

# **The Need for Abortion Law Reform in Ireland: The Case Against the Twenty-Fifth Amendment of the Constitution Bill, 2001**

*A position paper prepared by the Irish Council for Civil Liberties on the basis of legal research by James Kingston and a policy analysis by the Council's Executive and Women's Committee.*

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## **The Irish Council for Civil Liberties: Who We Are**

The Irish Council for Civil Liberties/An Comhairle um Chearta Daonna (ICCL) was founded in 1976, and is an independent voluntary membership organisation that works to promote and defend human rights and civil liberties. Civil liberties are a precious democratic inheritance. They include the traditional freedoms such as freedom of expression and association, freedom from arbitrary arrest, the right to silence and to a fair trial. They also encompass the right to be free from discrimination on grounds of gender, race, ethnic origin, religion, sexual orientation, disability etc. And in today's diverse world, civil liberties include rights of cultural self-esteem and resourcing, e.g. for ethnic minorities.

Increasingly, the ICCL operates in partnership with civil liberties groups in other European member states, exercising vigilance to ensure that, in a single-state Europe, essential rights and liberties are not whittled away for the sake of political and administrative convenience. There are also opportunities in the international human rights arena. For example, in 1993 and again in 2000 the ICCL contributed to holding Ireland's record to account for the first time before the United Nations Human Rights Committee.

Part of the ICCL's work includes monitoring proposed legislation, influencing legislators and mounting public campaigns. The ICCL was particularly active in the campaigns leading to the decriminalisation of gay sexual behaviour (1993), the ending of the State of Emergency (1995), and the lifting of the Constitutional ban on divorce (1995).

The ICCL is affiliated to the International Federation for Human Rights (FIDH), and works closely with the Committee on the Administration of Justice (Northern Ireland), the Scottish Human Rights Centre and Liberty (England).

## **The ICCL Position in a Nutshell**

In this position paper the ICCL examines the reality of Irish abortion; as indicated in this examination, abortion may sometimes be necessary to protect the life or physical or mental health of pregnant women. However such abortions are rare and women facing crisis pregnancies may seek abortions for a whole range of other reasons. In the view of the ICCL, legal prohibitions on abortion are neither effective nor desirable. Ultimately, it is up to the pregnant woman herself to determine whether to terminate or to continue with her pregnancy. Legal, economic and social measures must be put in place to support a woman whatever decision she takes regarding her pregnancy so as to ensure that the right to choose becomes a reality. These measures must include the repeal of the 1983 Eighth Amendment to the Constitution that equates the life of a woman with that of a foetus and the introduction of legislation ensuring that Irish women can access abortion facilities freely as part of the health care system. The ICCL believes that the Irish public understands the issues facing women in crisis pregnancies and supports a compassionate approach, including greater availability of abortion services in Ireland, in order to deal with these pregnancies.

Our examination of the legal issues surrounding abortion shows that an abstract prohibition on abortion simply cannot survive a challenge based on the reality of crisis pregnancy. Regrettably, experience in Ireland, Britain and other countries which attempted to place an absolute ban on abortion shows that legal change has been brought about on the basis of court challenges aimed at affording access to abortion to particularly vulnerable women and girls. In an appalling coincidence, exceptions have been identified to both the criminal and constitutional prohibitions on abortion operating in Ireland because of the need to provide abortions for raped and suicidal fourteen year old girls in the **Bourne** and **X** cases respectively. The ICCL is of the view that it is unacceptable that legal reforms should be based on the suffering of individual women and calls for a proactive approach that would bring the law in line with reality and provide for the availability of abortion services in Ireland.

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The ICCL's study has also shown that despite the much-heralded Green Paper and Oireachtas All-Party Committee Report on Abortion, the Government, in drawing up the Twenty-Fifth Amendment of the Constitution Bill, failed to undertake a comprehensive examination of medical issues arising in pregnancy that might indicate the necessity or desirability of abortion. The central plank of the Government's proposal is to reduce the constitutional right to life of pregnant women by removing the entitlement, first identified by the Supreme Court in the **X case, to abortion** where necessary to protect life from the risk of suicide. Insofar as the threat of suicide in pregnancy is concerned, reliance has been placed on irrelevant statistics showing that pregnancy may lessen suicide risk. No study was commissioned on the adverse mental health effects of crisis pregnancy, in particular where requests for abortion have been denied. Furthermore, the Government has interpreted the view that it is difficult to predict suicide risk as an excuse for failing to act to prevent such risk. Inexcusably, no evidence was sought from Irish psychiatrists and other medical personnel who have, as practise on both sides of the border in the past decade has shown, concluded that, in the cases of certain individual women and girls, abortion is an appropriate medical treatment to ameliorate the risk of suicide or other adverse mental health

consequences arising out of crisis pregnancy. This aspect of the proposal deviates fundamentally from the basic principle that medical diagnosis and treatment should be based on a professional client-doctor relationship, where the individual circumstances of the client are examined in light of the best available medical knowledge. Instead, the Government proposes that the diagnosis and treatment of complex medical issues should be decided by the public at large in a referendum.

Despite the Government's claim that its proposal will protect and strengthen existing medical practice on termination of pregnancies where necessary to protect the life of pregnant women in cases other than suicide risk, the proposal in fact lessens the constitutional protection of the right to life of such women also. The Government's lack of candour in this regard is illustrated by the fact that when medical evidence showed that - despite years of protest to the contrary by the anti-abortion movement - abortion is sometimes, albeit rarely, necessary to protect the life of pregnant women from risks arising out of physical causes it responded by proposing to define "abortion" in a manner contrary to established medical, legal and even theological definitions. Under the Government's proposal a termination of a pregnancy prior to the foetus reaching viability will not constitute an abortion where the termination is necessary to protect the life of the pregnant woman - except, of course, where the risk is one of suicide. The Government's semantic gymnastics are designed to soothe the ideological fears of the anti-abortion movement and illustrate that the basis of the proposal is hypocrisy rather than a desire to protect pregnant women, or indeed foetuses. One of the more shocking aspects of the Government's proposal is that these non-abortions can only take place in an "approved place" even where emergency action is needed to terminate a pregnancy in order to save the life of a woman. Despite concerns raised in the course of the Twenty-Fifth Amendment of the Constitution Bill's passage through the Oireachtas that this aspect of the Bill could place women's lives at risk, the Government refused to accept any amendment aimed at protecting such women. In no other area of medical practice is a procedure regarded as necessary to save a patient's life required to be carried out in a particular location, even where the procedure is regarded on the basis of medical opinion as being urgently required.

The proposal is also flawed in that no research has been carried out in relation to other medical issues, such as the adverse effects that a pregnancy might pose for the health of the pregnant woman, despite considerable public support for abortion in these circumstances. The proposal also fails to deal with an issue which was identified in the medical testimony given to the All-Party Committee: namely that the current legal situation requires women pregnant with foetuses which, due to congenital abnormalities, cannot survive outside the womb are forced to continue with their pregnancies until twenty-six weeks at which stage the foetus would, if normal, become viable. The fact that the proposals will perpetuate a situation whereby the medical profession and - more importantly - women facing the trauma of accepting that a perhaps much wanted pregnancy will not result in the birth of a live child are forced to continue a non-viable pregnancy until a point is reached where the fiction of "notional viability" can be called into play is nothing short of scandalous. The ICCL's analysis also shows that the Government's indications that the legality of the morning-after pill and the IUD will be copper-fastened is unfounded and, again, it is surely unacceptable that the opportunity has not been taken to clarify once and for all the legal status of these forms of contraception. Finally on the medical aspects of the Bill, the conscientious objection clause of the Bill is fundamentally misconceived relating as it does to medical procedures necessary to save the life of a pregnant woman: best international medical practice indicates that a conscientious objection clause should be dis-applied rather than introduced in cases where pregnancy termination is required in order to save a woman's life.

As has been shown, the Bill is seriously flawed in its legal regulation of medically necessary abortions - denying that necessity in cases of suicide risk and being more concerned to protect the sensitivities of anti-abortion activists and doctors than to safeguard women's lives and health in other cases. However, one of the most fundamental flaws of the proposal is its failure to address honestly the needs of the seven thousand and more Irish women who travel abroad each year to obtain abortions while attempting to ensure that they can in fact obtain abortions outside

the State. The proposal aims to enshrine the criminal prohibition on abortion in the Constitution - there is only one precedent for defining a criminal offence in the Constitution, namely Article 39, which defines treason. The fact that the Government proposal strengthens the criminal prohibition rather than removing it belies its claim to take a compassionate approach to women in crisis pregnancies. Despite the fact that a number of submissions to the All-Party Committee recommended decriminalisation of abortion, at least insofar as the pregnant woman is concerned, the Government instead copper-fastened the penal approach to abortion and set a maximum penalty of twelve years, which is particularly harsh having regard both to the general level of penalties imposed for criminal offences in Ireland and to the level of penalties imposed in other countries which penalise abortions.

On the other hand, the proposal tries to ensure that the State can avoid having to deal with Irish women requiring abortions by maintaining the existing situation whereby women have a constitutionally enshrined freedom to travel abroad for abortions. The Government has attempted to justify this two-faced approach by claiming that it would not be constitutionally "practicable" to stop women from travelling abroad to obtain abortions - yet the real reason is that public opinion would not stand for any state interference with Irish women seeking abortions. That this is the case is illustrated by the fact that the Pro-Life Campaign now accepts and even endorses the freedom to travel abroad for such women. The only practicable, honest solution is thus to legalise abortion within Ireland, yet the Government refuses to do this, preferring instead to rely on Britain to deal with Irish women's need for abortion. However, the Government is not consistent even in its hypocrisy - by maintaining a freedom rather than a right to travel abroad for an abortion it fails to ensure that pregnant women and girls in foster care, psychiatric hospitals, prisons or otherwise in State care can go abroad for abortions. The High Court decision in the **C** case indicates that women in the State's care or control can travel abroad to obtain an abortion only where it would be lawful to perform the abortion in Ireland. As is explained in the position paper, the Government's half-hearted attempt in the Bill to ensure that such women can travel abroad is likely to be unsuccessful. The so-called freedom to travel also discriminates against women from poorer socio-economic backgrounds, leading many Irish women to delay travelling abroad until they can raise the funds for the journey as well as for the abortion itself, thus increasing the risk of physical and psychological trauma.

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Another issue of concern is the fact that the Government drove legislation through the Oireachtas in December 2001 to ensure that no public money will be spent informing the public of the reasons why they might wish to vote against the proposal. In the view of the ICCL the Government's desire for consensus on this matter cannot justify its attempts to ensure acquiescence by denying the voters information. The establishment of a Referendum Commission which will provide 'neutral' information on the referendum does not address this inadequacy.

The Government's proposals also run the risk of a clash between Irish law and Ireland's obligations under both EU and international human rights law. In particular, the proposals represent a rejection of concerns raised by the United Nations Human Rights Committee and fly in the face of the 1999 recommendation by the UN Committee on the Elimination of All forms of Discrimination Against Women that the Government initiate a debate with a view to liberalising Irish abortion law.

In sum then the Twenty-Fifth Amendment of the Constitution Bill represents an insult to all Irish women by reducing their right to life. It further insults women in crisis pregnancies who obtain abortions by equating them with traitors and by encroaching on their internationally protected human rights. In common with much of Government policy, this proposal impacts most negatively on poorer sections of Irish society:

*better-off women, with the Government's tacit approval, will be able to travel abroad to obtain an abortion if they so choose;*

*less well-off women will still travel but will have to delay their abortions as they will need time to raise funds for the costs of the journey to Britain or elsewhere plus the cost of the procedure itself, the later the abortion the greater the risk of physical or psychological complications, but the Government's proposals will ensure that no state assistance can be provided to them in advance of the abortion, although they may be able to access post-abortion counselling on their return to Ireland;*

*even poorer women will have to continue their pregnancy and attempt to care for a child that they may not have the resources to parent properly or - if they are truly desperate - they may terminate their own pregnancies, perhaps via a failed suicide attempt, in which case they risk a twelve year jail sentence rather than compassion or counselling.*

Finally, the Government insults the intelligence of the Irish public by attempting to deny them information on the adverse consequences of its proposal. The ICCL thus calls for the rejection of the proposal contained in the Twenty-Fifth Amendment of the Constitution Bill and calls on the Government and the Oireachtas to bring forward proposals aimed at ensuring that Irish women requiring abortions can access such services in Ireland.

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### **Summary**

**This chapter sets out the ICCL's position on abortion - namely that the Eighth Amendment to the Constitution should be repealed and legislation enacted to ensure the availability in Ireland of abortion services on the basis of a woman's right to choose. The chapter also contains a brief summary of the current legal situation in Ireland whereby abortion is, in general, prohibited by both criminal and constitutional law. However, exceptions have had to be carved out in both the criminal and constitutional prohibitions in order to deal with the reality of abortion. The chapter also looks at how the Twenty-Fifth Amendment of the Constitution Bill came to be formulated following on from the Government's 1999 Green Paper and the 2000 All-Party Oireachtas Committee's Report on Abortion. The chapter concludes by outlining elements of the current proposal, the net effect of which is to reduce the right to life of pregnant women.**

## The ICCL Position

The Irish Council for Civil Liberties believes that Irish-resident women should have access to legal abortion services in Ireland. In accordance with the submission of its Women's Committee to the Joint Oireachtas Committee on the Constitution,<sup>1</sup> the ICCL is of the view that a proposal should be put to the People to repeal Article 40.3.3 of the Constitution and that, following such an amendment, legislation should be introduced to facilitate access to abortion in Ireland on the basis of a woman's right to choose. In the absence of constitutional change, the ICCL believes that legislation should be introduced immediately to give effect to the Supreme Court ruling in the *X* case,<sup>2</sup> ie to facilitate access to abortion for women whose lives would be put at risk by the continuation of their pregnancy, whether the root of that risk is physical or mental. Legislation should also be introduced to decriminalise abortion.

The issue of abortion, along with the so-called "national question", is one of the longest-running and most divisive facing the Irish people. Indeed, both issues are in a sense inter-linked, as they raise profound questions relating to our sense of self as we are and as we would like to be and to our relationship with our nearest neighbour, Britain, and with the wider Europe.

<sup>1</sup>The text of the submission is available at <http://www.iccl.ie/women>.

<sup>2</sup>*Attorney General v X* [1992] IR 1.

## The Current Legal Position - A Summary

The current legal regulation of abortion in Ireland is based on two main provisions, the Offences Against the Person Act, 1861 and Article 40.3.3 of the Constitution - the so-called Eighth Amendment of 1983 (subsequently amended in 1992). Both the Westminster Parliament in the mid-Victorian era and the Irish people in the last quarter of the Twentieth Century attempted to lay down comprehensive prohibitions on abortion and in both cases legal absolutism was forced to yield to the reality of women's lives. In a bitter and ironic twist of fate, abstract legal principles were shaken to their core by the fate of two suicidal fourteen-year old girls, pregnant as the result of rape. The legal aspects of these cases will be discussed later in this paper, but the facts giving rise to them are outlined here.

In the *Bourne* case,<sup>3</sup> a British doctor, Aleck Bourne, was acquitted by a jury on the charge brought under the 1861 Act of unlawfully procuring the miscarriage of an un-named teenaged girl. This young woman had been brutally gang-raped by three soldiers one evening in London in 1938, as a result of which she became pregnant. Having given evidence in the trial of her assailants, they were convicted of a range of sexual offences, including rape. The girl's parents, being concerned about the adverse effect her pregnancy was having on her mental health, contacted the defendant, via another doctor, to see if he would terminate her pregnancy. Before agreeing to perform the abortion, Dr Bourne decided to keep the girl under observation to satisfy himself that she was not "feeble-minded" or of a "prostitute mind" and thus either sufficiently unaware or sufficiently immoral to bear a child conceived in rape. He was convinced of the need to perform an abortion when, in the course of his taking a vaginal swab for a pathological examination, her assumed cheerfulness broke down and she started to weep uncontrollably. It was this event that decided Dr Bourne that the teenager had to be relieved of her pregnancy because "[in] her there was nothing of the cold indifference of the prostitute". This rationale was expanded on in the trial judge's direction to the jury, whose attention was drawn by the judge to a poem by Swinburne entitled "Dolores", who was "a member of the prostitute class", "marked cross from the womb and perverse", unlike the unfortunate rape victim on whom Dr Bourne had performed an abortion.

