiming that it existed prior to this, specifically as an unenumerated right.⁴ There is a (slim) possibility that this would be used to establish foetal rights even if Article 40.3.3 were removed, so that constitutional ‘silence’ on this matter may not be wise.⁵

The contrasting cases of *IRM v Minister for Justice, Equality and Law Reform* [2016] IEHC 478 and *Ugbelese v Minister for Justice, Equality and Law Reform* [2009] IEHC 598 show that there is some disagreement in our courts about whether the right to life in Article 40.3.3 is the only constitutionally protected right of the unborn or whether there are others. If the unborn has further constitutional rights removal of Article 40.3.3 does not remove those further rights, which might frustrate efforts to reform abortion law.

B. This may result in an ‘absolute’ right to abortion under the Constitution

Prof. Gerry Whyte has claimed that removal of the 8th Amendment would result in an absolute right to access abortion without limitations.⁶ His argument rests on the presumption that repeal would mean ‘the People’ intended all constitutional

⁴ *Attorney General (SPUC) v Open Door Counselling Limited and the Wellwoman Centre Ltd* [1988] 1 I.R. 593

⁵ See further Enright et. al. “Abortion Law in Ireland: A Model for Change” (2015) 5(1) *feminists@law*

⁶ Gerry Whyte, “Abortion on Demand the Legal Outcome of Repeal of the 8th Amendment”, *Irish Times*, 28 September 2016. See responses from Ivana Bacik & Fiona de Londras, *Irish Times* letter page, 29 September 2016. See su-rebuttal from Gerry Whyte, *Irish Times* letter page, 30 September 2016. See further response from Fiona de Londras, *Irish Times* letter page, 5 October 2016.

protection to be removed from the foetus *resulting in* an absolute right. However, this argument is undermined by the experience in other jurisdictions, which shows that, even where there is no constitutional right to life of the foetus, courts still recognise a state interest in the preservation of foetal life. However, that interest can be pursued only in a manner that recognises and respects the right to bodily integrity and to privacy of a pregnant woman so that abortion would be made available but could be limited by, for example, term limits and grounds provided they did not disproportionately interfere with the rights of the pregnant woman. This is the case, for example, in the United States (most recently affirmed by the US Supreme Court in *Whole Women's Health v Hellerstedt* 579 U.S. ____ (2016)).

C. Simple repeal does not compel legislation

A simple repeal of the 8th Amendment would not, by itself, confirm or clarify the constitutional position; neither would it make abortion more freely available without subsequent legislative enactment.

The Protection of Life During Pregnancy Act 2013 would remain in place but it would be vulnerable to challenge and may be struck down in whole or in part in future litigation. Should the legislation be struck down there would be no legislative scheme to govern abortion, which would instead be governed by medical ethics and guidelines. This poses considerable challenges such as (i) lack of preparedness of medical profession as it has been operating for 33 years in an idiosyncratic and punitive legal regime, (ii) lack of clarity re conscientious objection, especially given high volume of medical care institutions under the patronage of the Catholic Church, (iii) lack of access in real life in large parts of the country (as happens in some parts of Canada) where there are few or no doctors willing to perform either medical or surgical abortions.

While there would be political pressure (and popular expectation) for some legislation to be introduced, the Constitution itself would not clearly determine what needed to be included. A substantial delay may, then, arise in legislating to give effect to the constitutional change (as happened after the 8th Amendment to the Constitution, introduced in 1983 but not given legislative 'shape' until 2013).

Option 2: Repeal Article 40.3.3 and Replace with Abortion-related Provision

A second option is to remove Article 40.3.3 and replace it with a provision that permits abortion in limited circumstances. Such a provision might (i) recognise the right to life of 'the unborn'/the societal value of the protection of foetal life, (ii) recognise the rights of the pregnant woman to life and to health, and (iii) explicitly allow for abortion in express circumstances that align with the internationally recognised grounds for access to abortion, i.e. protection of the life of the pregnant woman, rape, incest and fatal foetal abnormalities. It might also allow for abortion in

cases of serious risk to health. However, such an approach would pose serious difficulties.

A. It would tie the hands of the Oireachtas

The role of the Oireachtas is to make law in a manner that is compatible with the Constitution and which is based on evidence. As already seen, a key critique of Article 40.3.3 is that it means the Oireachtas' 'hands are tied' and it has little space to make evidence-based, policy decisions about the availability of abortion that could be reflected in legislation. An 'Option 2' provision would reproduce that difficulty, with the Oireachtas having extremely limited space for manoeuvre and being unable to reflect best medical practice, scientific advances, and popular will in the legislation *beyond* the limited grounds outlined in the Constitution.

