



Irish Council for  
**Civil Liberties**

**ICCL Submission to the Citizens' Assembly on the Eighth  
Amendment to the Constitution**

**16 December 2016**

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## **About the Irish Council for Civil Liberties (ICCL)**

The Irish Council for Civil Liberties (ICCL) is Ireland's independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone.

Founded in 1976 by Mary Robinson and others, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. These have included campaigns resulting in the historic Marriage Equality referendum, establishment of an independent Garda Síochána Ombudsman Commission, the legalisation of the right to divorce, more effective protection of children's rights, the decriminalisation of homosexuality and introduction of enhanced equality legislation.

We believe in a society which protects and promotes human rights, justice and equality.

## **What we do**

The ICCL

- Advocates for positive changes in the area of human rights;
- Monitors Government policy and legislation to make sure that it complies with international standards;
- Conducts original research and publishes reports on issues as diverse as equal rights for all families, the right to privacy, police reform and judicial accountability;
- Runs campaigns to raise public and political awareness of human rights, justice and equality issues;
- Works closely with other key stakeholders in the human rights, justice and equality sectors.

## **How we are funded**

The ICCL is a non-party political non-governmental organisation which receives funding from Trusts and Foundations, members and supporters and the European Commission. The ICCL does not receive any funding from Government.

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@ICCLtweet

Dear Mrs Justice Laffoy,

On behalf of the Irish Council for Civil Liberties (ICCL), I am pleased to enclose a copy of the Council's submission to the Citizens' Assembly on the Eighth Amendment to the Constitution.

The ICCL has been a long-standing voice seeking reform of Art 40.3.3 of the Constitution which was inserted by the Eighth Amendment to the Constitution following a referendum in 1983. We consider that a referendum on the Eighth Amendment is an opportunity to bring the Constitution into line with prevailing social values around pregnant women's medical care. Such reforms, we believe, would be entirely consistent with the evolution of social and ethical attitudes over the last number of decades, including with respect to issues such as contraception, divorce and marriage equality. We know that public opinion polls and research consistently demonstrate increased support for access to abortion in Ireland, including favourable inclinations by respondents towards repeal of the Eighth Amendment, sometimes by up to three quarters of participants.

In the vast majority of countries in the world, access to abortion services is a normal, accepted, de-stigmatised part of a functioning health care system. It is a service which is available to women within defined legal and medical frameworks. Pathways to provide abortion services are set out for midwives, doctors, nurses and other health care professionals. They care for pregnant women patients without fear of prosecution and in the best interests for her health and safety. At present in Ireland, establishing legal, policy and medical frameworks around best practice in the provision of maternity and abortion services is not possible. In order to achieve this, removal of the Eighth Amendment is necessary.

Ireland is one of a smattering of countries which places restrictions on access to abortions services within the Constitution. As we know from the cases which have come before our courts and into the public arena, those restrictions have huge consequences for women and families in Ireland. The absolute rigidity of the Article 40.3.3 vis-à-vis the provision of access to abortion in Ireland means that Ireland has been found consistently to violate women's human rights, including by the European Court of Human Rights and the UN Human Rights Committee. Several international human rights bodies have called upon the State to take the necessary steps towards constitutional reform and just this year, the State received 15 separate recommendations on abortion law reform by members of the UN Human Rights Council under the Universal Periodic Review process (see further herein).

This submission is designed to explain the constitutional and human rights considerations which should underpin any abortion law reform. It covers the following areas: current legal framework; the European Convention on Human Rights; international human rights; decriminalisation; conscientious objection and the future legal framework. Some recommendations are included also.

It is the considered view of the ICCL that this current process and the prospect of abortion law reform represents an opportunity for Ireland to move beyond the bare minimum human rights requirements identified by the European Court on Human Rights and by UN Committees. The Assembly, the Oireachtas and the people of Ireland now have the

opportunity to pursue improvements in Ireland's human rights record and the ICCL strongly urges it to do so.