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In the *X* case,<sup>4</sup> a teenaged girl, referred to in subsequent court proceedings as "Miss X", had been sexually abused by a family friend over an eighteen month period, as a result of which she became pregnant. Her abuser was subsequently convicted of unlawful carnal knowledge. When her parents discovered her pregnancy and the fact that she had been assaulted, they reported the matter to the Garda Síochána. Ms X and her parents decided, in light of the effect the pregnancy was having on her mental health, to have it terminated in England. The parents contacted the Garda to inform them of this decision and enquired if foetal tissue could be submitted in evidence in criminal proceedings against the abuser. Evidence subsequently given to the High Court showed that Ms X was greatly distraught and upset when she found out that she was pregnant. She informed her mother that she wanted to kill herself and told her father that death would be preferable to the situation that she found herself in. She also informed a Garda that she wanted to commit suicide by throwing herself down a flight of stairs. The Garda Síochána obtained legal advice to the effect that evidence as to the identity of her assailant obtained from an analysis of foetal tissue would not be admissible in court and the family, having been so informed, travelled to England to obtain an abortion. Prior to the operation, the Attorney General obtained an injunction prohibiting the abortion. The Garda gave notice of the injunction to Ms X's parents and they returned to Ireland. Upon her return to Ireland, Ms X was examined by an experienced clinical psychologist, in the course of which she again expressed the desire to kill herself. The psychologist formed the view that she was capable of committing suicide and that her mental health would be seriously damaged should she be forced to continue with her pregnancy. It was almost three weeks, following legal proceedings in both the High Court and Supreme Court, before Ms X was given permission to terminate her pregnancy because of the risk to her life posed by suicidal tendencies arising out of the abuse and pregnancy. As is explained in [Chapter Three](#), in November 1992, a Government proposal to over-turn the decision of the Supreme Court that Ms X should be allowed to terminate her pregnancy was defeated in a referendum.

From this brief account of the law it is clear that an absolute prohibition on abortion would lead to extreme hardship in certain cases. It is also clear that abstract attempts to impose such a ban have to be modified to take account of real life situations.

<sup>3</sup> [1939] 1 KB 687. For an analysis of the case see J Keown, *Abortion, Doctors and the Law* (1988), ch 3 and J Kingston, A Whelan and I Bacik, *Abortion and the Law* (1997), ch 3.

<sup>4</sup> Op cit. See Kingston, Whelan and Bacik, op cit, ch 1, for an analysis of this case.

## Recent Political Developments

As is outlined in [Chapter Three](#), the *X* case brought about a sea-change in Irish public attitudes to abortion. However, despite Government promises to introduce legislation to give effect to the *X* case ruling on abortion in the event of its November 1992 proposal to over-turn it being rejected, nothing was in fact done for several years. The recommendation of the Constitution Review Group in May 1996 that no further referenda should be held and that legislation to give effect to the Supreme Court's ruling on abortion in the *X* case should be introduced was ignored.<sup>5</sup> However, a further court case involving a suicidal teenager pregnant as a result of rape, Miss C, finally spurred the Government to initiate some show of action.<sup>6</sup>

In 1997 the Government set up a Cabinet Committee to oversee the drafting of a Green Paper, which was prepared by an inter-Departmental Working Group of officials, to consider how to deal with the issue of abortion. The public was invited to make submissions to the Working Group by 31 March 1998 and over 10,000 submissions were received. The Green Paper was published

and sent to the All-Party Oireachtas Committee on the Constitution in September 1999.<sup>7</sup> The Green Paper, having reviewed legal, medical and other submissions put forward seven possible ways of dealing with abortion: (i) introducing an absolute constitutional prohibition on abortion; (ii) permitting abortion where the life of the woman was put at risk by the continuation of pregnancy, except where the risk was one of suicide; (iii) retaining the status quo; (iv) retention of the constitutional status quo, but with a new criminal prohibition on abortion to replace the 1861 Act; (v) enacting legislation to give effect to the Supreme Court decision on abortion in the X case; (vi) repealing Article 40.3.3; and (vii) permitting abortion on wider grounds than those specified in the X case, such as risk to the mental or physical health of the pregnant woman, in cases of pregnancies arising out of rape or incest, in cases of foetal abnormality, on socio-economic grounds or on request.

The All-Party Oireachtas Committee also invited submissions from the public and received some 105,000 submissions - of these some 97 per cent were petitions or circular letters.<sup>8</sup> Having taken oral evidence at a series of public hearings between May and July 2000, the Committee suggested, in November 2000, three possible options: (i) retention of the status quo; (ii) legislation to give effect to the Supreme Court decision on abortion in the X case; and (iii) a constitutional amendment to prohibit termination of pregnancy in cases of risk to the life of the pregnant woman arising out of suicide.

<sup>5</sup> See Report of the Constitution Review Group, 1996, p 279.

<sup>6</sup> This case is described in Chapter 3.

<sup>7</sup> Green Paper on Abortion, 1999.

## **The Government's Proposal - A Summary**

The Government, having studied the All-Party Committee's Report, decided to press forward with the third option outlined above. Accordingly, the main thrust of the proposal contained in the Twenty-Fifth Amendment to the Constitution (Protection of Human Life in Pregnancy) Bill, 2001 is to overturn the decision of the Supreme Court on abortion in the X case and thus to reduce the constitutional right to life of women, by prohibiting termination of their pregnancy in circumstances where that pregnancy poses a real and substantial risk to their lives, arising out of the danger of suicide. The proposal would also enshrine a "constitutionalised" criminal offence coterminous with the prohibition on abortion. This proposal, aimed as it is at further reducing the status of women, is unacceptable to the ICCL. Unlike most constitutional changes which offer some hope of resolving a perceived problem (such as the constitutional changes arising out of the Nineteenth Amendment to the Constitution Act, 1998, which many see as paving the way for a resolution of the national question), the proposal contained in the Twenty-Fifth Amendment of the Constitution Bill offers nothing in the way of a solution to anyone seeking to deal with the phenomenon of Irish abortion.

## **The Structure of the Paper**

The paper first looks, in [Chapter Two](#), at the reality of Irish abortion in terms of medical practice in Ireland, the numbers of Irish-resident women availing of abortions in Britain, the reasons why women choose to terminate their pregnancies and the views of Irish people about abortion. The position paper then outlines in Chapter Three the history and current state of Irish abortion law. It also examines Ireland's EU and international legal obligations. Chapter Four looks at why, even in terms of the goals sought to be obtained by the Government, their proposal is flawed. This

chapter concludes with a recommendation that the Irish People should reject the proposal to amend the Constitution suggested by the Government.

<sup>8</sup>See All-Party Oireachtas Committee, *Fifth Progress Report: Abortion*, 2000

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## Chapter Two - The Reality of Irish Abortion

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### Summary

**This chapter examines current medical practice regarding abortion in Ireland and shows that a small number of abortions are performed in Ireland each year in order to save the lives of pregnant women where that risk is a physical one. Although legally permissible, abortions are not performed in Ireland where the risk to the woman's life is one of suicide, largely because of Medical Council guidelines. Regrettably, the Oireachtas All-Party Committee failed to garner evidence on suicide and pregnancy from expert witnesses with experience of dealing with pregnant suicidal women and also failed to look at other medical issues, such as adverse consequences to women's health arising out of pregnancy. The chapter also looks at the fact that at least seven thousand Irish women travel abroad annually, mainly to Britain, to have their pregnancies terminated for a wide variety of reasons. The chapter looks at public opinion in Ireland and concludes that the majority of Irish people favour greater availability of abortion services in Ireland.**

### Introduction

This chapter looks at the reality of Irish abortion. It first looks at medical practice in Ireland. It then looks at the numbers of Irish women having abortions abroad and their reasons for doing so. Finally, the chapter looks at Irish public opinion on the issue of abortion.

### Current Medical Practice

### Physical Medical Indications for Abortion

Despite the considerable public debate on abortion in Ireland over the past twenty years, it was only after the publication of the Oireachtas All-Party Committee's Fifth Progress Report on Abortion in November 2000 that public debate reflected the fact that a small number of pregnancy terminations are performed in Ireland each year to save pregnant women whose lives are put at risk by their pregnancies, where such risks arise out of physical factors. Evidence adduced by the Inter-Departmental Working Group on Abortion<sup>9</sup> and written and oral medical evidence given to the Committee<sup>10</sup> indicates that pregnancy poses a physical threat to women's lives in a number of situations. The evidence given to the Committee was that the standard medical text-book definition of "induced abortion" (or "induced miscarriage") includes any action taken to terminate a pregnancy prior to foetal viability. As will be seen in [Chapter Three](#), this definition appears to equate with the legal definition of "procured miscarriage". Accordingly, the term "abortion" as used in this paper means induced abortion as defined in the standard terminology.<sup>11</sup> Terms such as "termination of pregnancy" are also used.

Pregnancy termination may be necessary in cases of cancer of the cervix, where hysterectomy is a necessary part of the medical treatment of the pregnant woman: such treatment would in canon law constitute an "indirect" abortion. As is discussed in Chapter Three, this concept does not form part of Irish law. Termination of ectopic pregnancies, where the foetus has developed outside the womb, normally in the fallopian tube, will also require to be terminated. Previously, ectopic pregnancies were terminated by removing the fallopian tube, thus constituting "indirect" abortions. However, evidence given by Senator Mary Henry, a medical doctor, to the Committee indicates that current medical practice permits the direct removal of the foetus from the fallopian tube.<sup>12</sup> Women suffering from high blood pressure or cardiac problems may also require abortions; in such cases termination of pregnancy is effected by directly removing the foetus from the womb. Haemorrhage in pregnancy may also put women's lives at risk and termination may be required in order to avert that risk.

Evidence was also given to the Committee that in many jurisdictions abortions are performed in cases of foetal abnormality incompatible with life, in particular where the foetus suffers from anencephaly: a congenital abnormality where the foetus has an undeveloped brain. In Ireland, despite the fact that an anencephalic foetus has no chance of remaining viable outside of the womb, pregnancy cannot be terminated until approximately twenty-six weeks, at which stage a normal foetus might be viable. As Senator Henry explained in her evidence to the Committee, the anencephalic foetus is only notionally viable, but that notional viability permits termination of pregnancy at that stage.

Extraordinarily, medical experts were not asked to give the Committee any information on adverse consequences for women's health, mental or physical, falling short of risk to life, arising out of pregnancy. Similarly, the Green Paper did not deal with this issue and its chapter entitled "Pregnancy and Maternal Health" deals only with life-endangering situations arising during pregnancy. This omission is particularly significant in that, as the Committee's Report itself notes, 99.7 per cent of abortions performed in Britain on Irish-resident women are performed on the basis of risk to the physical or mental health of the pregnant woman or her existing children.<sup>13</sup> Furthermore, as is explained below, a significant percentage of the Irish public would likely support abortion in cases of serious risk to the health of the pregnant woman.

<sup>9</sup> See chapter 1 of the Green Paper.

<sup>10</sup> See [appendix IV](#) and [appendix II](#), respectively, to the Report.

<sup>11</sup> The only doctors appearing before the Committee who challenged this definition were those who for ideological reasons did not wish to admit that abortion should ever be permitted. They did however indicate that it was necessary in certain instances to terminate pregnancies prior to viability.

<sup>12</sup> See p A412 of the Report

<sup>13</sup> See p 86 of the Report.

## Suicide and Pregnancy

Despite the Supreme Court decision in the *X* case,<sup>14</sup> it appears that abortions are not performed in Ireland on that basis, largely because of Medical Council Guidelines prohibiting abortion in such circumstances. The Guidelines are discussed further below. The Government's approach to pregnancy, suicide and abortion relies on the All-Party Oireachtas Committee's examination of these issues; the Committee's approach appears to be coloured by the findings of the Green Paper on this issue, which includes, without question, a conclusion in the private Rawlinson inquiry on abortion purporting to show that the Royal College of Psychiatrists, the professional body representing psychiatrists in Britain and Ireland, was of the view that there is no psychiatric justification for abortion.<sup>15</sup> However, as Medb Ruane's research indicates, this representation of the Royal College's collective view-point appears to be incorrect.<sup>16</sup> Despite statistical evidence showing that pregnant women are less likely to commit suicide than other women, no evidence was presented to the Committee of research as to the comparative suicide rates of women with unwanted pregnancies presenting as suicidal denied abortion and those permitted to have abortions. Dr John Sheehan quoted a Finnish study to the effect that statistically women who have had abortions are more likely to commit suicide than women who had given birth to a live baby or who had miscarried.<sup>17</sup> However, the authors of that study have subsequently pointed out that they had not studied, and were not aware of, any data comparing suicide rates of women with unwanted pregnancies who were denied abortion and those who obtained abortion. They further indicated that, in their view, for many women abortion might be an answer to unwanted pregnancy and a relief.<sup>18</sup> The evidence presented to the Committee did, however, show that pregnant women do commit suicide, including women denied abortions, and that suicide rates amongst pregnant women have dropped post-legalisation of abortion in some countries.<sup>19</sup> It would appear that negative social attitudes to abortion and delays in accessing abortion may increase the risk of adverse physical and psychological consequences for women, but no attempt is made to identify measures to remove these factors.

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All the psychiatrists who gave evidence indicated that it was difficult to predict whether or not a person would commit suicide. The multiple and complexly inter-related factors involved in assessment and determining appropriate intervention were also emphasised. However, Dr Geraldine Moane, a clinical psychologist, indicated that there are well-established guidelines and instruments for suicide assessment and intervention. Of course, medical personnel do assess clients for risk of suicide and take appropriate measures of intervention, which may include involuntary detention of a potentially suicidal person. Regrettably, the Committee did not hear any medical evidence from doctors who had personal experience of the issue. Fred Lowe, the clinical psychologist who gave evidence in the *X* case did appear before the Committee but did not give evidence about his experience. It is clear, however, that the psychiatrist in the *C* case,<sup>20</sup> discussed in Chapter Three, was of the view that abortion was the appropriate treatment of the thirteen year old pregnant and suicidal rape victim before the court. Similarly, in the four cases brought before the Northern Irish High Court in the 1990s seeking directions as to the lawfulness of proposed abortions, expert psychiatric evidence indicated that abortion was an appropriate treatment to relieve adverse mental health consequences, including the risk of suicide, arising out of pregnancy in each instance.<sup>21</sup> The authority of the All-Party Committee's Report is considerably lessened by its failure to elucidate evidence from psychiatrists and other medical personnel who have dealt with and treated pregnant suicidal women, despite the fact that it should have been possible to obtain such evidence, in camera if necessary, from the doctors who gave evidence in the *C* case and in the four Northern Irish cases dealt with in [Chapter Three](#). The Committee did not even hear evidence as to the mental health consequences of crisis pregnancy

but instead seems to have looked at statistical evidence relating to mental health in pregnant women as a whole, which is largely irrelevant to the question of abortion.

<sup>14</sup> [1992] 1 IR 1.

<sup>15</sup> See p 63-4 of the Green Paper.

<sup>16</sup> See Irish Times, 1 February 2002, p 14.

<sup>17</sup> M Gissler and others, "Suicide after pregnancy in Finland, 1987-94" (1996) 313 BMJ 1431.

<sup>18</sup> See the authors' letter: (1997) 314 BMJ 902.

<sup>19</sup> See in particular the evidence of Dr Anthony Clare.

## Medical Council Guidelines

The 1993 edition of the Medical Council's Guide to Ethical Conduct and Behaviour and to Fitness to Practise provided that "While the necessity for abortion to preserve the life or health of the sick mother remains to be proved, it is unethical always to withhold treatment beneficial to a pregnant woman, by reason of her pregnancy." This phraseology was particularly ambiguous, especially as the Medical Council also indicated that it was not intended to "reflect in any manner whatsoever" on the Supreme Court decision in the X case.<sup>22</sup> The 1998 edition of the Guide, however, provided that "The deliberate and intentional destruction of the unborn child is professional misconduct. Should a child in utero suffer or lose its life as a side-effect of standard medical treatment of the mother, then this is not unethical. Refusal by the doctor to treat a woman with a serious illness because she is pregnant would be grounds for a complaint and could be considered to be professional misconduct." The 1998 provision appears clearly to conflict with the decision in the X case. It also appears to call into question existing medical practice involving termination of pregnancy by means of direct removal of the foetus from the womb. In May of 2001 the Council's policy was temporarily changed to allow for abortion in cases of "real and substantial risk" to the life of the pregnant woman, including the risk of suicide, and in cases of "foetal abnormality incompatible with life outside the womb".<sup>23</sup> This policy would have allowed doctors to perform abortions in the situations envisaged by the Supreme Court in the X case and would also have permitted abortion of anencephalic foetuses, without the necessity to resort to the concept of "notional viability". However, in September 2001 the Council adopted a new guideline providing that termination of pregnancy is permissible only in cases of a "real and substantial risk" to the life of the pregnant woman.<sup>24</sup> The new guideline appears to require Irish doctors to continue to operate the fiction of viability when determining the date on which an anencephalic foetus can be aborted. The guideline does appear to recognise that abortion may be necessary and does not in terms run contrary to the X case decision. However, a statement by the Council that it subscribed to the view of the Institute of Obstetricians and Gynaecologists as given to the All-Party Oireachtas Committee indicates otherwise, as the Institute's submission did not include suicide as a ground rendering termination of pregnancy medically necessary.

<sup>20</sup> [1998] 1 IR 464.

<sup>21</sup> These cases are also discussed in [Chapter Three](#).

<sup>22</sup> See Kingston, Whelan and Bacik, p 23.