Furthermore, such a provision would not conform to the usual thesis of 'chrononomy' in constitutional design, i.e. the principle that Constitutions should be capable of reflecting the past, governing the present, and adapting to the future.⁷ A provision of this kind would not allow for the Oireachtas to make law in the future in response to changes in public, popular sentiment, international human rights law, medical science etc but would, rather, require constitutional change by means of referendum again.

B. It would be unduly complex

Such a provision would be extremely complex when compared to almost all other constitutional provisions, which generally lay down broadly worded, policy statements. The exception is Article 41.3.2 (on divorce) introduced pursuant to the 29th Amendment of the Constitution. This provision does not allow for sensible and progressive divorce law reform and requires a very long period of separation before divorce is possible.

Some of the terms that would be used in such a provision are themselves contested. For example, anti-abortion campaigners often challenge the term 'fatal foetal abnormality' and the term is difficult to define. The same is true of 'risk to life', where questions arise about whether this requires abortion to be permitted only to avoid death or whether it can have a broader meaning (e.g. maintaining a quality of life), and about how imminent a risk to life must be before an intervention resulting in destruction of foetal life can be taken. Such a constitutional provision would require the Oireachtas to define these terms and those definitions would be susceptible to litigation and challenge before the Supreme Court. Post-1982 a campaign of litigation was undertaken in the attempt to ensure that Article 40.3.3 was given the most restrictive interpretation possible, and there is no reason to believe this would not be replicated in respect of any new constitutional provision.

⁷ Richard Kay, "Constitutional Chrononomy" (2000) 13 *Ratio Juris* 31.

C. It may cause harm to women

Should the Constitution explicitly permit abortion in cases of rape or incest, questions would arise as to how a woman seeking an abortion would be required to establish her ‘qualification’ under these grounds. The difficulties of this would become especially acute should abortion be criminalised outside of the specific grounds that such a provision would allow for in the constitutional text. Recognising a general right to life of the “unborn” while allowing for abortion in exceptional cases (such as rape) may mean that abortion would not be available on the basis of a ‘mere’ claim of rape or incest (in order to vindicate the general right to life of the unborn). If this were so, women may be required somehow to prove rape or incest (for example, by engagement with the Gardaí) or at the very least to convince a medic of the veracity of the claim. Medics may be subject to criminal liability should they provide abortion care to someone who made a false claim, and this would likely produce a “chilling effect” where medics would be cautious about such claims. This would not only cause harm to women and assault their dignity, but it would also place significant power in the hands of doctors, which power may not always be exercised in good faith. Should a criminal report of rape or incest be required, this would require women to engage with the criminal justice system whether she is ready or willing to do so or not, and further strip a woman of her control and autonomy in a situation in which she has already suffered an extreme assault on her dignity and disregard for her consent. Ultimately such an arrangement would do harm to women, perhaps even resulting in ‘rape trauma syndrome’ in some cases.⁸

D. It would not resolve the problem

Such a provision would still result in most women who require or desire abortion to terminate their pregnancies travelling abroad to access abortion or importing abortifacients, either because the Irish law does not accommodate abortion for the grounds on which it is required or desired by most women *or* because the Irish regime is harmful and traumatic (e.g. by requiring women to report rape in order to access abortion). Thus, the core problem produced by the 8th Amendment (i.e. the lack of availability of abortion care in Ireland) would not be resolved.

Such a provision would also fail to address further problems caused by (or related to) the 8th Amendment including the criminalisation of a safe and health-improving medical practice (abortion) and medical practitioners, compelling medical practitioners to act against their conscience and what they believe to be in the best interest of their patients, undermining the principle of consent in maternal care, stifling of political innovation and debate about abortion, and undermining people’s

⁸ See the argument against a ‘rape ground’ in Enright et. al., above n. 5.

ability effectively to make autonomous moral judgements relating to their pregnancies.