Yours sincerely,

*Liam Herrick*  
Executive Director

# 1. INTRODUCTION

## Our history on abortion rights

The ICCL has long campaigned for the full realisation of reproductive rights for women and girls in Ireland including access to safe and legal abortion. Prior to the referendum in 1983 which introduced Art 40.3.3 into the Irish Constitution, the ICCL opposed the proposal. The ICCL publicly declared its opposition to the amendment describing the referendum as an “expensive and unnecessary” procedure which would make little difference to the legal status quo at the time. A spokesperson for the organisation said of the referendum that “A constitutional amendment will not affect any of the pressures which at present are driving many Irish women to seek abortions abroad.”<sup>1</sup>

The ICCL’s observation that the 1983 amendment would not clear up aspects of the law proved prescient almost a decade later during the ‘X’ case, when the High Court forbade a 14-year-old girl who was pregnant as a result of rape from travelling to England for an abortion. While the Supreme Court later overturned this, the ICCL expressed “extreme concern” at the willingness of judges to limit the right of women to free movement for obtaining an abortion abroad.<sup>2</sup>

The three subsequent 1992 referenda on the right to travel, the right to information and making abortion illegal except if the life of the mother was in danger was one of the most controversial and bitterly contested moments in the State’s history. The ICCL called for a ‘Yes’ vote on the right to travel and information, but opposed the Government’s wording on the substantive issue. Instead, it called for a wording that would allow women to choose, up to the time of the independent viability of the foetus.<sup>3</sup>

A decade later, the organisation was again expressing its opposition to another referendum on the issue, which then-Taoiseach Bertie Ahern insisted was an attempt to ‘clarify’ abortion law. This time the proposed amendment – which sought to allow abortion in cases where a pregnant woman’s life was at risk, but would not permit the threat of suicide as justification for the procedure – attracted opposition from both anti-choice and pro-choice groups. The ICCL said the proposed amendment “demeaned women by assuming they could not be trusted” and urged its rejection. The amendment was defeated.<sup>4</sup>

In 2013 the ICCL was invited to attend the hearings of the Oireachtas Committee on health on the Expert Group report on the Judgment in *A, B & C v. Ireland*. It also made detailed submissions to the hearings on the General Scheme of the protection of Life during Pregnancy Bill 2013.

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<sup>1</sup> ICCL, 2006, *Protecting Civil Liberties, Promoting Human Rights – 30 Years of the Irish Council for Civil Liberties* Available at:

<http://www.iccl.ie/attachments/download/4/Protecting%20Civil%20Liberties%20Promoting%20Human%20Rights%2030%20Years%20of%20the%20ICCL%20May%202006.pdf>

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

The ICCL has been at the forefront of civil society stakeholder reporting to the UN Treaty Monitoring System<sup>5</sup> and to the UN Human Rights Council in the form of the Universal Periodic Review (UPR) process.<sup>6</sup> The ICCL has played a significant leadership role in bringing stakeholders together to report under the various treaties, to attend UN Committee hearings in person and to lobby and advocate for meaningful recommendations on Ireland's outdated abortion laws at the UN, Council of Europe and with many representatives from Permanent Missions to Ireland of other UN Member States regarding UPR. On each occasion the ICCL has pressed for and facilitated calls for abortion law reform.

Welcoming the establishment of the Citizens' Assembly as a positive deliberative forum to progress abortion law reform debate, the ICCL developed and distributed a 'blueprint' regarding the principles which should be core to the workings of the Assembly including with respect to transparency, effective operations, hearing the voices of civil society and women themselves.<sup>7</sup>

### **What is the ICCL's position on access to abortion?**

The ICCL believes that all women in Ireland, regardless of their economic or social status, should be entitled to access medical services, including abortion services, according to best medical practice, and in compliance with human rights standards, in Irish hospitals and clinics.

The ICCL believes that Irish law, policy and practice should be amended to provide access to abortion services according to international human rights law on grounds of rape/sexual assault, incest, diagnosis of fatal foetal anomaly, and protection of health.<sup>8</sup> Provision should be made for abortions without reasons.

All women<sup>9</sup> should be entitled to equal treatment under the law and no one should be discriminated against in relation to the type of medical service which they need to access. Constraining the right to access abortion services to impossibly narrow grounds as is currently the case, violates women's rights to privacy, family and home life, and may constitute inhuman or degrading treatment or punishment.