<sup>23</sup> See Irish Times, 12 September 2001, p 7.

## The Reality of Irish Abortion

Despite the fact that abortion is unobtainable in almost all circumstances in Ireland, it is clear that Irish abortions do occur, albeit largely in Britain. In their comprehensive survey of Irish abortion Evelyn Mahon, Catherine Conlon and Lucy Dillon,<sup>25</sup> on the basis of the then available statistics,

estimated that the Irish abortion rate was 5.6 abortions per year 1000 women of child-bearing age (15-44) (this figure had risen to 7.2 in 1999).<sup>26</sup> Alternatively, they calculated that 8.5% of all Irish pregnancies result in abortion. British statistics show that the recorded numbers of Irish women having abortions has been steadily rising and that in 2000 6,381 women having abortions in Britain indicated that they were resident in this State. This compares to Central Statistics Office figures showing that 54,239 births were registered in the State in 2002, which indicates that the percentage of pregnancies ending in abortion is also rising. It is widely accepted that many Irish-resident women do not give their real addresses when obtaining abortions in Britain,<sup>27</sup> and therefore it is impossible to estimate with accuracy the real number of Irish women availing of abortion services, except to say that the true figures are higher than the above-quoted official statistics indicate. British statistics also indicate that eighty per cent of Irish women have their pregnancies terminated in the first twelve weeks of pregnancy (although the percentage of Irish-resident women having later abortions is higher than that of British-resident women), eighty per cent are single and fifty-three per cent are under twenty-four.<sup>28</sup> The fact that Irish women have later abortions than their British counterparts may indicate that many have difficulties in accessing information; furthermore, the need to raise the funds necessary to pay for the cost of travelling to Britain and obtaining accommodation there as well as for the abortion itself are likely to cause significant difficulties for less well-off women.

<sup>24</sup> See Irish Times, 15 September, 2001, p 7.

<sup>25</sup> *Women and Crisis Pregnancy*, 1998.

<sup>26</sup> See the All-Party Committee's Report, p 86.

<sup>27</sup> See eg Irish Women's Abortion Support Group, *Abortion Information Handbook*, 1995, p 2.

<sup>28</sup> See the All-Party Committee's Report, p 86.

The Mahon report is the best available *qualitative* study of the reasons why Irish women decide to terminate their pregnancies, comprising as it does data collated from interviews with eighty-eight Irish-resident women availing of abortion services in British clinics. The reasons given by the women for choosing abortion included career and job-related concerns and concerns relating to education and training, fear of the effects of the stigma of lone parenthood on the women themselves and on their families, financial difficulties, concern for existing children, feelings of being unable to cope with a child, concerns that they were too young or too old to have a child and the desire to exercise the right to control of their fertility. There is no evidence that the lack of legalised abortion in Ireland has had any effect on the Irish abortion rate, although the expense entailed in travelling to Britain and the cost of paying for the abortion itself may cause difficulties, particularly for less well-off women and other vulnerable groups. In some instances this may mean that Irish women cannot travel to Britain, but more often it means that they have abortions later than they would wish. The visit of the Dutch ship *Aurora* to Dublin in May of last year, which led to many Irish women seeking to obtain on-board abortions showed that requiring women to travel abroad to obtain abortions results in extreme hardship for a significant number.<sup>29</sup>

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## Public Opinion

It is difficult to establish the views of Irish people on abortion: for example, in November 1992, approximately two thirds of voters voted against the Government's proposal to exclude risk of suicide as a ground for termination of pregnancy in Ireland, but some did so because they thought the proposal would undermine women's right to life, whereas other did so because they felt that it did not give sufficient protection to the unborn. Furthermore, some people may have

voted in favour of the proposal because they (mistakenly) assumed that it would provide increased protection to Irish women. The net effect of the vote on the three November 1992 referenda was to support proposals to liberalise the law relating to abortion information and travel and to reject a proposal that would have restricted the constitutional right to life of pregnant women identified by the Supreme Court in the X case. It is worth noting that, despite protests from anti-abortion campaigners about the democratic entitlement of the people to vote to outlaw abortion, the people have never been given the democratic right to vote for a liberalisation of abortion law and when they were last given the chance to change the law they refused to restrict the right to abortion and favoured the liberalising of the law in the ancillary areas of travel and information.

Surveys asking members of the public if they favour an abortion referendum are meaningless unless it is indicated what type of referendum is being sought.<sup>30</sup> Surveys consisting of questions put to the public as to whether or not they favour a particular legislative or constitutional proposal are of limited value unless the proposal is understood by respondents: for example, a survey carried out by Ireland on Sunday in October of last year, shortly after the Government announced its proposal to amend the Constitution showed that 53 per cent supported it, 35 per cent opposed it and 12 per cent did not have an opinion; conversely 49 per cent of the respondents favoured liberalising Irish abortion law, with only 31 per cent wishing to make abortion legally more difficult to obtain. Clearly, therefore, the response of some members of the public reflected a lack of understanding as to the actual nature of the Government's proposal. A recent Irish Times/MRBI poll that showed thirty-nine per cent of voters planning to vote in favour of the proposal, with thirty-four per cent planning to vote against and twenty-one per cent undecided, would, on the evidence of past referenda, indicate that the proposal will be rejected. This is because there is a pattern of constitutional amendments proposed by governments losing support as polling day approaches.<sup>31</sup> The fact that the question put to voters by the MRBI, which states that the proposal will protect the unborn from implantation rather than fertilisation, may be somewhat misleading as it could be read as indicating that the proposal will legalise post-coital contraception, which, as is explained in Chapter Four, is not the case. Thus the poll likely understates opposition to the proposal from those tending to favour increased access to reproductive health services.

<sup>29</sup> See Irish Times, 14 June 2001, p 3.

<sup>30</sup> See the December 1997 Irish Times/MRBI poll which showed that 32 per cent of respondents wanted the law on abortion to remain the same, while 16 per cent wanted legislation to give effect to the X case and 52 per cent wanted a referendum.

<sup>31</sup> See Irish Times, 26 January 2002, p 1, 5.

In-depth surveys may, however, provide a truer illustration of public opinion. In this context, a survey carried out by Lansdowne Market Research Limited for Abortion Reform in March 2001 is of interest.<sup>32</sup> 1,200 persons over the age of fifteen were asked to give their views on the three options put forward by the All-Party Oireachtas Committee, the three options having been explained: of these 36 per cent favoured maintaining the status quo, whereby women are constitutionally entitled to avail of abortion only where necessary to prevent a risk to her life, whether for physical reasons or because of the risk of suicide, but where no legislation exists setting out procedures whereby the woman may avail of this entitlement; the same percentage favoured the enactment of legislation to give effect to women's entitlement to avail of abortion where necessary to prevent risk to life, whether for physical reasons or because of the risk of suicide; seventeen per cent favoured amending the Constitution to maintain the right to abortion where a woman's life is physically at risk, but excluding suicide as a ground for abortion (twelve per cent of respondents refused to answer the question). This aspect of the Abortion Reform poll is of interest, as the respondents were given information on the existing legal situation and the effect of the possible constitutional amendment. However, the poll is particularly valuable in that it

asks respondents to respond not only to legal questions, but also to give their views as to whether abortion should be available in particular sets of factual circumstances.

<sup>32</sup> Details of the poll are available at <http://www.abortionreform.ie>.

Respondents to the Abortion Reform poll were asked whether abortion should be available in Ireland in one or more of a number of instances. Fifty-two per cent of respondents indicated that abortion should be permitted where a woman's life is physically at risk; forty-seven per cent thought abortion should be available in cases of rape or incest; forty-one per cent thought abortion should be permissible when continuation of pregnancy would cause irreparable damage to the woman's health; thirty-seven per cent thought that women at risk of suicide should be permitted to terminate their pregnancy; twenty-three per cent thought it should be permissible in cases of foetal abnormality incompatible with life; nineteen per cent thought that abortion should be available on request; and six per cent thought abortion should be available on socio-economic grounds. Sixteen per cent of respondents thought that abortion should never be available and five per cent did not know.

## **Conclusion**

This chapter has shown that abortion does occur in Ireland, albeit in very limited circumstances. However, the vast majority of the thousands of Irish abortions performed annually take place abroad. A variety of factors may lead a woman to seek an abortion abroad. The Irish public has no overall view on abortion, although significant percentages support either abortion on request or a total ban on abortion, the majority of people's views on abortion are somewhere in between and differ depending on the reasons put forward for terminating a pregnancy. It appears, however, that a significant proportion of the public favour greater rather than lesser access to abortion in Ireland.

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## **Chapter Three - Irish Law and Ireland's EU and International Obligations**

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**Summary**

**This chapter examines the current criminal and constitutional prohibitions on abortion. It explains that both the criminal law and the Constitution provide for exceptions to the general prohibition, although the scope of these exceptions is not necessarily the same, with the criminal law providing for a greater degree of leeway than the Constitution. In neither instance has it been found possible to maintain an absolute ban on abortion while protecting the life of pregnant women. Recent experience in both this jurisdiction and in Northern Ireland, show that unwanted pregnancy can pose severe risks to the life and health of pregnant women. In this, the Irish experience mirrors that of Britain and other common law countries that imposed a general prohibition on abortion. The chapter also looks at the current legal regulation of information on abortion services abroad and on freedom to travel abroad for an abortion. The law on travel results in a situation whereby access to abortion is determined on the basis of ability to pay, with a disproportionate burden being placed on women in deprived socio-economic circumstances. The chapter also explains that any future change in Irish law restricting the right to abortion is susceptible to review by the European Union and also runs the risk of falling foul of Ireland's international human rights obligations.**

## **Introduction**

The first part of this chapter looks at the current statutory and constitutional regulation of abortion in Ireland. The law in Northern Ireland is also considered. Aspects of the law on abortion information and the freedom to travel abroad to obtain abortions are then outlined. The second part of the chapter looks at the relationship between Irish and EU law concerning abortion and also examines the compatibility of Irish law with Ireland's international human rights obligations.

## **Irish Law**

At present, abortion is prohibited as a matter of constitutional law, by virtue of Article 40.3.3 of the Constitution, and is a criminal offence under the provisions of sections 58 and 59 of the Offences Against the Person Act, 1861. However, both constitutional and criminal law admit of exceptions to the general prohibition on abortion.

## **The Criminal Law**

At common law abortion was not treated as homicide. The law relating to murder and manslaughter applied only where the victim achieved an existence independent from that of his or her mother. Abortion was, however, regarded as a misdemeanour (ie a relatively minor criminal offence), when the foetus had "quickened" in the womb. Quickening was thought to occur when the foetus's movements in the womb became noticeable to the pregnant woman and occurred at some time in the second trimester of pregnancy.<sup>33</sup> In 1803, the Miscarriage of Women Act (commonly referred to as "Lord Ellenborough's Act" made abortion of a quickened foetus a felony (ie a serious criminal offence) punishable by death and provided less serious penalties with regard to earlier abortions. The stated purpose of the legislation was the protection of pregnant women, whose lives could be put at risk by unsafe abortion.<sup>34</sup> The Offences Against the Person Act, 1837 abolished the distinction between quickened and non-quickened fetuses. The current criminal prohibition on abortion is set out in section 58 of the Offences Against the Person Act, 1861 which provides that:

*Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether or not she be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and on being convicted thereof shall be liable to be kept in penal servitude for life.*

Section 59 of the Act created the offence of "unlawfully" supplying or procuring poisons and instruments knowing that they are intended to be used to procure a miscarriage.

The 1861 Act uses the term "miscarriage" rather than "abortion" and it has been argued that not all induced terminations of pregnancy resulting in foetal death constitute miscarriages: eg the ending of foetal life in the womb followed by its expulsion. However, it is likely that the 1861 Act covers such procedures.<sup>35</sup> It has also been argued that the 1861 Act draws a distinction between so-called "direct" and "indirect" abortions and excludes the latter from its scope.<sup>36</sup> This distinction is closely linked to the concept of "double effect", which is found in medical ethics and Roman Catholic theology. The proponents of the double effect doctrine argue that it arises where an action (or means) has two effects (or ends) one of which, the principal effect, is desired and one of which, the subsidiary effect, is not desired. The principal effect must necessitate the means adopted - ie if another means could be used which would bring about the primary end, but not the secondary end, it must be utilised. Furthermore, the moral desirability of the primary end must outweigh the moral repugnance of the secondary end. Importantly, the doctrine has traditionally required that the means used must only indirectly bring about the subsidiary end.<sup>37</sup> Thus, in the case of an ectopic pregnancy, where the foetus has implanted itself in the fallopian tube rather than the womb, the tube may be removed from the woman thus indirectly removing the foetus but it is impermissible to remove the foetus from the tube directly. It is argued by its proponents that in situations where the doctrine arises the secondary end is not "intended". However, while the term intention may be equated with desire in ordinary discourse and in ethical or theological discourse, in law one is presumed to intend the natural and probable consequence of one's actions and thus it seems clear that the 1861 Act does not in fact draw a distinction between direct and indirect abortion.<sup>38</sup> As has been explained in Chapter Two, it is clear that a small number of "direct" abortions are performed each year in Irish hospitals.

<sup>33</sup> In some ways, the common law's distinction between quickened and un-quickened foetuses is similar to the distinction between "ensouled" and "un-ensouled" foetuses formerly espoused by the Roman Catholic Church, a distinction to which some Islamic thinkers still adhere. Augustine was of the view that ensoulment occurred forty days after conception in the case of male foetuses and at ninety days after conception where the foetus was female. From 1588 the Roman Catholic Church was of the view that ensoulment occurred at conception, but it was not until 1869 that all induced abortion was declared to be wrong: see D Mitchell, "An Argument for Christian Conservatism in the Abortion Debate Within a Contemporary Secular Society" [1999] University College London Law Review 220.

<sup>34</sup> See E Veitch and R Tracey, "Abortion in the Common Law World" (1974) 22 American Journal of Comparative Law 652.

<sup>35</sup> See P Charlton, *Offences Against the Person* (1992), p 184.

<sup>36</sup> See R Byrne and W Binchy, *Annual Review of Irish Law* 1992 (1994), pp 167 et seq.

<sup>37</sup> See Kingston, Whelan and Bacik, op cit, p 56 and Mitchell, op cit, p 223.

<sup>38</sup> See G Hogan, "Law, Liberty and the Abortion Controversy" in A Whelan (ed), *Law and Liberty* (1993), p 115.

The fact that the 1861 Act does not draw a distinction between indirect and direct abortion does not, however, mean that it does not permit abortion in certain circumstances. The seminal case (although not the first)<sup>39</sup> on the interpretation of section 58 was *R v Bourne*.<sup>40</sup> The facts of this case were outlined in [Chapter One](#): Dr Bourne was charged with committing an offence under section 58 after he confessed to the police that he had performed an abortion on a teenaged girl, pregnant as the result of rape, because of the adverse effect of the pregnancy on her mental health. In the resulting court proceedings the trial judge, Macnaghten J, directed the jury that

section 58, by referring to the "unlawful" procuring of miscarriages, had to be interpreted as permitting abortion where necessary to preserve the life of the pregnant woman. Macnaghten J was of the view that it was not possible to draw a clear distinction between life and health, as grave impairment of health could result in death. He also was of the view that the psychological as well as the physical life of the woman had to be preserved and directed the jury that if a doctor "is of the opinion, on reasonable grounds, that the probable consequence of the pregnancy will be to make the woman a physical or mental wreck" the termination of her pregnancy could be regarded as being lawful within the meaning of section 58. Applying this test the jury acquitted Dr Bourne. Subsequent British cases, prior to the liberalising of the law by the Abortion Act, 1967, followed the line of reasoning in the *Bourne* case. Many other common law jurisdictions, including Australia, Canada, a number of US states, British East Africa, British West Africa, Fiji and New Zealand, based their abortion law on the 1861 Act and the legislation in all these countries was interpreted along the lines set out in the *Bourne* case.<sup>41</sup>

<sup>39</sup> See J Keown, *Abortion, Doctors and the Law* (1992), ch 3.

<sup>40</sup> [1939] 1 KB 687; [1938] 3 All ER 615.

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The Irish courts have never dealt with a defence to a charge brought under section 58 similar to that raised in the *Bourne* case, although a number of brief and contradictory references to section 58 and its interpretation have been made by Supreme Court judges in the *X* case and a subsequent case regarding abortion information.<sup>42</sup> However, the Northern Irish High Court has dealt in some depth with its scope in the context of a number of applications made to it in the 1990s by health authorities seeking to obtain abortions for girls and young women in their care: these cases again followed the reasoning in *Bourne* and are discussed in more detail below in the context of suicide and pregnancy.