E. This may not satisfy Ireland's human rights obligations

A provision of this kind may be sufficient to satisfy international human rights law *for now*, but the *Mellet v Ireland* decision of the Human Rights Committee (2016), together with comparative developments in constitutional and human rights law relating to abortion, suggest that international human rights law may recognise a broader right to access abortion (either as a stand-alone right, or within the right to adequate health care, the right to be free from inhuman and degrading treatment, the right to non-discrimination, or the right to privacy) in the near future. Should this happen the *status quo* in which Ireland's constitutional arrangement puts it in violation of its international obligations would reemerge.⁹

F. It would require immediate replacement or amendment of the Protection of Life During Pregnancy Act 2013

Any such provision would require the 2013 Act to be replaced or amended immediately in order to ensure access to abortion on the new constitutional grounds, meaning that fully developed legislation would have to be ready and, almost certainly, agreed upon in principle within the Oireachtas before the referendum. This would almost certainly cause extreme delays in holding a referendum.

Option 3: Repeal Article 40.3.3 and replace with a Negative Provision

One could propose removal of the 8th Amendment and its replacement with a negative provision that makes it clear that the Constitution does not prohibit making abortion available through law. Such a provision would be worded in a manner along the lines of:

‘Nothing in this Constitution shall preclude abortion as regulated by law’.

A. It makes it clear that the Oireachtas may legislate on abortion

Such a provision would make the regulation of abortion a firmly political matter, leaving it to politics to decide (i) whether and (ii) how to regulate abortion by law. There would be substantial political pressure to introduce legislation, but no constitutional compulsion to do so. However, the removal of the 8th Amendment would mean that the 2013 Act would be vulnerable to a challenge as to its constitutionality (see C. below).

⁹ For a full discussion of the broader significance of *Mellet* see Fiona de Londras, “Fatal Foetal Abnormality, Irish Constitutional Law, and *Mellet v Ireland*” (2016/17) *Medical Law Review* ____ (forthcoming).

B. It would not tie the hands of the Oireachtas

Whatever legislation the Oireachtas introduced in the wake of such a constitutional amendment could be changed in the future through the ordinary legislative process, so that the hands of the Oireachtas would not be tied and the principle of chronology in constitutional design would be respected.

C. It would leave the Protection of Life During Pregnancy Act 2013 in place but vulnerable to challenge

The precise meaning of any such amendment would fall to be determined by the Supreme Court, most likely in a challenge to the PLDPA 2013. Such a provision would likely be taken to mean that the Oireachtas can regulate abortion by law, *but in so doing* it must respect constitutional rights, so that this provision would be interpreted ‘harmoniously’ with the remainder of the Constitution. That includes a right to privacy and a right to bodily integrity on the part of pregnant women, which would almost certainly no longer be subjected to counter-weight by a *constitutional* right to life of the foetus, although it would be subject to limited by the public good in the preservation of foetal life. It may also be balanced against other constitutional rights of the ‘unborn’ depending on the outcome of the appeal to *IRM v Minister for Justice, Equality and Law Reform* [2016] IEHC 478. Thus, the question would be whether the Protection of Life During Pregnancy Act 2013 constituted a *proportionate* interference with those rights. Given the extremely limited nature of the Act (allowing for abortion only where the life of the pregnant woman is at risk) it is quite possible that it would be struck down as a disproportionate interference with these rights.

Should the legislation be struck down there would be no legislative scheme to govern abortion, and a negative provision of this kind would not make it clear whether such a scheme is required, or whether abortion would then be precluded or, alternatively, permitted subject to the normal medical regulation usually applied to all medical care. Thus, should the 2013 Act be struck down following an Option 3 constitutional amendment severe uncertainty would result.

D. It does not positively protect the rights of pregnant women

Such a provision would fail to address further problems caused by (or related to) the 8th Amendment including the criminalisation of a safe and health-improving medical practice and medical practitioners, compelling medical practitioners to act against their conscience and what they believe to be in the best interest of their patients, undermining the principle of consent in maternal care, a medical culture of paternalism and lack of autonomy for pregnant women, the stifling of political innovation and debate about abortion, and the ability of individuals to effectively make autonomous moral judgements relating to their pregnancies.

Option 4: Repeal Article 40.3.3 and replace with a Positive Provision

One could propose removal of Article 40.3.3 and its replacement with a positive protection of the right to bodily integrity and self-determination in medical decision-making. The provision would also include a second clause that ensures abortion cannot be absolutely precluded. Thus, a new provision that reads something like this is contemplated here:

The State guarantees by its law to protect and vindicate the right of all persons to bodily integrity and, in particular, to self-determination in all matters of medical treatment.

Nothing in this Constitution shall be read as prohibiting abortion as regulated by law.