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<sup>5</sup> For example see, ICCL led Civil Society Coalition Report on Ireland's Fourth Periodic Examination under the International Covenant on Civil and Political Rights available at: <http://iccl.ie/civil-society-report-to-the-fourth-periodic-examination-of-ireland-under-the-iccpr-%28june-2014%29.html>

<sup>6</sup> For more information on ICCL's leading civil society role on UPR see [www.rightsnow.ie](http://www.rightsnow.ie)

<sup>7</sup> See Blueprint for a Citizen's Assembly – available at <http://hearourvoices.ie/the-blueprint>

<sup>8</sup> The World Health Organization definition of health is "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

<sup>9</sup> References to women in the text should, unless specified, be taken to include minors who may also require access to abortion services.

## 2. CURRENT LAW

### What is the current legal position in relation to abortion in Ireland?

Abortion is legal in Ireland. It has been legal, in certain highly-restricted circumstances, for the past twenty four years. In *Attorney General v X*<sup>10</sup> the Supreme Court unambiguously affirmed that a pregnant woman's *constitutional right to life* entitles her to terminate her pregnancy if it is established as a matter of probability that there is a real and substantial risk to her life (as distinct from her health) which can only be avoided by termination of the pregnancy. The Supreme Court included the risk of suicide within the definition of real and substantial risk to life. This is an authoritative interpretation of the Eighth Amendment which inserted Article 40.3.3 into the Constitution.

The Protection of Life During Pregnancy Act 2013<sup>11</sup> provided legislation based on the Supreme Court decision in *X* and was progressed politically on foot of the European Convention on Human Rights (ECHR) judgment in the case of *A, B and C v. Ireland* (for more information on this case, see page 15 below).<sup>12</sup>

The 2013 Act allows for abortion in extremely restricted circumstances when the life, not the health, of the mother is at risk. Guidelines for medical practitioners were published to accompany the 2013 Act.<sup>13</sup> The legislation, however, was drawn up within the context of Article 40.3.3 and unlikely to be fit for purpose should the Eighth Amendment be repealed.<sup>14</sup>

### How does the Eighth Amendment affect access to abortion in Ireland?

The Eighth Amendment to the Constitution places foetal existence on an equal footing with the right to life of a woman under the law.

This means that doctors and other medical personnel who are providing services to a pregnant woman must, at all times, consider the viability of foetal existence when making medical decisions around the treatment of women. Failure to adequately balance foetal existence with the right to life of the pregnant woman may result in prosecution under the 2013 Act.<sup>15</sup>

The Eighth Amendment also covers access to information and freedom to travel (see below).

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<sup>10</sup> [1992] 1 IR 1.

<sup>11</sup> <http://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/pdf>.

<sup>12</sup> [2010] ECHR 2032.

<sup>13</sup> Department of Health, (19 September 2014), Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals, available at <http://health.gov.ie/blog/publications/implementation-of-the-protection-of-life-during-pregnancy-act-2013-guidance-document-for-health-professionals/>.

<sup>14</sup> For example, Irish law would continue to be in violation of international human rights law if the 2013 Act remains the main legislative framework for access to abortion.

<sup>15</sup> Protection of Life During Pregnancy Act 2013, section 22.



## **What about the ground of suicide?**

In the *X* case, the Supreme Court stated explicitly that the grounds of threat of suicide to the mother was included in its test 'real and substantial risk to life'. The Twelfth Amendment to the Constitution was put to a referendum in 1992 stating that the risk of suicide should not be considered sufficient reason to legally allow an abortion. This was rejected by the Irish people. Another attempt to further limit the provision of abortion on the grounds of suicide was put to a referendum in 2002 via the Twenty-Fifth Amendment to the Constitution but this was also defeated (in addition to new penalties for anyone performing an abortion).