There is a certain lack of clarity as to whether the 1861 Act prohibits abortion from the moment of fertilisation or only relates to implanted foetuses. The only Irish case that mentions the issue does so only in passing, but assumes that section 58 applies pre-implantation.<sup>43</sup> British writers differ on this issue,<sup>44</sup> but the matter will come up for determination in the English courts shortly as the Society for the Protection of Unborn Children in Britain has obtained leave to seek judicial review on the legality of sales of the morning after pill, which the Society claims is contrary to section 58.<sup>45</sup> Following on from the British anti-abortion movement's challenge to the morning-after pill, a newly formed Irish anti-abortion group, Ireland for Life, set up to oppose the Twenty-Fifth Amendment to the Constitution Bill, is seeking to bring a similar claim under the 1861 Act in the Irish High Court.<sup>46</sup>

<sup>41</sup> See Kingston, Whelan and Bacik, ch 3 for a discussion of these cases.

<sup>42</sup> *Society for the Protection of Unborn Children (Ireland) Limited v Grogan and Others* [1998] 4 IR

<sup>43</sup> See the judgment of Hamilton P in *Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd v Open Door Counselling Ltd and Dublin Well Woman Centre Ltd* [1988] IR 593, p 598.

<sup>44</sup> See Kingston, Whelan and Bacik, pp 53-4.

<sup>45</sup> The Times, 3 May 2001.

<sup>46</sup> See Irish Times, 28 January 2002, p 5.

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## Constitutional Law

Article 40.3.3 of the Constitution, inserted into the Constitution by means of the Eighth Amendment in 1983, and subsequently amended in 1992 by the Thirteenth and Fourteenth Amendments, is the core Irish legal provision relating to abortion. However, before looking at Article 40.3.3 it is necessary to examine the pre-existing constitutional provisions and jurisprudence and the political issues that led up to the adoption of the Eighth Amendment.

Prior to the entry into force of the Eighth Amendment, the Constitution did not contain any explicit protection for the unborn. Article 40.3.1 of the Constitution does, however, provide that the State "guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the [unspecified] personal rights of the citizen." Article 40.3.2 further provides that the State "shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." Immediately after its entry into force in 1937, the fundamental rights provisions of the Constitution were relatively under-utilised, but in the 1960s the High and Supreme Courts started to develop an extensive jurisprudence on fundamental rights: this approach reflected the fact that more and more lawyers and members of the judiciary had been trained post-independence. The increasing activism of Irish judges mirrored trends in other jurisdictions, most notably perhaps the United States. The Irish judges were given a relatively free hand by the relatively open-textured nature of the fundamental rights provisions of the Constitution and Article 40.3.1 in particular.<sup>47</sup>

The new constitutional jurisprudence did not have to deal directly with the issue of abortion, but a number of cases dealing with the personal rights protected by Article 40.3, as well as the rights of the family protected by Article 41, did touch on it. The first of these cases was the landmark decision of the Supreme Court in *McGee v Attorney General*<sup>48</sup>. In that case a majority of the Supreme Court identified a right to marital privacy as an un-enumerated personal right protected by Article 40.3 and ruled further that this right included a right to use contraception. Although abortion was not at issue in this case, two of the judges, Walsh J<sup>49</sup> and Griffin J, did deal with it and stated that the Constitution did not provide for a right to abortion. Walsh J reiterated his view that the Constitution provided for a right to life for the unborn in a subsequent case dealing with adoption<sup>50</sup> and this view was further endorsed by McCarthy J in another Supreme Court case dealing with criminalisation of sexual acts between men.<sup>51</sup> Barrington J, in the High Court, dealing with a challenge to the holding of the Eighth Amendment also stated his view that the unborn was protected by the Constitution as it stood.<sup>52</sup>

Despite these cases, anti-abortion activists were concerned that the courts might identify a right to abortion as part of the un-enumerated right to privacy protected by the Constitution. This fear arose partly out of developments in US jurisprudence, where the right to marital privacy, including a right to avail of contraception, had been identified by the US Supreme Court in the case of *Griswold v Connecticut*<sup>53</sup>. The *Griswold* case had been cited in *McGee* and was used by the US Supreme Court in its landmark ruling that the un-enumerated right to privacy guaranteed by the United States Constitution included a right to abortion. Thus anti-abortionists feared that the Irish judiciary, despite their protestations to the contrary, might find that the Constitution contained an un-enumerated right to abortion. They were also concerned that the Oireachtas might repeal or modify sections 58 and 59 of the Offences Against the Person Act, 1861. Certain anti-abortion activists came together to form the Pro-Life Amendment Campaign (out of which grew the current Pro-life Campaign) to lobby for an explicit constitutional prohibition on abortion. This lobbying eventually led to the passing by the Houses of the Oireachtas of the Eighth Amendment to the Constitution Bill, 1983.

<sup>47</sup> See G Hogan and G Whyte, JM Kelly: *The Irish Constitution*, 3rd ed, 1994, pp671 et seq for a general history of the development of Irish constitutional jurisprudence.

<sup>48</sup> [1974] IR 284.

<sup>49</sup> Walsh J relied primarily on Article 41 in identifying the right to marital privacy.

<sup>50</sup> *G v An Bord Uchtála* [1980] IR 32.

<sup>51</sup> *Norris v Attorney General* [1984] IR 36.

<sup>52</sup> *Finn v Attorney General* [1983] IR 154.

<sup>53</sup> (1965) 381 US 479.

The history of the drafting of the Bill and its passage through the Houses of the Oireachtas is a curious one. The form of wording proposed by the Pro-Life Amendment Campaign, which now forms the first paragraph of Article 40.3.3, was initially endorsed both by the Fianna Fáil Government and the opposition Fine Gael party. Following the collapse of the Fianna Fáil Government, the new Fine Gael-Labour Government were advised that the wording proposed by the Pro-Life Amendment Campaign might facilitate the introduction of abortion and the then Attorney General, Peter Sutherland, drafted a new proposal which would have prevented the courts from declaring unconstitutional any prohibition on abortion.<sup>54</sup> The Government wording was rejected by the Dáil and Seanad, which led to the Government campaigning against the Eighth Amendment. Following a long and bitter campaign, the People voted on 7 September 1983 to insert a new provision - Article 40.3.3 - into the Constitution.<sup>55</sup>

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The new Article 40.3.3 provided that:

*"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."*

This new constitutional provision was not supplemented or fleshed out in any way by the Oireachtas and the 1861 Act continued to be the sole legislative provision dealing with abortion in the State. It was not until the case of *Attorney General v X*<sup>56</sup> in 1992 that the courts had to deal with abortion and, in particular, with the conflict between the rights to life of the pregnant woman and of the unborn. However, a series of cases initiated at the behest of or by an anti-abortion group, the Society for the Protection of Unborn Children (Ireland) Ltd (SPUC), led to restrictions on the provision of information on abortion services available in other countries, most notably Britain.

The first of the information cases was initiated by SPUC in 1985 against two non-directive pregnancy counselling services, Open Door Counselling and the Dublin Well Woman Centre.<sup>57</sup> SPUC sought an injunction against the two clinics prohibiting them from providing information and assistance to pregnant women seeking to avail of abortion services abroad. Following a challenge to its entitlement to initiate proceedings, the Attorney General, at SPUC's request, took over the case. Hamilton P issued an injunction in the High Court against the defendant clinics. Following the unanimous rejection of their appeal, the Supreme Court granted a permanent injunction restraining the clinics from assisting pregnant women in the State to travel abroad to obtain abortions by referral to a clinic, by making travel arrangements for them, by informing them of the identity and location of clinics abroad providing abortions or by assisting them in any other way.<sup>58</sup> The basis for granting the injunction was that the provision of such assistance constituted an infringement of the right to life of the unborn set out in Article 40.3.3. The clinics subsequently obtained a judgment from the European Court of Human Rights holding that the injunction infringed their right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights.

<sup>54</sup> The proposed wording was as follows: "Nothing in this Constitution shall be invoked to invalidate or deprive of force or effect any provision of a law on the grounds that it prohibits abortion."

<sup>55</sup> For a history of the events leading up to the insertion of the Eighth Amendment into the Constitution see T Hesketh, *The Second Partitioning of Ireland? The Abortion Referendum of 1983* (1990) and E O'Reilly, *Masterminds of the Right* (1992).

<sup>56</sup> [1992] 1 IR 1.

<sup>57</sup> *Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd v Open Door Counselling Ltd and Dublin Well Woman Centre Ltd* [1988] IR 593. For an analysis of this case see Kingston, Whelan and Bacik, ch 5.

<sup>58</sup> *Open Door Counselling and Others v Ireland* (1993) 15 EHRR 244. This case is further discussed below in the context of Ireland's international obligations.

Following the granting of the injunction against Open Door Counselling and the Dublin Well Woman Clinic, SPUC turned its attention to the provision by students' unions, in hand-books distributed free of charge to their members, of information concerning the location and identity of abortion clinics in Britain. Having successfully established its right to initiate proceedings seeking injunctions against the unions in a case brought against officers of the UCD Students' Union,<sup>59</sup> SPUC initiated High Court proceedings against officers of the Union of Students in Ireland, UCD Students' Union and TCD Students Union seeking an injunction prohibiting them from providing such information. Carroll J in the High Court decided to refer the matter to the Court of Justice of the European Communities to see whether such an injunction would contravene the freedom to provide services guaranteed by EC law and did not grant an injunction. The Supreme Court however did issue a temporary injunction, pending the Court of Justice's ruling, on the basis that the information contained in the student handbooks contravened the right to life of the unborn guaranteed by Article 40.3.3.<sup>60</sup> Subsequently, in 1991, the Court of Justice decided that as there was no commercial link between the students' unions and the British clinics referred to in the handbooks no question of EC law arose.<sup>61</sup> Following the Court of Justice ruling, the High Court granted a permanent injunction against the students' unions.<sup>62</sup>

<sup>59</sup> See *Society for the Protection of Unborn Children (Ireland) Ltd v Coogan* [1989] IR 734.

<sup>60</sup> See *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan* [1989] IR 753.

<sup>61</sup> See Case C-159/90, *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan* [1991] ECR I-4685.

<sup>62</sup> See *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan* [1994] 1 IR 46.

Despite its success in the *Open Door and Grogan* cases in the Irish courts and the EC Court of Justice, the anti-abortion movement was still concerned that the European Community might, by either legislative or judicial means, dilute the protection provided to the unborn by Article 40.3.3. In fact it was highly unlikely that the European Community legislature would try to harmonise the abortion law of the member States and the Court of Justice, in light of its refusal to involve itself in the *Grogan* litigation, would also appear to have been reluctant to involve itself in the issue.<sup>63</sup> However, the anti-abortion movement received further comfort from the Fianna Fáil Government of the day when it successfully negotiated a Protocol to the Maastricht Treaty providing that nothing in EU or EC law "shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."

<sup>63</sup> Such a possibility could not however be excluded: see Kingston, Whelan and Bacik, ch 2.

Following on from these developments, the cosy consensus between the Government, the judiciary and the anti-abortion movement, appeared secure. It must have seemed that, with the apparent acquiescence of the majority of Irish people, Article 40.3.3 could be interpreted in an increasingly draconian fashion, with a consequent diminution in the rights and freedoms of Irish

women. However, the supposed anti-abortion consensus was shattered by the so-called X case, the facts of which have been described in [Chapter One](#).

The X case is probably the most controversial ever to have come before the Irish courts and the spectacle of a suicidal teenaged victim of sexual assault being dragged through the highest courts in the country changed the nature of Irish public debate on abortion forever. The Attorney General commenced legal proceedings against Ms X and her family while they were in Britain preparing to have her pregnancy terminated and successfully obtained an interim injunction preventing her from having an abortion. When the family returned to Ireland, having been informed by the Garda of the injunction, inter-party proceedings commenced in the High Court. Costello J was the first Irish judge to have to grapple directly with a conflict between the right to life of the unborn and the equal right to life of the pregnant woman. Costello J heard evidence, as reported in [Chapter One](#), of various comments made by Ms X to family members and to members of the Garda expressing a desire for death and contemplating suicide. He also had the opportunity to assess the expert evidence of an experienced clinical psychologist to the effect that Ms X was capable of committing suicide and that forcing her to continue with her pregnancy would have severe consequences for her mental health. However, Ms X herself did not give evidence and nor did any member of her family - understandably given the urgency of the case and the severe pressure under which they operated. Unfortunately, no psychiatric evidence was put to Costello J and this has led to criticism that the courts were not fully briefed when making their decisions. Certainly, Costello J's judgment contains a profound lack of understanding: he did not deny Ms X's suicidal tendencies but held that her condition was not a medical one correctable by surgical intervention. In light of this view of the facts, he held that the risk posed to Ms X's life by requiring her to continue with her pregnancy was "much less and ... of a different order of magnitude" than the risk to the life of the unborn, which would be terminated in the absence of an injunction prohibiting Ms X and her family for arranging for her to have an abortion. He further held that the right to travel guaranteed by Irish and EC law had to give way to the right to life of the unborn and accordingly issued an injunction prohibiting Ms X from having an abortion either in Ireland or abroad and restraining her from leaving the country for a nine month period. This judgment was immediately appealed to the Supreme Court, which held by a four to one majority that the injunction should be lifted.

Each of the five Supreme Court judges issued a separate ruling and thus the precise parameters of the decision are hard to ascertain. Hederman J, in a dissenting judgment, upheld the decision of the High Court. He was of the view that the Constitution did permit abortion to save the life of the pregnant woman, but only where the evidence allowed for no other conclusion than that continuation of the pregnancy would "to an extremely high degree of probability" cost the pregnant woman her life. In his view the evidence put to the courts did not prove to a sufficiently high degree of probability that Ms X would kill herself should she be forced to continue her pregnancy and was of the view that she could be confined and supervised until she gave birth. He was also of the view that a woman whose continued pregnancy would render her a "physical wreck" was not entitled to have an abortion. The other four judges agreed that Ms X was entitled to have an abortion, but differed somewhat in their reasoning.

Finlay CJ - in what is often, but mistakenly, regarded as the definitive ruling in the X case - held that "if it can be established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible." He was of the view that the risk of suicide had to be regarded as a risk to the woman's life, to be taken into account when balancing her right to life with that of the foetus "as would be appropriate with any other form of risk" and that it was not necessary that the risk of death be inevitable or immediate. He was also of the view that the facts put to him showed that there was a real and substantial risk to Ms X's life, as distinct from her health, which could only be avoided by permitting her to have an abortion. This judgment is to be commended for recognising the reality of mental health issues, but the distinction drawn between

life and health is somewhat artificial - as was recognised as long ago as the 1930s in the *Bourne* case. Egan J gave a judgment that in substance equates with that of the Chief Justice.

O'Flaherty J also ruled that abortion was permissible where necessary to prevent a substantial risk to the life of the pregnant woman (he did not make an explicit distinction between life and health) and also ruled that this risk need not be imminent or immediate. Having found that Ms X met the standard laid down by him, he also held that the provisions of Article 40.3.3 did not permit the legalisation of "[a]bortion, as such" and certainly not "abortion on demand". This somewhat cryptic statement left open the possibility that abortion might be permissible in certain situations, such as risk to maternal health or in cases of pregnancy arising out of rape or incest. McCarthy J also ruled that abortion was permissible in cases of real and substantial risk to the "survival" of the pregnant woman and that Ms X's life was put at real and substantial risk by her pregnancy. He went on to castigate the legislature for its failure to flesh out the provisions of Article 40.3.3, describing its inactivity as "inexcusable". He was of the view that the legislature could legitimately permit abortion, in cases where pregnancy posed a risk to women's lives and also possibly in other situations and referred specifically to pregnancies arising out of rape and incest and under-age pregnancies.

All five judges in the *X* case held that abortion was permissible in Ireland in certain circumstances and indeed that women had a constitutional right to obtain abortions where necessary to save their lives. Such abortions could be performed in Ireland or abroad. However, Finlay CJ, together with Hederman and Egan JJ, also ruled that Article 40.3.3 did not allow women to travel out of the jurisdiction to obtain abortions in circumstances where it would not be permissible to terminate their pregnancies within the State. The *X* case thus demonstrated that while Article 40.3.3 did not contain an absolute prohibition on abortion, it did require the State to provide protection of the right to life of the unborn by ensuring that pregnant women did not travel out of the jurisdiction and also pointed out the necessity of legislating to clarify the parameters of Article 40.3.3.

The response of the Government to the decision of the Supreme Court in the *X* case was extraordinary in that it attempted to diminish both the right to life of pregnant women and the constitutional protection of the unborn as identified therein. At European Union level, the Government persuaded its EU partners to make a Declaration to the Maastricht Protocol, providing that it was not intended to exclude from the scope of application of EU law the freedom to travel between Member States or the freedom to impart and receive in Ireland information relating to services lawfully available in other Member States. Importantly, the Declaration also provided that, in the event of any future amendment to the Irish Constitution concerning the subject-matter of Article 40.3.3, the other Member States, at Ireland's request, would be favourably disposed to amend the Protocol. The Maastricht Treaty was subsequently approved by the Irish People in a referendum held in July 1992. In the European Court of Human Rights,<sup>64</sup> the Government admitted that the injunction granted against Open Door Counselling and the Dublin Well-Woman Centre was over-broad, in that it prohibited the clinics from providing assistance to pregnant women whose lives were at risk. As has been mentioned above, the clinics subsequently obtained a ruling from the European Court of Human Rights that the injunction constituted a violation of the right to freedom of expression protected by Article 10 of the European Convention on Human Rights.