This provision is that suggested in Enright et. al. “Abortion Law in Ireland: A Model for Change” (2015) 5(1) *feminists@law*.

A. It compels political action on abortion without tying the hands of the Oireachtas

Although this does not expressly require the Oireachtas to legislate for abortion, the positive protection for bodily integrity and self-determination in all matters of medical treatment would almost certainly make the general criminalisation of abortion, as is currently the case, unconstitutional.

This would leave the Oireachtas with sufficient space to determine grounds, time limits, conscientious objection and all other such matters that might be thought need to dealt with in a legislative scheme to govern abortion. It would require that the Oireachtas do so by reference to express constitutional rights to bodily integrity and self-determination of pregnant women. Thus, while a right to access abortion *per se* would not be introduced, the rights against which all limitations to abortion that might be introduced (e.g. time limits, grounds) would have to be assessed would be express thus introducing further clarity to law-making, although the question of proportionality of any such law would ultimately be determined by the Supreme Court.

Any legislation introduced on foot of such a provision would be subject to future amendment through the ordinary legislative process.

B. It would addresses the issue in a broad sense

A provision of this kind would not only address the problems caused by the 8th Amendment in a narrow sense (i.e. lack of access to abortion for most people who require or desire it), but also in a broader sense inasmuch as it would positively assert

and protect the right to bodily integrity and to self-determination in medical matters thus forcing or nudging a cultural shift in maternal medical care towards autonomy. This would have significant advantages in liberalising maternal care in Ireland (e.g. the National Consent Policy, the availability of and support for home births, a reduction in ‘managed labour’). Thus, such a provision would both help to address these broad issues *and* recognise the wide range of harms caused by Article 40.3.3 and experiences by most or all women who experience maternal care in Ireland well beyond the discrete question of whether a woman who requires or desires it can access abortion (on which I refer the Assembly to the work of Midwives for Choice).

C. It would leave the Protection of Life During Pregnancy Act 2013 in place but vulnerable to challenge

The Protection of Life During Pregnancy Act 2013 would remain in place but it would be vulnerable to challenge and may be struck down in whole or in part in future litigation.

The PLDPA would be particularly vulnerable in the face of an express right to bodily integrity and self-determination in medical matters given its extremely restrictive provisions which would almost certainly not be proportionate by reference, in particular, to a right to self-determination in medical matters.

Should the PLDPA be struck down the positive right protected in the new clause would almost certainly mean that abortion should be constitutionally available, but would be difficult to access in practical terms in the absence of a legislative scheme. Thus, it is to be expected that such a constitutional change would be followed by comprehensive legislative reform.

D. It may have unintended consequences

Such a broad recognition of autonomy and self-determination in medical decision-making may have unintended and broad consequences, for example in recognising a right to make end of life decisions. Were this not desired, an additional clause could be inserted to make it clear that, notwithstanding this general right, euthanasia is prohibited.

Option 5: Repeal Article 40.3.3 and entrench legislation in the Constitution

A further option is to remove the 8th Amendment but to regulate abortion by a piece of legislation prepared and published in advance of the referendum, and ‘entrenched’ in the Constitution (i.e. expressly mentioned in the Constitution and, thus, effectively requiring constitutional change for it to be amended in the future). This would echo the approach taken in the 2002 abortion referendum campaign. The proposed change in that referendum, *inter alia*, would have required the Oireachtas to pass the

proposed Protection of Human Life in Pregnancy Act 2002 within 180 days of the referendum, and granted that proposed Act constitutional protection so that, in future, it could only be amended by referendum of the People. A similar approach could be taken in any future referendum.

A. This would tie the hands of the Oireachtas

Such an arrangement would require the Oireachtas to pass the law as proposed at the time of the referendum within a set period of time. It is likely that no variations between the text as it stood on the day of the referendum and the text that would be passed would be permitted.

As in 2002, the amendment would probably include a provision that it would lapse unless the legislation in question were to be passed within the determined timescale.

The Oireachtas would be under a political obligation to pass such a law in these circumstances *but* refusal to pass the legislation would be an option that would result in the constitutional change being nullified and the 8th Amendment reinstated. Thus there may be perverse incentives for legislators strongly opposed to any change to the 8th Amendment to attempt to torpedo the legislation and thus reinstate the *status quo ante*.