## **What does the law say about travelling to another country for an abortion?**

The Constitution specifies that the prohibition of abortion should not limit freedom of travel in and out of the State.<sup>16</sup>

The UK Department of Health releases annual statistics on the number of women and girls who present addresses from the Republic of Ireland at abortion clinics in England and Wales. In 2015,<sup>17</sup> the UK Department of Health reported that 3,451 women and girls in Ireland travelled to the UK to access abortion services. It has been reported that between 1980 and 2015, at least 165,438 women and girls in Ireland accessed UK abortion services.<sup>18</sup>

Of course these numbers are merely a component of the total number of women in Ireland who access abortions outside the jurisdiction on a daily basis. Some women travelling to UK abortion clinics may not wish to give their Irish addresses, women travel to countries other than the UK and many more women and girls access abortion pills online.

## **Does the law allow access to information on abortion?**

Under Article 40.3.3 provides that the prohibition of abortion should not limit the right to distribute information about abortion services in other countries.<sup>19</sup>

The Regulation of Information (Services Outside the State For Termination of Pregnancies) Act 1995 provides the legal basis for the provision of information on abortion services in Ireland.<sup>20</sup> The 1995 Act (usually referred to as the Abortion Information Act) allows doctors,

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<sup>16</sup> The Thirteenth Amendment of the Constitution of Ireland. It was affected by the Thirteenth Amendment of the Constitution Act, 1992, which was approved by referendum on 25 November 1992 and signed into law on 23 December of the same year.

<sup>17</sup> The year for which the most recent figures are available.

<sup>18</sup> Irish Family Planning Association, see [www.ifpa.ie](http://www.ifpa.ie).

<sup>19</sup> Fourteenth Amendment to the Constitution. It was effected by the Fourteenth Amendment of the Constitution Act, 1992, which was approved by referendum on 25 November 1992 and signed into law on the 23 December of the same year.

<sup>20</sup> In re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995 [1995] 1 IR 1 was a decision of the Supreme Court of Ireland after a referral by President Mary Robinson under Article 26 of the Constitution of Ireland. This is a procedure whereby the constitutionality of a bill is considered by the Supreme Court before it is signed into law, similar to the concept of a facial challenge in the United States. If the Court finds that it is constitutional, it may not later be challenged after its enactment.

advisory agencies and individual counsellors to give information on abortions services abroad if a woman makes a request. However, doctors and other health professionals are prohibited under the Act from making an appointment for an abortion in another country<sup>21</sup> and any information on abortion must be given as part of one to one counselling and with information on parenting and adoption.

### **How does this impact on women seeking legal access to abortions?**

If a woman wishes to have an abortion for a reason other than her life being at risk, she is entitled to information about abortion services in another country and can travel to another country to access abortion services, if she chooses.

Except where her life is at risk (including a threat of suicide), she cannot access the abortion service in Ireland.

A woman cannot access abortion services in Ireland if:

- She has chosen termination of pregnancy as the best personal option, including with respect to family life;
- She risks experiencing health complications including very serious health matters;
- She has been a victim of rape;
- She has been the victim of incest;
- She is carrying a foetus with a diagnosed severe or fatal foetal anomaly.

### **What does the ICCL think about the Eighth Amendment?**

The ICCL believes that a provision which regulates women's access to medical services should not be placed in the Constitution and that the Eighth Amendment should be removed from the Constitution without replacement.

As our foundational legal instrument, the Constitution should contain broad statements of principles and shared values, which guide the courts when interpreting the law, and in judicial development of constitutional rights. Article 40.3.3 is a rigid legal mechanism which has become unworkable and has slowed down the development of jurisprudence with respect to any issue where there is foetal-maternal conflict. It impacts on matters such as delivery of maternity services; consent to medical treatment for pregnant women and birth choices.

Prior to the introduction of the Eighth Amendment, the then Attorney General, Peter Sutherland recognised the exceptional nature of "ensconcing ... an Act in the Constitution in such a manner" stating that it could have "unforeseeable and perhaps undesirable consequences, and which could set an unfortunate precedent in other areas and ultimately

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The Supreme Court ultimately found that the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill, 1995 was constitutional, and decisively rejected the argument that natural law supersede positive law in the Constitution of Ireland.