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<sup>64</sup> The European Court of Human Rights was set up in the 1950s under the Council of Europe's European Convention on Human Rights. It is wholly distinct from the Court of Justice of the European Communities (or European Court of Justice) which comes under EU auspices: confusingly, some commentators refer to either or both courts as "the European Court".

At domestic level, the Government sought to over-turn the Supreme Court's decision in the X case in two conflicting ways: first of all, it sought to prevent suicidal women from obtaining abortions in Ireland and, secondly, it sought to ensure that women would be free to travel abroad to obtain abortions even where such abortions would, if carried out in Ireland, be unlawful. The Government also sought to over-turn the decisions of the Supreme Court in the *Open Door and Grogan* cases and thereby to permit the flow of information on abortions services available abroad. It sought to achieve these goals by holding three simultaneous referenda in November of 1992. Three proposals were thus put to the People - the Twelfth, Thirteenth and Fourteenth Amendments to the Constitution.

The Twelfth Amendment of the Constitution Bill contained a proposal to add the following provision to Article 40.3.3:

*"It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction."*

The Government sought to endorse Finlay CJ's somewhat artificial distinction between life and health, while ignoring the reality of the risk of suicide, thus subordinating the right to life of pregnant women to that of the unborn.<sup>65</sup>

The Thirteenth Amendment to the Constitution Bill provided for an addition to Article 40.3.3 of a freedom to travel abroad. The Fourteenth Amendment to the Constitution Bill provided for a freedom to impart and obtain information in Ireland information on services lawfully available abroad, subject to conditions laid down in legislation.<sup>66</sup>

These proposals were made by a Fianna Fáil-Progressive Democrat Government but extraordinarily the PDs came to oppose the Twelfth Amendment to the Constitution Bill as being overly restrictive of women's rights, while supporting the other two proposals. In this they were joined by Opposition Parties and the pro-choice movement, while the anti-abortion movement, led by the Pro-Life Campaign opposed all three proposals, on the basis that the Twelfth Amendment Bill recognised the possibility of lawful abortion, while the other two Bills diminished the protection afforded by the Constitution to the unborn. The People ultimately voted down the proposal contained in the Twelfth Amendment to the Constitution by a ratio of approximately two to one, but supported the other two proposals by a similar margin.<sup>67</sup> The net effect of the November referenda was thus to reject a proposal which would have restricted the right to life of pregnant women, while endorsing constitutional changes allowing women to travel abroad to avail of abortion services and to obtain information on such services prior to leaving the State.

<sup>65</sup> For an analysis of this wording see Hogan, op cit.

<sup>66</sup> The Freedom of Information (Services Outside the State for Termination of Pregnancies) Act, 1995 lays down such conditions.

<sup>67</sup> The Twelfth Amendment to the Constitution Bill was rejected by 1,079,297 votes to 572,177; the Thirteenth Amendment to the Constitution Bill was endorsed by 1,035,308 votes to 624,059 and the Fourteenth Amendment to the Constitution Bill was endorsed by 992,833 votes to 665,106.

Following on from the November 1992 referenda, the Government failed to introduce legislation on Article 40.3.3 despite the harsh criticism by McCarthy J of legislative inertia in this area and despite a promise made by the then Taoiseach, Albert Reynolds, to introduce legislation to give effect to the X case decision should the Government's proposals fail.<sup>68</sup>

The Supreme Court has addressed the issue of abortion only once, and in the abstract, since the X case ruling. In 1995, in the context of a review of the constitutionality of the Freedom of

Information (Services Outside the State for Termination of Pregnancies) Bill, 1995, the Supreme Court as a whole held that the right to life of the unborn was unaffected by the travel and information amendments; three of the five judges then looked at the issue of abortion in their individual judgments. Hamilton CJ reiterated the test set down by Finlay CJ in *X* as to the circumstances where abortion could lawfully be carried out in the State. Denham J referred to the lawfulness of abortion where there is a real and substantial risk to the life of the pregnant woman, but did not reiterate the Chief Justice's distinction between life and health. Finally, Keane J, with reference to the judgment of McCarthy J in the *X* case, raised the possibility that the courts might rule, in appropriate circumstances, that abortion is permitted to prevent a risk to the health of the pregnant woman or in cases of rape and incest.

Unlike the Supreme Court, the District Court and High Court have had to deal with another raped, pregnant and suicidal teenager in the so-called *C* case.<sup>68</sup> Ms C was a thirteen year old girl who became pregnant as the result of an extremely violent sexual assault perpetrated upon her by a family acquaintance. Ms C at all times wished to obtain an abortion; her parents initially supported her decision, but subsequently came to oppose it. Meanwhile, the Health Board had taken her into care and placed her with a foster mother. As Ms C was in the care of the Health Board, the permission of the District Court had to be obtained in order for her to travel abroad for an abortion (the possibility of her having her pregnancy terminated in Ireland does not seem to have been considered). The District Court, unlike the High Court in the *X* case, heard evidence from two psychiatrists, one of whom dealt specifically with the question of suicide. Having examined Ms C he formed the view that there was a likelihood that she would commit suicide unless her pregnancy was terminated and that therapy would not obviate the need for an abortion. In light of this evidence, the District Court ruled that Ms C could travel to England to have an abortion and that an abortion would be in her best interests.

<sup>68</sup> See Irish Times, 9 October 1992, p 1.

<sup>69</sup> See *A and B v Eastern Health Board and Others* [1998] 1 IR 464.

This ruling was judicially reviewed in the High Court where Geoghegan J upheld the ruling. Geoghegan J held that in light of the strong medical evidence it appeared that there was a real and substantial risk to Ms C's life, as distinct to her health, which could only be avoided by terminating her pregnancy and that such a termination constituted "medical treatment" of her life-threatening condition. However, Geoghegan J also expressed the view that the Irish courts could only authorise travel out of the jurisdiction to obtain an abortion where the abortion would be lawful if performed in Ireland. This reasoning was based on the fact that the right to life of the unborn was unaffected by the travel and information amendments to the Constitution. The travel amendment simply provides a negative freedom to individuals to leave the jurisdiction, if they are able to do so, without fear of having a court injunction issued against them. However, the Constitution does not provide for a positive right to abortion and so all state agencies must have regard to the constitutional right to life of the unborn and thus should not facilitate its termination abroad.

The *C* case thus indicates that where an individual needs the permission of the courts, or any other state body, to leave the country, such permission can only be granted in respect of abortions permitted by Irish law. It also calls into question the apparent practice of the Minister for Justice, Equality and Law Reform in permitting asylum seekers to travel to Britain for abortions and then to return to Ireland.<sup>70</sup> Furthermore, the fact that Irish women have a mere freedom, as opposed to a right, to travel abroad means that they cannot access state funds to obtain abortion services abroad. This is particularly significant as the law thus facilitates unequal access to abortion dependent on the socio-economic circumstances of the pregnant woman.

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## Northern Ireland

As well as the *Information Bill* and *C* cases, legal developments in Northern Ireland in the period immediately after the *X* case also throw some light on the application of sections 58 and 59 of the Offences Against the Person Act, 1861, which continues to apply in Northern Ireland.<sup>71</sup> More significantly perhaps, these cases illustrate the approach taken in the neighbouring jurisdiction on mental health and the risk of suicide in pregnancy and it is regrettable that more heed was not taken of the Northern Irish experience in the All-Party Oireachtas Committee. Between 1993 and 1995 four cases involving pregnant suicidal women or girls in care came before the Northern Ireland High Court.<sup>72</sup>

Until 1993 there appears to have been no judicial interpretation of the operation of sections 58 and 59 of the Offences Against the Person Act, 1861 in situations where pregnancy put at risk the life or health of a pregnant woman. The so-called *K* case<sup>73</sup> involved a fourteen year old girl who was placed in care having become pregnant. Ms K had consistently and frequently expressed her desire to commit suicide from the time that she became aware that she was pregnant. A psychiatrist who had treated her since before the pregnancy and who examined her at least twice since the pregnancy was confirmed was of the opinion that there was a substantial risk that she would commit suicide if she did not have an abortion. In his view no surveillance system could negate the risk of suicide and the longer the pregnancy continued the greater the risk of becoming a "physical and psychological wreck". The adverse risks to her mental health included an ever-increasing risk of suicide. Two other doctors also gave evidence to the effect that her pregnancy posed a threat to her life and physical and mental health. On the basis of this evidence, Sheil J concluded that there was a genuine risk to her life if she was forced to continue her pregnancy and accordingly he gave permission for her to have an abortion, which he ruled would be in her best interests. In reaching this decision Sheil J made reference to the *Bourne* case and subsequent English case-law.

<sup>70</sup> See Irish Times, 15 October 2001, p 3.

<sup>71</sup> The British Abortion Act, 1967, as amended, applies only in England and Wales and in Scotland.

<sup>72</sup> For an analysis of the law and practice on abortion in Northern Ireland see Kingston, Whelan and Bacik, ch 8.

<sup>73</sup> Reported as *Northern Health and Social Services Board v F and G* [1993] NI 268.

The following year MacDermott LJ had to rule on the case of a pregnant ward of court who was also severely mentally handicapped.<sup>74</sup> Ms A was examined by a consultant gynaecologist who was of the opinion that her pregnancy should be terminated. Two psychiatrists also examined her independently and both formed the view that continuation of the pregnancy would have adverse consequences for her mental health and could lead her to harm herself physically. In light of the evidence, MacDermott LJ ruled that it would be both lawful and in Ms A's best interests for her to have an abortion.

In 1995 two more cases came before the High Court. In the first of these, *Re: SJB*,<sup>75</sup> involved a pregnant seventeen year old with severe mental handicap who was a ward of court. An obstetrician gave evidence to the court that termination of the pregnancy would best serve Ms S's psychological health. This view was supported by two psychiatrists, one of whom had known her professionally since before her pregnancy. Both psychiatrists were of the view that requiring Ms S to continue with her pregnancy would cause her severe psychological trauma. On the basis of this evidence, Pringle J ruled that it would be lawful to terminate Ms S's pregnancy and in her best interests to do so. The last of these cases once more involved a pregnant and suicidal teenaged girl, who had been taken into care when it was discovered that she was pregnant.<sup>76</sup> Ms

H, who had a history of psychological problems and physical self-harm, was counselled by her social worker and a psychiatrist whom she had been seeing for over a year on the options available to her. She was adamant that she wished to terminate her pregnancy and stated that she would commit suicide if forced to continue with it. Evidence was given to the court by the social worker that Ms H's threats were serious. A joint report was also submitted by two other psychiatrists, who also gave oral evidence to the court. Both psychiatrists were of the view that continuation of her pregnancy would lead to severe psychological consequences for Ms H and that her threats of suicide should be taken seriously. A fourth psychiatrist also gave evidence that there was a substantial risk that she would kill herself or cause herself severe physical harm if forced to continue her pregnancy. In light of the evidence, Sheil J, who had previously ruled in the *K* case, was of the view that it would be lawful and also in her best interests to terminate Ms H's pregnancy.

<sup>74</sup> Re: *AMNH*, unreported, High Court, 21 January 1994.

<sup>75</sup> Unreported, High Court, 28 September 1995.

<sup>76</sup> Re: *CH*, unreported, High Court, 18 October 1995.

These cases throw considerable light on the mental health consequences of unwanted pregnancy and also show a clear link between physical and mental health. The *K* and *H* cases also show that the risk of suicide in pregnancy is taken very seriously by psychiatrists and other doctors and that abortion is seen as appropriate treatment in the best interests of the pregnant woman in a variety of circumstances. These cases give a certain degree of certainty as to the law in Northern Ireland, but the law was criticised as uncertain by Sheil J in the *K* case. The former Northern Ireland Standing Advisory Committee on Human Rights also criticised the law as being so unclear as to come into conflict with the European Convention on Human Rights and the Family Planning Association of Northern Ireland is currently bringing judicial review proceedings under the UK's Human Rights Act, 1998 to direct the Minister for Health to issue guidelines further clarifying the law.<sup>77</sup>

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## **Ireland's EU and International Obligations**

### European Union Law

The effect of European Community law on Irish abortion law and on the regulation of abortion information has been discussed briefly above. Prior to the Maastricht Protocol it might in theory have been possible, albeit unlikely, for the European Community to legislate in such a way as to dilute Ireland's almost absolute prohibition on abortion. The most likely legislative basis would have been under ex-Article 100a of the EEC Treaty (now Article 95 of the EC Treaty) if it could be argued that the functioning of the internal market required uniform rules on the provision of abortion services: however, this article permits Member States to make derogations on grounds including public policy.<sup>78</sup> It should be noted that the provisions of the EC Treaty on public health specifically exclude the possibility of legislative harmonisation.<sup>79</sup> It might also have been possible for the Court of Justice to require a change in Ireland's abortion laws, by holding them to constitute an unlawful interference with free movement of goods or services. Free movement rules are, however, subject to public policy exceptions. Unlike the Court of Justice, Advocate General van Gerven, in the *Grogan* case, had expressed the view that the distribution of information services in Britain by Irish students' unions did come within the scope of Community law, but in his opinion the restrictions imposed by Irish law were justifiable under EC law.

However, as any derogation on the freedoms guaranteed by Community law is subject to Community principles on fundamental rights (which in turn are largely influenced by the European Convention on Human Rights), it might have been possible in the future for a Court to hold that Ireland's restrictions on abortion could not be justified.

<sup>77</sup> See the September 2001 issue of the NIFPA's news-letter, *Challenge*, p 1.

<sup>78</sup> Other possible legislative bases, such as Article 138(ex-Article 118a), which deals with health and safety at work, and Article 308(ex-Article 235), which deals with measures necessary in the operation of the common market to obtain one of the Community's objectives, seem even more unlikely. See Kingston, Whelan and Bacik, ch 2, for an analysis of EU law and abortion.

<sup>79</sup> See paragraph 4(c) of Article 152 (ex-Article 129).

The decision of the Member States in 1992 to conclude the Maastricht Protocol would appear to have excluded the possibility of EU interference with the application of Irish abortion law within the State. The text of the Protocol, in referring to Article 40.3.3, did not make it clear whether it was the provision as it then stood or the provision as amended in the future which was excluded from the ambit of EU law. However, the subsequent Declaration of May 1992, which was drafted after the decision of the Supreme Court in the *X* case and at a time when the Government was contemplating the three referendum proposals put to the People in November of that year, throws further light on the intention behind the Protocol. The Declaration states that it is a legal interpretation of the Protocol by the Member States. One of its purposes was to clarify that freedom to travel and to provide information would continue to be subjected to EU law, but it also expresses a willingness on the part of the other Member States to reflect in an amendment to the Protocol any future amendment concerning "the subject matter of Article 40.3.3" which would not interfere with travel or information. Such an amendment would clearly be unnecessary if any text other than the original Eighth Amendment to the Constitution was already covered by the Protocol as it stood. Accordingly, it would seem that any amendment to Article 40.3.3, and particularly one which restricts further the right to abortion in Ireland, would be subject to EU law and in particular to the jurisdiction of the Court of Justice.

## **International Law**

Ireland is party to a range of universal international human rights instruments, including the United Nations-sponsored International Covenants on Civil and Political Rights and Economic Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child and the regional European Convention on Human Rights adopted under the auspices of the Council of Europe. International human rights treaties, reflecting as they do a wide-ranging consensus, are unlikely to give many specific guidelines on countries' abortion policies. It is clear that while international law does not prohibit states from protecting the unborn, it does not regard the foetus as having any general right to life enforceable against the pregnant woman. Conversely, international law does not require states to permit abortion on the basis of a woman's right to choose.<sup>80</sup>

However, the various international conventions do provide for certain rights, such as the right to life,<sup>81</sup> the right to freedom from inhuman and degrading treatment,<sup>82</sup> the right to privacy,<sup>83</sup> the right to freedom from discrimination<sup>84</sup> and the right to health,<sup>85</sup> which might have a certain bearing on Ireland's abortion law. It is clear that any abortion law which impacted negatively on a pregnant woman or girl's right to life would run counter to Ireland's international human rights obligations. Any abortion law which led to severe consequences for a woman's physical or mental health might also run counter to the obligation to provide adequate health-care and the obligation to refrain from imposing inhuman or degrading treatment.

<sup>80</sup> See Kingston, Whelan and Bacik, ch 4, for an analysis of the compatibility of Ireland's post-X case abortion regime in light of its international obligations.

<sup>81</sup> See Article 6 of the International Covenant on Civil and Political Rights, Article 6 of the Convention on the Rights of the Child and Article 2 of the European Convention on Human Rights.

<sup>82</sup> See Article 7 of the International Covenant on Civil and Political Rights, Articles 37 and 39 of the Convention on the Rights of the Child and Article 2 of the European Convention on Human Rights.