The legislation in question could not be changed in the future without a constitutional referendum. This would almost certainly be required even for a simple change, not to mention a substantive change. Thus, the hands of the Oireachtas would be tied, and the principle of chrononomy would not be respected. Hence, regardless of its content, the creation of entrenched legislation is, in principle, an unfavourable approach.

Option 6: Repeal Article 40.3.3 with a promise to introduce legislation, a draft of which is available in advance

Under this proposal Article 40.3.3 would either be removed without replacement (Option 1, above) or with a replacement (Options 2, 3, 4 above) and a draft of detailed legislation would be made available to the electorate, intended to be *illustrative of* the legislation that would be introduced following the constitutional change. The precise format of the constitutional change would be subject to the arguments outlined in 1-4 above.

A. This does not tie the Oireachtas' hands

Under this proposal there would be a clear *political* obligation on the Oireachtas to legislate along the lines of the proposed legislation. However, there would be no *constitutional* obligation to do so.

The Oireachtas would be able to make amendments to the proposed detailed text as part of the ordinary legislative process. Once passed, the legislation in question would be subject to amendment under the ordinary legislative process.

Once passed, the legislation would be subject to constitutional challenge so that any disproportionate interferences with constitutional rights of the pregnant woman would be struck down.

Until the new legislation was passed, the PLDPA 2013 would continue to operate unless/until challenged and potentially found unconstitutional in whole or in part.

Option 7: Repeal Article 40.3.3 with a promise to introduce legislation modeled on published ‘heads’

Under this proposal Article 40.3.3 would either be removed without replacement (1, above) or with a replacement (2, 3, 4 above) and heads of a bill would be made available to the electorate, intended to be *illustrative of* the kind of legislation that would be introduced following the constitutional change. The precise format of the constitutional change would be subject to the arguments outlined in relation to Options 1-4 above. The detailed text of the proposed legislation would not be formulated or published.

A. This does not tie the Oireachtas’ hands

Under this proposal there would be a clear *political* obligation on the Oireachtas to legislate along the lines of the proposed legislation. However, there would be no *constitutional* obligation to do so.

The Oireachtas would be able to develop and make amendments to the proposed legislation in accordance with the ordinary legislative processes. Once passed, the legislation in question would be subject to amendment under the ordinary legislative process.

Once passed, the legislation would be subject to constitutional challenge so that any disproportionate interferences with constitutional rights of the pregnant woman would be struck down.

Until the new legislation was passed, the PLDPA 2013 would continue to operate unless/until challenged and potentially found unconstitutional in whole or in part.

6. AFTER CONSTITUTIONAL REFORM

In all likelihood, legislation will be required to give practical effect to a change in the Constitution. As outlined throughout Section 5 of this submission, the form of constitutional change that is chosen may determine the legislation to be introduced.

However, in designing and implementing a legislative scheme the Oireachtas will be giving effect to the constitutional position, as it exists following constitutional change (should such be successfully put to the People in a referendum). In so doing, it will likely need to be attentive to issues such as (i) term limits, (ii) grounds for accessing abortion, (iii) processes for accessing abortion, (iv) review of decisions to refuse abortion care, (v) conscientious objection, (vi) practical availability of abortion care throughout the country, (vii) protection of places where abortion care is provided, and so on. In doing so, the Oireachtas will be able to draw on a wealth of comparative experience as well as international human rights law.

As part of a group of 10 legal scholars working with the Labour Women Commission on Repeal of the 8th Amendment, I was involved in drafting a ‘model’ Act for accessing abortion in Ireland that might be introduced following constitutional change.¹⁰ That model law forms part of the collective submission to the Citizens Assembly of Enright, Conway, de Londras, Donnelly, Fletcher, McDonnell, McGuinness, Murray, Ring & ní Chonnachtaigh.

In respect of prospective legislative change I adopt that collective submission in full.

¹⁰ Mairead Enright, Vicky Conway, Fiona de Londras, Mary Donnelly, Ruth Fletcher, Natalie McDonnell, Sheelagh McGuinness, Claire Murray, Sinead Ring, SORCHA UI CHONNACHTAIGH, “General Scheme of the Access to Abortion Bill 2015” (2015) 5(1) *feminists@law*; Mairead Enright, Vicky Conway, Fiona de Londras, Mary Donnelly, Ruth Fletcher, Natalie McDonnell, Sheelagh McGuinness, Claire Murray, Sinead Ring, SORCHA UI CHONNACHTAIGH, “Abortion Law Reform in Ireland: A Model for Change” (2015) 5(1) *feminists@law*