<sup>83</sup> See Article 17 of the International Covenant on Civil and Political Rights, Article 16 of the Convention on the Rights of the Child and Article 8 of the European Convention on Human Rights.

<sup>84</sup> See Articles 2, 3 and 27 of the International Covenant on Civil and Political Rights, Articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights, the Convention on the

<sup>85</sup> See Article 12 of the International Covenant on Economic, Social and Cultural Rights, Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women and Article 24 of the Convention on the Rights of the Child.

The Human Rights Committee set up under the International Covenant on Civil and Political Rights has expressed concern about Ireland's abortion law. During the course of its consideration of Ireland's first periodic report to the Committee on its compliance with its obligations under the Covenant in 1992, in the immediate aftermath of the X case, a couple of Committee members expressed concern about Ireland's abortion law: Ms Evatt made a general remark that Ireland's protection of the unborn conflicted with the Covenant, while Mr Mavrommatis expressed the view that Irish abortion law needed to be kept under constant review by the Committee.<sup>86</sup> In its concluding observations on Ireland's second report in 2000, the Committee as a whole expressed the view in its concluding observations<sup>87</sup> that Ireland should ensure that women were not forced to continue their pregnancies in circumstances that would infringe their right to freedom from inhuman and degrading treatment or in circumstances that would fringe their right to sexual equality, as set out in the Committee's General Comment No. 28 of 29 March 2000 on Article 3 of the Covenant. The General Comment refers to the need to ensure protection of right to life and freedom from inhuman and degrading treatment in the context of reproductive rights and requests states to provide information on access to abortion for rape victims.<sup>88</sup> Individual Committee members had also expressed concern that overly strict abortions laws could constitute inhuman and degrading treatment (Mr Ando) and were over-harsh (Mr Amor). The Committee has also expressed its concerns to other countries regarding blanket criminalisation of abortion,<sup>89</sup> and in the case of legislation permitting abortion in what were described as very limited circumstances, but including cases where the woman's life or health was put at risk by the continuation of her pregnancy and where the pregnancy was the result of rape.<sup>90</sup>

Elimination of All Forms of Discrimination Against Women, Article 2 of the Convention on the Rights of the Child and Article 14 and the Twelfth Protocol to the European Convention on Human Rights.<sup>86</sup> See Kingston, Whelan and Bacik, p 82.

<sup>87</sup> The Committee's concluding observations of 19 July 2000 are available at <http://www.unhchr.ch/search.htm>.

<sup>88</sup> The General Comment is also available at <http://www.unhchr.ch/search.htm>.

<sup>89</sup> See its concluding observations in 1999 on Chile's report and in 1998 on Senegal's report.

<sup>90</sup> See its concluding observations in 1999 on Poland's report

The Committee monitoring the Convention on the Elimination of All Forms of Discrimination Against Women has also expressed its strong concern at Ireland's very restrictive abortion law and its effect on women's health. In this context it noted the fact that travelling abroad to obtain abortions creates hardship for vulnerable groups in Irish society and urged the Government to initiate a debate on women's reproductive freedom and restrictive abortion legislation.<sup>91</sup> The Committee has also expressed the view that it is not sufficient to permit abortion only where the life and physical or mental health of a woman is at risk, stating that abortion should be permitted in cases where pregnancy results from rape and incest.<sup>92</sup> The Committee has also observed that Luxembourg's law, which permits abortion in the first twelve weeks of pregnancy where the life or health of the pregnant woman is at risk, in cases of rape and incest, in cases of foetal abnormality and on socio-economic grounds and thereafter in cases of risk to life and health and foetal abnormality, was overly strict.<sup>93</sup>

The Committee established to monitor states' compliance with the International Covenant on Economic, Social and Cultural Rights has not dealt with abortion in its concluding observations on periodic reports submitted by Ireland, but has in other cases expressed the view that legislation permitting abortion on therapeutic grounds and in cases of rape and incest should be enacted.<sup>94</sup>

The monitoring organs of the European Convention on Human Rights have given quite a wide margin of appreciation to its state Parties to shape their own abortion policies: on the one hand it has held that British abortion law, allowing for abortion in cases of risk to maternal life and health, in cases of foetal abnormality and on socio-economic grounds, and Norwegian law, allowing for abortion on request in the first twelve weeks of pregnancy and on limited grounds thereafter, did not constitute a violation of any right to life that a foetus might have under Article 2 of the Convention.<sup>95</sup> Conversely, it held that German abortion law, which permits abortion only where necessary to protect the life or health of the pregnant woman, in cases of pregnancy arising out of a sexual offence and in cases of foetal abnormality, did not constitute an interference with the right to respect for private life of pregnant women guaranteed by Article 8 of the Convention.<sup>96</sup> However, it should be noted that to the extent that there is any interference with the right to respect for private life of pregnant women, such interference must be regulated by law and such law must be clear. As has been mentioned above, Northern Irish law on abortion has been criticised as being insufficiently clear for the purposes of the Convention<sup>97</sup> and is currently being reviewed in the Northern Ireland courts. It should also be borne in mind that any interference with women's rights must be an effective means of achieving the right to life of the unborn: the European Court of Human Rights in the *Open Door* case ruled that the ban on dissemination of information in Ireland on abortion services abroad was an unjustified interference with the clinics freedom of expression because it did not actually protect the life of the unborn by reducing the number of abortions performed on Irish resident women.<sup>98</sup> The Convention also prohibits any law that would endanger the right to life of pregnant women under Article 2 or a law that contravenes the right to freedom from inhuman or degrading treatment.

<sup>91</sup> See the Committee's concluding observations of 1 July 1999 on Ireland's combined second and third periodic reports under the Convention.

<sup>92</sup> See its concluding observations in 2000 on Jordan's report and in 1999 on Nepal's report (both these countries permit abortion where the life or health of the woman is at risk)..

<sup>93</sup> See its concluding observations in 1997.

<sup>94</sup> See its concluding observations in 2001 on Nepal's report and in 1995 on Mauritius's report.

<sup>95</sup> See Application No 8416/79, *Paton v UK* (1980) 19 D and R 244 and Application No 17004/90, *H v Norway* (1992) 73 D and R 155.

<sup>96</sup> See Application No. 6559/75, *Bruegemann and Scheuten v Germany* (1978) 10 D and R 100.

<sup>97</sup> See S Lee, "Abortion Law in Northern Ireland: The Twilight Zone" and "An A to K to Z of Abortion Law in Northern Ireland", both in A Furedi (ed), *The Abortion Law in Northern Ireland: Human Rights and reproductive Choice*, 1995.

<sup>98</sup> In this context the Court accepted expert evidence from a doctor that the ban on information led to later, rather than fewer, abortions.

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## Travel and Information

As has been set out above, pursuant to the Thirteenth Amendment to the Constitution, women are free to travel from Ireland to other countries to avail of abortion services. However, this freedom does not amount to a right to travel abroad such as would require the State to provide assistance to pregnant women who, for whatever reason, are unable to travel abroad for abortions, except in circumstances where the abortion would be lawful if performed in Ireland. Furthermore, it appears from the judgment of Geoghegan J in the *C* case that the State may be obliged to prohibit women and girls in its care or custody from travelling abroad to avail of abortion services for abortions that would be constitutionally prohibited in Ireland.

Following on from the Fourteenth Amendment, the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995 was enacted to regulate the circumstances in which abortion information may be disseminated.<sup>99</sup> In cases other than counselling situations, it is permitted to disseminate information on the location and identity of abortion clinics to specific individuals or groups, but not to the public at large.<sup>100</sup> It is also prohibited to send any publication containing such information to an individual who has not solicited it:<sup>101</sup> this may cause difficulties for students unions in distributing guide-books containing such information, although it may be argued that as members of unions students are to be regarded as a discrete group rather than as members of the public.<sup>102</sup> It would appear to be illegal to send a friend in the post a copy of a magazine, such as Cosmopolitan or Marie Claire, containing advertisements for British abortion clinics! Counsellors may provide information on the location and identity of abortion clinics, but may not assist women in travelling abroad to obtain abortions.<sup>103</sup> Counsellors in Ireland are unable to refer a woman directly to a foreign abortion clinic.<sup>104</sup> No person may in any circumstances advocate abortion.<sup>105</sup>

<sup>99</sup> For a criticism of the Bill see the ICCL Women's Committee's press release of 23 February 1995 and the press release of the ICCL as a whole of 27 February 1995; the Women's Committee's analysis of the Supreme Court ruling on the Bill is contained in its press release of 12 May 1995. These press releases are available at <http://www.iccl.ie/women>.

<sup>100</sup> See section 3 of the Act.

<sup>101</sup> See section 4 of the Act.

<sup>102</sup> See Kingston, Whelan and Bacik, p 197.

<sup>103</sup> See section 5 of the Act.

<sup>104</sup> See section 8 of the Act.

<sup>105</sup> See sections 3 and 5 of the Act.

The Supreme Court, pursuant to a reference made by the President under Article 26 of the Constitution has held that the terms of the Act are not in contravention of the Constitution.<sup>106</sup> The injunctions against the Dublin Well Woman Centre and Open Door Counselling and against the students unions have been lifted.<sup>107</sup>

<sup>106</sup> See *Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancy) Bill*, 1995 [1995] 1 IR 1.

<sup>107</sup> See Kingston, Whelan and Bacik, ch 7, for an analysis of legal developments regarding travel and information since the November 1992 referenda.

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## **Chapter Four - The Proposal**

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## Summary

This chapter examines in detail the proposal to be put to the People in the forthcoming referendum. It shows that, on a procedural level, the Twenty-Fifth Amendment of the Constitution Bill proposes to set aside the normal constitutional checks and balances in a manner reminiscent of discredited 1930s emergency provisions legislation (Article 2A, Free State Constitution). Substantively, the proposal aims at reducing the right to life of pregnant women by removing the right to abortion where a woman's life is put at risk by reason of suicide. This proposal is based on a flawed understanding of the medical issues surrounding mental health and pregnancy. The proposal also fails to address other medical issues and reduces the protection afforded to women whose lives are put at risk because of physical complications arising out of pregnancy requiring immediate treatment by criminalising medical procedures necessary to save the life of the woman except where performed in an "approved place".

The chapter also explains that the proposals would enshrine the pre-existing discrimination against vulnerable women, particularly those living in poverty, by providing for a freedom rather than a right to travel. It also shows that the proposal would not, contrary to Government claims, copper-fasten the legality of the morning-after pill and IUD. The chapter shows that the proposals are not protected by EU law and run counter to Ireland's obligations under a variety of international human rights treaties. Finally, the chapter goes on to condemn the decision of the Oireachtas to amend the Referendum Acts so as to ensure that no public money will be spent explaining arguments for and against the proposal contained in the Twenty-Fifth Amendment of the Constitution Bill and calls for a No vote in the forthcoming referendum.

## Introduction

The Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001 was passed by both Houses of the Oireachtas in December 2001. It is expected to be put to the People in a referendum in February or March of this year. The net effect of the proposal, if passed, will be as follows:

*It will exclude suicide as a ground for lawful abortion in Ireland, thus interfering with the right to life of pregnant women;*

*It will extend the scope of the criminal law on abortion, thus interfering with existing medical practice and further restricting the right to life of pregnant women, and will give constitutional status to that law.*

Clearly this proposal runs counter to the ICCL's position that the Constitution should be amended to remove the constitutional prohibition on abortion and that legislation should be introduced to allow women to access abortion facilities in Ireland freely and free of charge. The proposal also runs counter to the ICCL's position that should the Constitution not be amended as just mentioned, legislation should be introduced to give effect to the Supreme Court decision in the X

case and to decriminalise abortion. However, the ICCL is also of the view that the proposal set out in the Bill runs directly counter to the stated aims of the Government in introducing it: namely that it represents a compassionate approach to the issue of abortion; that it introduces clarity in the law, including clarification of the law regarding the Intra-Uterine Device (IUD) and the morning-after pill; that it allows for all appropriate medical treatment to be given to pregnant women; that it ensures Irish women will be able to travel abroad to obtain abortions; and that it deals with the detail of abortion law at its correct level, namely in legislation rather than in the Constitution.

### **Technical Aspects of the Proposal**

The Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001) has two sections and two Schedules. Sections 1 and 2 amend Article 46 of the Constitution by inserting the text set out in the First Schedule into a new subsection, Article 46.6.

The proposed Article 46.6 contained in the First Schedule to the Act itself consists of four subsections (46.6.1 - 46.6.4):

(a) Article 46.6.1 is a further constitutional amendment, providing that Article 40.3 shall be amended to include a new Article 40.3.4 and 40.3.5. The effect of these two subsections on the existing Article 40.3.3 will be examined below. Within the text of both 40.3.4 and 40.3.5 is a reference to the Protection of Human Life in Pregnancy Act, 2002. The text of this Act is set out in the Second Schedule to the Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001.

(b) Article 46.6.2 is a self-eliminating clause, providing that if the legislation set out in the Second Schedule is enacted by the Oireachtas, "this section" (ie the whole of the proposed new Article 46.6) will be omitted from every official text of the Constitution, but will continue to have the force of law nonetheless.

(c) Article 46.6.3 provides that if the legislation in the Second Schedule is not enacted within 180 days of the insertion of Article 46.6 into the Constitution, Article 46.6 will cease to have effect.

(d) Finally, Article 46.6.4 provides that the provisions of Article 26 and 27 of the Constitution (relating to reference of Bills to the Supreme Court and to the People) shall not apply to the Second Schedule legislation.

### **Difficulties with the Proposed Mechanism to Change the Law**

The Twenty-Fifth Amendment Bill therefore consists of a constitutional amendment within a constitutional amendment, containing a piece of legislation which itself is to be enshrined within the Constitution. This is an unprecedented format for amending the Constitution. It runs counter to Article 46.4 of the Constitution. Article 46.4 provides that: "A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal" However, the Bill contains two separate and distinct amendments to the Constitution, together with a new type of "constitutionalised" criminal statute. This matter was raised in the Dáil by the Labour Party in a question to the Taoiseach, and in the Taoiseach's reply he conceded that the Second Schedule is not a constitutional amendment and does have legal effect.

Since it is a "proposal", but not a "proposal for the amendment of this Constitution" it runs counter to Article 46.4. In order to carry out this procedure in a manner consistent with normal constitutional procedures, Article 46.4 should have been amended first in a separate referendum. The Bill aims to get around this by amending Article 46, rather than directly amending Article 40.3 of the Constitution, which deals with the substantive issue of the unborn. During the course of the Parliamentary debate on the Bill, the Labour and Fine Gael parties raised doubts as to the constitutionality of the proposed mechanism to change the law. Whether or not the process is actually unconstitutional or not, it is clearly undesirable that normal constitutional procedures be set aside to facilitate a constitutionalisation of the criminal law on abortion. The consequences of this unprecedented constitutionalisation of a criminal statute are examined further below.

The proposal contained in the Twenty-Fifth Amendment Bill also offends the principle of separation of powers, by usurping the legislative function of the Oireachtas. The provisions set out in the Second Schedule under the heading "An Act to Protect Human Life in Pregnancy, to repeal sections 58 and 59 of the Offences Against the Person Act, 1861, and to provide for related matters" are to be known as the Protection of Human Life in Pregnancy Act, 2002. Yet this Act itself will not go through the legislative process as a stand-alone piece of legislation. It can only be considered by the Oireachtas in its present form as the "provisions set out in the Second Schedule" to another piece of legislation, the Twenty-Fifth Amendment Bill. If the proposal contained in the Bill is approved by the People in a referendum, the contents of the Second Schedule will become a binding template for the House of the Oireachtas. They can either enact the Second Schedule as the Protection of Human Life in Pregnancy Act, 2002, or not enact it, but they cannot amend or alter it in any way. If after 180 days the Oireachtas has not enacted the provisions of the Second Schedule, the twenty-fifth amendment itself will cease to have effect. Thus, the proposal ties the hands of the Oireachtas and runs counter to the provisions of Article 15.2.1 of the Constitution, which provides that "[t]he sole and exclusive power of making laws for the State is hereby vested in the Oireachtas", by usurping the exclusive function of the Oireachtas.

The provision of the proposed Article 46.6.3, that if the Second Schedule legislation is not enacted within 180 days of the insertion of Article 46.6 into the Constitution, Article 46.6 will cease to have effect, itself offends the principles enshrined in Articles 46 and 47 of the Constitution (relating to the Referendum process). It is not envisaged in either Article, or anywhere else in the Constitution, that a proposal to amend the Constitution, once duly passed by the people in a Referendum, should thereafter be capable of effective veto by the legislature. Again this amounts to the provision of a normally unconstitutional function for the Oireachtas, since it gives the legislature a previously unknown power of veto over the Referendum process. Further, Article 46.6.4 rules out the possibility of any reference of the Second Schedule legislation to the Supreme Court by the President under Article 26, or any reference of the legislation to the people under Article 27. Again, this is contrary to the established constitutional legislative process, whereby all legislation (with three exceptions) is subject to this Presidential power. The exclusion of the Article 26 power of reference in the case of the Protection of Human Life in Pregnancy Act, 2002 represents an interference with the powers of the President and removes an important constitutional safeguard.

The ICCL is concerned that the mechanism for constitutional and legislative change set out in the Twenty-Fifth Amendment Bill, if not actually contrary to the letter of the Constitution,<sup>108</sup> certainly offends its spirit, by disturbing the constitutional balance of power, interfering as it does with the powers of the People, the President, the judiciary and the Oireachtas. The only apparent precedent for casting aside the normal constitutional checks and balances in this way is the infamous Constitution (Amendment No. 17) Act of 1931, which inserted an Article 2A into the Constitution, dealing with emergency powers, to which all other constitutional provisions were subordinate. This amendment played a significant part in under-mining the credibility of the 1922 Constitution and helped to bring about its ultimate demise.

<sup>108</sup> At the time of writing, the Mr Justice Kelly has ruled in the case of *Ní Mhaoldomhnaigh and Morris v Minister for the Environment and Local Government*, has ruled that the Twenty-Fifth Amendment of the Constitution Bill is not unconstitutional, High Court, unreported, 1 February 2002, but this judgment is currently under appeal to the Supreme Court: see Irish Times, 2 February 2002, p 4.

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## **Substantive Aspects of the Proposal**

### **(i) First Schedule**

The proposed new Article 46.6.1, contained in the First Schedule to the Bill, provides that Article 40.3 shall be amended to include a new Article 40.3.4 and 40.3.5. Each of these new provisions is considered in turn below:

Article 40.3.4:

The proposed Article 40.3.4 provides that

*"In particular, the life of the unborn in the womb shall be protected in accordance with the provisions of the Protection of Human Life in Pregnancy Act, 2002."*

The proposed text has to be read in conjunction with existing constitutional provisions on the unborn. As explained in [Chapter Three](#), Article 40.3.3 provides that:

*"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."*

This provision, introduced by the Eighth Amendment of the Constitution in 1983 was added to in November 1992 to contain provisions relating to freedom of travel and information described in Chapter Three.

A significant difficulty with the proposed Article 40.3.4 relates to the manner in which it inter-relates with Article 40.3.3. The use of the words "in particular" indicates that where there is a conflict between the provisions of the 2002 Act and Article 40.3.3 insofar as the protection of the unborn is concerned, the Act prevails and thus amends Article 40.3.3. The relationship between Article 40.3.3 and the proposed new Article 40.3.4/Protection of Human Life in Pregnancy Act is particularly worrying in that the latter provisions make no reference to the right to life of the pregnant woman. Clearly, of course, the main purpose of the proposal is to exclude consideration of the right to life of a pregnant woman who is suicidal when protecting the unborn, but the lack of any reference at all to the right of the woman may also have consequences for protection of that right even when it is put at risk for physical reasons. These consequences are spelt out in the consideration of the provisions of the 2002 Act. The use of the words "in particular" also indicates that where the 2002 Act is not applicable the standard of protection of the unborn set out in Article 40.3.3 remains in force. The implications of this are significant and give rise to considerable concerns. These concerns are also addressed below when the provisions of the 2002 Act are explored.

Article 40.3.5

The proposed new Article 40.3.5 provides that Article 46.2 and Article 47.1, 47.3 and 47.4 shall apply to any Bill purporting to amend the Protection of Human Life in Pregnancy Act, 2002. This means that the new Act will not be capable of amendment except by way of legislation that must be put to the People in a referendum. This provision means in effect that the 2002 Act has constitutional status. It therefore usurps the legislative function of the Oireachtas and ties its hands in a hitherto unprecedented manner. It means that if the Protection of Human Life in Pregnancy Act, 2002 becomes law, even the most minor amendment (for example, to alter the criminal penalty provided for in the Act) will require a referendum. The implications of this should be examined in light of the Taoiseach's own statement introducing the Twenty-Fifth Amendment of the Constitution Bill.<sup>109</sup> In his speech the Taoiseach stated that the deliberations leading up to the publication of the Green Paper on Abortion and the Report of the All-Party Oireachtas Committee "led the Government to conclude that there is no simple sentence, or paragraph, that can be inserted into the Constitution which, by itself, would amount to a balanced, effective, legal response to the complex medical and legal issues which surround protection of human life in pregnancy. The proper place to strike that balance is in legislation - not in the Constitution."

<sup>109</sup> See "Speech by the Taoiseach Mr Bertie Ahern" released by the Government Information Service on 2 October 2001.

This statement is one with which the ICCL can agree. As the Taoiseach indicated, constitutional documents should deal only with broad statements of principle and policy and issues of detail should be dealt with by means of legislation. The reason why legislation rather than the Constitution is the appropriate place to deal with complex and detailed issues is that any balance struck may have to be reassessed and amended in the light of changing circumstances, such as ongoing advances in medical science, or unexpected judicial interpretation of legal provisions. It is appropriate that amendments dealing with questions of detail rather than issues of policy should be dealt with by the Oireachtas and not by means of constitutional amendment. However, Article 40.3.5 effectively gives the 2002 Act constitutional status by requiring a referendum before it can be amended: thus following the Taoiseach's own rationale it is an inappropriate means of dealing with abortion.

## **(ii) Second Schedule - Protection of Human Life in Pregnancy Act, 2002**

As has been indicated above, the proposed new Articles 40.3.4 and 5 give rise to significant concerns, these concerns are added to when the detail of the proposal as set out in the Protection of Human Life in Pregnancy Act, 2002 are looked at. The proposed Act is a criminal statute and consists of seven sections. Each section is outlined below and then the ICCL's concerns are set out. First, however, it is important to note that the effect of the 2002 Act, read in conjunction with the proposed Article 40.3.4, will be to overturn the decision of the Supreme Court in the X case. Furthermore, the proposal, by repealing sections 58 and 59 of the Offences Against the Person Act, 1861 will amend the criminal law. The precise scope of the amendment is unclear as the 2002 Act will be the first criminal statute to have constitutional status. However, it appears clear that the defence of necessity applied to the provisions of the 1861 Act in the *Bourne* case, discussed in [Chapter Three](#), will no longer be applicable. This will have serious and adverse consequences for the protection of women's health, as is explained below.

The ICCL has particular concerns that the Government did not consider the possibility of decriminalising abortion, at least insofar as the pregnant woman herself is concerned, despite the fact that this possibility, which would not require a referendum, was canvassed in a number of submissions to the All-Party Committee.<sup>110</sup> Instead the Government has extended the scope of the criminal law and enshrined the criminality of abortion in the Constitution. The penalty of twelve

years set out in section 2 of the Act is extremely harsh when compared with the maximum sentences for other offences in Irish law and for illegal abortion in other countries. It is particularly inequitable that a woman who can afford and is otherwise able to travel abroad may avail of abortion services - with the apparent approval of the Government (see further below) and on her return home will be entitled to counselling services - but that a vulnerable woman unable to travel can be imprisoned for up to twelve years if she terminates her pregnancy, even when the termination arises from a failed attempt at suicide. This hardly represents the compassionate approach to women in crisis pregnancies and women who terminate those pregnancies that the Government claims to wish to foster and will have the effect of further discriminating between women depending on their socio-economic circumstances, with the poorest women receiving the harshest treatment.

<sup>110</sup> See the submissions of the Irish Family Planning Association, Lawyers for Choice, the Well Woman Centre, the Women's Education Research and Resource Centre, the Irish Congress of Trades Unions and the ICCL's Women's Committee.

Section 1 of the Act is a "definitions" section. Section 1(1) defines "abortion" as "the intentional destruction of unborn human life after implantation in the womb of a woman." Section 1(2) provides for the exception to that definition and provides that abortion "does not include the carrying out of a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman's life other than by self-destruction." Section 1(3) defines an "approved place" as "a place in the State approved for the time being by order as being suitable for the purposes of this section". It also defines "medical practitioner" as a person "permitted for the time being by law to practise as a registered medical practitioner in the State." "Woman" is defined as a "female person". Finally, a "reasonable opinion" is defined as an opinion "formed in good faith which has regard to the need to preserve unborn human life where practicable".

Section 2 creates a new criminal offence of the carrying out or effecting of an abortion, with a maximum penalty of twelve years. Section 3 allows for conscientious objection to the carrying out of a medical procedure under Section 1 of the Act. Section 4 preserves freedoms to obtain and provide information, and to travel to another state for the purpose of an abortion. Section 5 provides for Ministerial powers to make orders relating to the provisions of the Act. Section 6 repeals the existing criminal offence of abortion under sections 58 and 59 of the Offences Against the Person Act, 1861. Section 7 provides for the title of the Act, and states that it shall not come into operation until at least two months after its passing.

### **The Definition of "Abortion"**

The provisions of the proposed Act apply only to unborn human life after implantation in the womb of a woman. This excludes application to unborn life post-fertilisation but pre-implantation, and also excludes application to unborn life that has developed outside the uterus, for example in the fallopian tubes of the woman. The reason given by the Government for this exclusion was to protect the legality of the morning-after pill and the IUD contraceptive method, both of which may operate after fertilisation. However, it would be dangerous to rely on the Government's assertion that the legality of these contraceptive methods will thereby be ensured. This is because nothing in the Act offers any protection to either method of contraception. They are excluded from the ambit of the legislation but not protected by it. This is because the words "in particular" in Article 40.3.4 mean that the existing protection of the unborn contained in Article 40.3.3 is not diminished. Accordingly, all that the 2002 Act does is to ensure that any possibility that a criminal prosecution based on section 58 of the 1861 Act will no longer be possible. The proposal does

nothing to stop, for example, a legal challenge by an anti-contraceptive group seeking an injunction to prevent a family planning clinic from issuing clients with the IUD or the morning-after pill on the basis that other pre-existing elements of the right to life of the unborn have been preserved. Thus, unborn right to life post-conception might arguably be protected under Article 40.3.3, notwithstanding the limited application of Article 40.3.4 to unborn life post-implantation. As is explained in [Chapter Three](#), the only judicial pronouncement so far on the issue indicates that Article 40.3.3 may operate to protect the unborn from the moment of fertilisation.<sup>111</sup> It is clear, therefore, that another reason given by the Government for supporting its proposal to amend the Constitution does not stand up to scrutiny.

The definition of "abortion" in the Act does not accord with either the standard medical or legal definitions of the term as set out in Chapters Two and Three. The definition instead attempts to deny the reality that abortion may be necessary in order to prevent a risk to the life of pregnant women in certain, rare circumstances. This dishonest approach reflects the Government's unwillingness to deal with the issues surrounding abortion openly.

<sup>111</sup> See the judgment of Hamilton P in *Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd) v Open Door Counselling Limited and Dublin Well Woman Centre Ltd* [1988] IR 593.

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## **Suicide and Pregnancy**

The test set out in section 1(2) read in conjunction with section 2, as to when a termination of pregnancy may legally be performed constitutes the Act's most serious flaw. As has been mentioned, these provisions constitute an amendment of both the existing criminal law and constitutional law as set out in [Chapter Three](#). The decision of the Supreme Court in the X case<sup>112</sup> established that the equal rights of woman and unborn set out in Article 40.3.3 mean that women as a minimum, in the words of Finlay CJ, have a constitutionally protected right to abortion where this is "necessary to prevent a real and substantial risk to the life, as distinct from the health" of the woman, whether the source of that risk is a physical condition or arises out of suicidal tendencies of the pregnant woman. Yet, the test set out in section 1(2) provides that a lawful abortion may only be carried out where "necessary to prevent a real and substantial risk of loss of the woman's life other than by self-destruction." The Government put forward its proposal on the basis that it would allow for all appropriate medical treatment of a pregnant woman, but the ban on performing abortions where a pregnant woman's life is put at risk by her suicidal tendencies runs directly counter to this assertion. The proposal implicitly puts forward the view that mental illness is not really illness, or alternatively that the risk of suicide is not really life-threatening.

The Government has adverted to the statistical evidence given to the All-Party Oireachtas Committee that suicide in pregnancy is rare; yet the evidence also clearly showed that abortion does occur. Furthermore, evidence presented in the Green paper on Abortion, which appears to have coloured the approach to suicide and pregnancy contained in the Act, to the effect that the Royal College of Psychiatrists, the professional body for psychiatrists in Britain and Ireland, is of the view that there are no psychiatric indications for abortion, appears to be incorrect.<sup>113</sup> The Government has also referred to medical evidence showing that suicide is hard to predict, yet that evidence, and in particular the evidence of Dr Geraldine Moane referred to in [Chapter Two](#), shows that health care professionals do assess risk of suicide and take appropriate interventive action to ameliorate that risk. The fact that it may be difficult to determine the existence of a risk to life and appropriate treatment thereof cannot be used as an excuse to do nothing. It is also clear, as illustrated in the evidence given in the X and C cases and in the Northern Irish cases examined in [Chapter Three](#) that, in particular cases, experienced health care professionals feel

competent to assess suicide risk and to prescribe abortion as an appropriate medical treatment to reduce risk of suicide in pregnant women.

In no other field of medicine is it regarded as appropriate that medical diagnosis and treatment should be determined by referendum rather than a professional assessment of individual patients. The net effect of the Act's provisions on suicide is that the right to life of the pregnant woman currently provided for in Article 40.3.3 on a basis of equality with that of the unborn is to be amended to render it of less value than that of the foetus. This is not a compassionate response to the problem of crisis pregnancy, nor is it an adequate response to the medical evidence available to the Government.

<sup>112</sup> *Attorney General v X* [1992] 1 IR 1.

<sup>113</sup> See Irish Times, 2 February 2002, p 14.

### **Medical Issues Not Dealt With**

The Government's assertion that medical aspects of abortion and pregnancy have been fully dealt with is further belied by the fact that its proposals do not take into account situations where medical treatment necessary to prevent risks to the long-term health of pregnant women, physical or mental, requires termination of pregnancy. This omission is particularly inexplicable in light of the fact, discussed in [Chapter Two](#), that over ninety-nine per cent of abortions performed on Irish resident women in Britain are performed on the basis of risk to the woman's own health or that of her children. Furthermore, the Abortion Reform poll discussed in Chapter Two shows that forty-seven per cent of respondents considered that a woman should be allowed to terminate her pregnancy in Ireland in such circumstances. Furthermore, the Government's proposals will necessitate a perpetuation of the situation described by Senator Mary Henry to the All-Party Oireachtas Committee and outlined in Chapter Two, whereby women pregnant with fetuses with congenital abnormalities incompatible with life are forced to continue with their pregnancies for approximately twenty-six weeks. A situation whereby, for legal reasons, such a pregnancy can be terminated after twenty-six weeks only because the foetus is "notionally viable", despite the fact that the pregnancy is being terminated precisely because the foetus can never become viable, should not have been allowed to stand. Finally, the proposal does nothing to clarify the situation which arose in Waterford last year, where a hospital was advised that the constitutional protection of the unborn required a brain-dead pregnant woman to be kept alive until the foetus became viable or expired.<sup>114</sup> Of particular concern in this case was the Attorney General's refusal to assist in obtaining clarification of the law in this area by acting as a "legitimus contradictor" in any court proceedings by the hospital seeking directions as to the correct application of Article 403.3 in the case. This is a further illustration of the Government's unwillingness to deal with problems faced by vulnerable women.

<sup>114</sup> See Irish Times, 16 June 2001, p 1.

### **Definition of Approved Place**

Under section 1(2) of the Act, an abortion may only be carried out at an "approved place". Section 1(3), when read in conjunction with section 5, gives a designated Minister the power to authorise "approved places". Clearly, if the Minister does not designate any approved place, or only designates a limited number of places, the constitutional right to life of the pregnant woman in any given life-threatening situation is put at risk. This would amount to a further limitation on the existing right to life of the woman. In response to concerns raised regarding section 5 as originally

drafted, a new sub-section 3 was inserted providing that the "Government shall ensure that such orders are made from time to time as are necessary to enable this Act to have full force and effect." The Government thus recognised that a future Government, unconcerned with the protection of women's lives, could restrict the number of approved places so as to render it impossible in practice for a woman to avail of a procedure "necessary to prevent a real and substantial risk of loss of the woman's life other than by self-destruction", in the words of section 1(2).

The net effect of the new sub-section would appear to be to give the courts powers to issue orders of mandamus directing a recalcitrant Government to make orders approving sufficient places to protect women's lives - a novel proposition, giving the judiciary new powers of control over the executive. Section 5(3) would thus appear to constitute yet another example of the tendency of elected politicians to refuse to take responsibility for the protection of women's lives, thus rendering it necessary for the courts to fulfil this function once more. It is unclear how, in practice, such a complex procedure would operate in a situation where a woman needed a termination in order to save her life while a recalcitrant Government was in power.

This problem is further exacerbated by the provisions of section 5(5), on the procedure for making orders under the Act. Section 5, as originally drafted, provided that orders made under its provisions were to be laid before the Houses of the Oireachtas who could annul them "without prejudice to the validity of anything previously done thereunder." Section 5(5) as contained in the Bill passed by both Houses of the Oireachtas, however, provides that an order proposed to be made under section 5 shall be laid in draft before each House and shall not be made unless and until both Houses pass resolutions approving the terms of the draft order. This procedure, while desirable in terms of democratic control of the executive by the legislature, could cause real problems where, for example, unforeseen circumstances necessitated the urgent making of an order approving a place for the purposes of the Act, particularly if the Oireachtas was on vacation.

The provisions of the Act regarding "approved places" thus give rise to considerable concern. In the first place, one might question the need to set out in legislation a requirement that a medical procedure necessary to save someone's life has to be carried out in any particular place. Section 5 thus represents yet another example where the rights of pregnant women are limited in a manner inconceivable in the case of any other category of person requiring medical attention. Secondly, if a requirement that life-saving procedures should take place in particular places was felt to be necessary one would expect that an exception would be made in cases of emergency. Senator Mary Henry<sup>115</sup> has indicated that circumstances may arise in practice, in particular in cases of haemorrhage, where emergency treatment may be required immediately to protect the life of a pregnant woman, but if such treatment required the termination of pregnancy it would be a criminal offence to provide it unless the woman were at or very near an approved place. It is regrettable that the Government refused to listen to or take on board such concerns when they were raised during parliamentary debate.<sup>116</sup> The Minister for Health's assertion that no such situations would ever arise in the future is contested by at least some medical experts, such as Senator Henry and the Adelaide Society.<sup>117</sup> The Government's apparent belief that it can predict all future scenarios in all future pregnancies with such a degree of certainty that it can enshrine its presumption in constitutional law indicates one more a complete lack of understanding of the complexities of medical practice.

<sup>115</sup>See Irish Times, 7 January 2002, p 13.

<sup>116</sup>See Irish Times, 29 November 2001, 9.

<sup>117</sup>See Irish Times, 4 February 2002, p 4.

## **Other Instances of Diminution of the Right to Life of Pregnant Women**

As has been mentioned above, section 1(2) of the Act specifies that a pregnancy may be terminated only where there is a "real and substantial risk of loss of the woman's life"; this test is somewhat different than the test set out in the judgment of Finlay CJ in the X case, which required a "real and substantial risk to the life" of the woman. This new formulation appears to restrict further the already restrictive test in the X case. The test set out in section 1(2) also assumes a certain clarity in the calculation of physical risk of loss of a woman's life, which may not always be present in the reality of medical practice. Such a restrictive test may not be suitable for doctors who will face potentially serious criminal action if they miscalculate.

Under section 1(3) of the Act, the definition of "reasonable opinion" provides expressly for the medical practitioner to have regard to the need to preserve unborn human life, but there is no provision for the necessary regard to be had to the need to preserve the right to life of the pregnant woman. This represents a further diminution of the right to life of pregnant women.

Section 6 of the Act repeals the old criminal offences relating to abortion provided under sections 58 and 59 of the Offences Against the Person Act 1861. A new criminal offence of abortion is created under section 2. This proposed new offence will eliminate the defence presently available under the 1861 Act, as interpreted in the *Bourne* case<sup>118</sup> and the other cases described in [Chapter Two](#), whereby an abortion was not to be considered unlawful if the continuation of the pregnancy would have rendered the woman a mental or physical "wreck". The penalty provided for is less than the present maximum of life imprisonment (twelve years will be the maximum under this proposal) but it would appear to be easier under section 2 of the Act to convict the woman herself or anyone who helps her in seeking an abortion in Ireland.

Despite the creation of this restrictive new criminal offence to cover any doctor who performs an abortion that falls outside the definition in section 1(2), no offence is provided for if a doctor refuses to carry out procedures necessary to save a woman's life, and the woman dies. Indeed, the conscience clause in section 3 of the Act appears to provide express protection for such doctors. It may be questioned whether any doctor who has a conscientious objection to performing a medical procedure necessary to prevent a risk to the life of a pregnant woman should be allowed to practise medicine, particularly when the risk cannot be one of suicide. It is even more concerning that the Government should think it appropriate that such a right should be enshrined in law with regard to a procedure it does not regard as an abortion and yet another example where normal legal and medical safeguards are to be denied to pregnant women. Conscience clauses are a feature of legislation in countries permitting abortion. However, as comprehensive research by the World Health Organisation<sup>119</sup> has shown, conscience clauses provided for in legislation are usually subject to an exception in emergency cases where the life of the woman is at risk and to a requirement that the woman be referred to a doctor who will provide her with the necessary medical treatment. The inclusion of a conscientious objection clause in a piece of legislation outlawing, rather than permitting, abortion is thus fundamentally misconceived, particularly in the absence of any limitations on the right to object.

<sup>118</sup> 1 KB 687.

<sup>119</sup> WHO, *Considerations for Formulating Reproductive Health Laws*, 2000, available at <http://www.who.int/reproductive-health/publications>.

## **Freedom to Travel**

Section 4(1) of the Act confirms freedom confirms the freedoms to travel and to information already inserted into Article 40.3.3 in the November 1992 referendums. However, neither it nor Article 40.3.3 provide any right to travel, or give any state agency or body any enabling power to assist a woman in travelling abroad. The absence of any such enabling power means that where a pregnant woman or girl is unable to travel abroad unassisted, she has no right to assistance

and so cannot in practical terms exercise her freedom to travel. As has been indicated in [Chapter Three](#), in the *C* case a Health Board was given permission by the Court to take a young pregnant girl in their care out of the jurisdiction for an abortion, only because she was suicidal and the continuation of the pregnancy was deemed to constitute a threat to her life, thus entitling her obtain to a "lawful" abortion in Ireland or to travel abroad to obtain such an abortion.

Section 4(2) of the Act represents a partial attempt to deal with the High Court's decision in the *C* case, by providing that nothing in the Act operates to prevent any person from travelling abroad on the basis that she intends to engage in conduct abroad that would constitute an offence under the Act. However, the use of the words "in particular" in the proposed Article 40.3.4 means that the existing constitutional prohibition on performing abortions in Ireland contained in Article 40.3.3 could be used to prevent a woman in the care of the State from travelling abroad and to prevent the State from providing her with assistance. This amounts to the most significant practical restriction on the right to life of women and will cause problems for any woman or girl who needs assistance or permission to travel, such as prisoners, children in care, wards of court, patients involuntarily detained in mental hospitals and women suffering economic deprivation; in other words, the most vulnerable categories of pregnant women.

The provisions on travel and information in the Bill represent a hypocritical approach to abortion: on the one hand, the Government is attempting to ensure, by constitutional amendment, a greater notional degree of protection for the unborn such that even women rendered suicidal by pregnancy cannot obtain abortion facilities in Ireland; on the other, it is attempting to ensure, again by means of constitutional amendment, that no responsibility will be placed on the State to protect the unborn by preventing women from leaving the jurisdiction to obtain abortions, for whatever reason. One of the more invidious aspects of this proposal is that the failure to provide a right, as opposed to a freedom, to travel abroad means that pregnant women seeking abortions abroad in circumstances where they would not be permissible in Ireland must travel without State assistance. Therefore, while better off women are constitutionally mandated to travel abroad, and, with the assistance of the newly formed Crisis Pregnancy Agency, can avail of counselling services on their return home, women unable to travel abroad who have their pregnancies terminated in Ireland face a twelve year prison sentence rather than professional support from a counsellor.

The Government has attempted to argue that it is impracticable and undesirable to attempt to protect the unborn abroad, yet the Oireachtas has enacted legislation with extra-territorial effect in the past, such as the Sexual Offences (Jurisdiction) Act, 1996, which makes it a criminal offence for an Irish national, wherever resident, or a foreign national resident in Ireland to commit sexual offences against children abroad. It is of course practicable to issue injunctions in cases where it is known that a woman intends to travel abroad for an abortion and even more practicable to prevent women in state care from travelling abroad. However, as the Government is aware, the public would not accept such restrictions on women's rights: the Government is neither prepared to follow public opinion and provide for abortion in Ireland nor to give practical effect to its stated constitutional policy. This hypocritical approach is most clearly illustrated by the Government's justification of excluding suicide as a ground for abortion in Ireland on the basis that suicidal women can travel abroad to obtain abortions. As has been indicated in this chapter, however, there is no certainty that this will indeed be the case. In any event, the Government's attempt to absolve itself of any responsibility to protect either the woman or the unborn in such circumstances and to place the onus of care on foreign health-care systems is hardly compatible with the assertion in Article 5 of the Constitution that Ireland is a sovereign and independent State. One of the more extraordinary features of the public debate on the current proposal is that the Pro-Life Campaign, which in 1992 campaigned against the Thirteenth and Fourteenth Amendments of the Constitution introducing the freedom to travel, has not condemned those aspects of the proposal which reaffirm the freedom to receive and obtain information on abortion services abroad and reaffirm and purport to strengthen the freedom to travel to avail of those services. It is a measure of how far the public mood on abortion has changed in the past decade

that the mainstream anti-abortion movement has accepted that Irish women must be able to access abortions even if only abroad.

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### **Compatibility of the Proposals with EU Law and Ireland's International Obligations**

As has been explained in [Chapter Three](#), the potential for EU harmonisation of Member State's abortion laws is unlikely, but cannot be ruled out completely. The Protocol to the Maastricht Treaty applies explicitly to exclude EU law from the "application in Ireland of Article 40.3.3 of the Constitution of Ireland". As was explained in Chapter Three, the Solemn Declaration of 1 May 1992 indicates that only Article 40.3.3 as initially inserted into the Constitution by the Eighth Amendment is covered by the Protocol. This exclusion clearly would not cover the new provisions in Article 40.3.4 and 40.3.5. This means that subsections 4 and 5 could be challenged under EU law. The Government has at times denied the need for any change to the Protocol and at other times indicated that such a change may be required.<sup>120</sup> However, as is made clear in the Declaration, the Protocol was never intended to cover travel and information so the then Government must have had concerns as to the compatibility of the Irish prohibition on abortion with EU law. As the proposed changes would further restrict the entitlement to abortion by outlawing suicide as a ground for abortion, it is clear that that any further restriction could be challengeable in the Court of Justice of the European Communities with a greater likelihood of success than that apparently feared by the Government in 1992. The Taoiseach, when admitting the possibility of a conflict between Irish and constitutional law, also indicated that a change to the Protocol would be relatively easy. However, it is clear that any change would require ratification by all Member States and that prior to any amendment EU law would prevail.

As has been indicated in [Chapter Three](#), Ireland is party to a range of UN human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. The jurisprudence of the monitoring bodies set up to interpret and to ensure compliance with the provisions of these treaties indicates that abortion should be legalised in cases of risk to life and health, and also perhaps in cases of rape and incest. The Human Rights Committee set up to monitor the International Covenant on Civil and Political Rights has expressed concern that Ireland's existing abortion regime is overly strict. The Committee set up to monitor the Convention on the Elimination of All Forms of Discrimination Against Women went even further in 1999 and recommended that the Government initiate a public debate with a view to liberalising Irish abortion law. The Government's proposals, as set out in the Twenty-Fifth Amendment to the Constitution Act, fly directly in the face of such a recommendation. The ICCL regrets the Government's apparently deliberate attempt to increase the risk of Irish abortion law violating the State's international human rights obligations. Similar concerns arise with respect to the European Convention on Human Rights, particularly in light of the ongoing uncertainties regarding travel and the legality of post-coital contraception, such as the IUD and morning-after pill, which would appear to breach the Convention's requirement that any interference with the rights set out therein should be regulated by a clear and foreseeable law.

<sup>120</sup> See Irish Times, 10 October, p 5.

### **Lead Up to the Referendum Campaign**

One final criticism may be made of the proposed referendum. In *McKenna v An Taoiseach*<sup>121</sup> the Supreme Court held that the use of public monies by the Government to fund a publicity campaign encouraging the public to vote in favour of a referendum proposal it supported was unconstitutional. Following on from that decision a Referendum Commission was set up on a statutory basis. In all referenda held to date since the *McKenna* decision the Commission has distributed publicly information on the proposal to amend the Constitution and set out the arguments put to it by persons in favour of and opposed to the proposal. The practice of requiring the Referendum Commission to put arguments for and against the referendum proposals proved unpopular with Governments and with political parties favouring such proposals. Accordingly, the All-Party Oireachtas Committee examined this issue and recommended that the Commission's function in this regard be taken away.<sup>122</sup> The Government accepted this recommendation and included a corresponding provision in the Referendum Bill it introduced in the Dáil in December 2001. The Committee recommended that, as an alternative to allocating public funds to the Referendum Commission to inform the public of arguments for and against a referendum proposal, funds should be allocated directly to the groups supporting and opposing such proposals. The Government, however, did not follow this recommendation and, despite opposition criticism, the Referendum Act, 2001 (as enacted) takes away the Commission's role of informing the public of arguments for and against the Twenty-Fifth Amendment of the Constitution Bill while failing to ensure any adequate alternative mechanism for informing the public. No public money will be spent informing the public of arguments against the proposal contained in the Twenty-Fifth Amendment of the Constitution Bill, while the Government will utilise public resources other than in the manner prohibited in the *McKenna* case. The Government's attempt to stifle informed public debate is particularly regrettable.

<sup>121</sup> [1995] 2 IR 10.

<sup>122</sup> See Irish Times, 13 December 2001, p 7.

## Conclusion

In this position paper the ICCL has examined the realities of Irish abortion, in terms of medical practice in Ireland, and in terms of the number of Irish women who travel abroad to obtain termination facilities denied them in Ireland. The paper also looked at public opinion on abortion. In this regard, the results of the Abortion Reform poll in particular show that many Irish people wish to see abortion made available more readily than is currently the case. Accordingly, a proposal to further restrict the rights of Irish women, including their right to life, hardly represents the broad consensus that the Government claims its proposals represent. The position paper has also analysed existing Irish law and Ireland's EU and international obligations and shown that the proposal represents a significant risk of the State being found to be in breach of these obligations. In light of our study of the existing situation, this paper shows that the proposals contained in the Twenty-Fifth Amendment of the Constitution Bill fail to address or take account of the range of medical issues arising in pregnancy. The failure to address the needs of women at risk of long-term damage to their health is of concern, as is the failure to ensure humane treatment of women pregnant with foetuses incapable of life. The fact that the proposal does not clarify the status of post-coital contraception or of brain-dead pregnant women illustrates the Government's lack of seriousness in addressing the issues arising out of the constitutional protection of the unborn. The central aim of the Twenty-Fifth Amendment of the Constitution Bill is to deny the right to life of suicidal pregnant women; as has been shown, the proposal may limit the right to life of pregnant women in other circumstances also. Furthermore, the Government's proposals run directly counter to Ireland's obligations under a range of human rights treaties.

The Government's attempt to export the vast majority of Irish abortion, while treating women who have abortions in Ireland as constitutional criminals, represents not a compassionate approach to women in crisis pregnancies or even a genuine attempt to protect the unborn, but an attempt to

evade its responsibility to deal with one of the most fundamental issues facing Irish society. The proposal contained in the Twenty-Fifth Amendment to the Constitution Bill represents a request by the Government to the People to join it in denying the reality of Irish abortion. At the same time, by its refusal to provide State funding to enable its arguments in favour of the referendum to be questioned, it is attempting to ensure that the voters are not in a position to make an informed decision. The ICCL rejects this approach and recommends a No vote in the forthcoming referendum.

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## **Appendix I - Useful Contacts**

**Irish Council for Civil Liberties**, Dominick Court 40-41 Lower Dominick Street, Dublin 1. Tel. 01 878 3136. [e-mail: iccl@iol.ie](mailto:iccl@iol.ie)

**Alliance for a No Vote**, e-mail: [allianceforanovote@eircom.net](mailto:allianceforanovote@eircom.net)

**Cherish**, 2 Lower Pembroke Street, Dublin 2. Tel. 01 6629212

**Fine Gael**, 51 Upper Mount Street Dublin 2. Tel. 01 6198444

**Green Party**, 5a Upper Fownes St., Dublin 2. Tel. 01 6790012

**Irish Congress of Trades Unions**, 31/32 Parnell Square, Dublin 1. Tel. 01 8897777

**Irish Family Planning Association**, 4th Floor Unity Building, 16/17 Lower O'Connell Street, Dublin 1. Tel. 01 4740944

**Irish Women's Abortion Support Group**, c/o Irish Family Planning Association (see above)

**Labour Party**, 17 Ely Place, Dublin 2. Tel. 01 6183433

**Marie Stopes Reproductive Choices**, 58 Blessington Street, Dublin 7.  
Tel. 01 830 0630

**Sinn Féin**, Unit 2, St. Dominic's Shopping Centre, Dublin 24. Tel. 01 4621091

**Socialist Party**, 141 Thomas Street, Dublin 8. Tel. 01 6772592

**Well Woman Centre**, 35 Lower Liffey Street, Dublin 1. Tel. 01 8728051