<sup>21</sup>Section 8.

even provide a means whereby the fundamental rights guaranteed in our Constitution could be undermined.”<sup>22</sup>

Mr Sutherland further stated, “the wording is ambiguous and unsatisfactory. It will lead inevitably to confusion and uncertainty, not merely amongst the medical profession, to whom it has of course particular relevance, but also amongst lawyers and more specifically the judges who will have to interpret it. Far from providing the protection and certainty which is sought by many of those who have advocated its adoption it will have a contrary effect”.<sup>23</sup>

Cases before the courts over the last two decades and the experiences of medics confirm the worst of his predictions. Most cases which make it to the courts or into public awareness occur at the extreme end of medical decision making and the unyielding legal regime imposed by Article 40.3.3. These include *Attorney General v X*,<sup>24</sup> the case of Savita Halappanavar,<sup>25</sup> *Ms Y* case<sup>26</sup> and *PP v HSE*.<sup>27</sup>

The ICCL wishes to see a referendum to change this constitutional position to sufficiently enable the introduction of a progressive and human rights based approach to protecting the lives and health of pregnant women in Ireland. In this respect, the ICCL wishes to see the removal of the Eighth Amendment from the Constitution without replacement.

### **How will removal of the Eighth Amendment impact on the Constitution?**

If a referendum to remove the Eighth Amendment is passed by a majority of the Irish people, the Protection of Life During Pregnancy Act 2013 will provide the legal basis for access to abortion in Ireland (together with the Regulation of Information (Services Outside the State For Termination of Pregnancies) Act 1995).

Therefore, it would remain the case that access to abortion in Ireland would be extremely restricted. In addition, the 2013 Act continues to criminalise women and medical professionals and sets out onerous procedures for women in order to access abortion, including assessment by potentially up to three doctors before certification for abortion is

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<sup>22</sup> See memoranda of Attorney General Peter Sutherland to government of 15 February 1983 and 1 March 1983 (National Archives Ref 2013/100/557-569).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Praveen Halappanavar, Savita’s husband settled his case for medical negligence against the HSE in early 2016. See Cullen P., Holland. K., (9 March 2016), “Husband’s action over death of Savita Halappanavar settled”, Irish Times, available at <http://www.irishtimes.com/news/crime-and-law/courts/high-court/husband-s-action-over-death-of-savita-halappanavar-settled-1.2566536>. The *Health Service Executive Report of the Investigation into the death of Ms. Savita Halappanavar* (13 June 2013), recommended that, “there is immediate and urgent requirement for a clear statement of the legal context in which clinical professional judgement can be exercised in the best medical welfare interests of patients (Recommendation 4b).”

<sup>26</sup> Ms Y was young woman who had sought asylum in Ireland and was pregnant as a result of rape. Despite two official investigations being launched no official record of this case has been published.

<sup>27</sup> Unreported High Court, 24 December 2014.

provided.<sup>28</sup> Under the regulatory framework of the 2013 Act, Ireland would continue to be in violation of international human rights law.

Should the Eighth Amendment be repealed, the ICCL wishes to see a clear and human rights compliant legal framework adopted to protect the health and safety of pregnant women and provide abortion services to women, and facilitate the provision of maternity services in line with best international medical practice.

### **Are there any other constitutional factors in relation to abortion aside from the Eighth Amendment?**

If a referendum were passed which removed the Eighth Amendment, the constitutional principle of respect for unborn life and foetal existence will remain. This was the case before the insertion of the Eighth Amendment and that jurisprudence will survive any repeal.<sup>29</sup>

However, the equivalence between foetal existence and the life of a woman, and the absolutist nature of the Eighth Amendment would be removed. It is unlikely that the Irish courts would stray into reasoning which elevates respect for foetal existence to any disproportionate level should a plebiscite recommend a removal of the Eighth Amendment.

In relation to the provision of contraception and family planning, the courts have identified a right of marital privacy<sup>30</sup> and indeed, one of the drivers of the campaign for the Eighth Amendment was the potential implications for access to abortion under the right to marital privacy.

The right to bodily integrity has also been identified by the Supreme Court as an unenumerated constitutional right and this could be expanded in the future to encompass provision of abortion services.<sup>31</sup> Some argue for adding an expressly enumerated right to bodily integrity to the Constitution.<sup>32</sup>

### **Do other countries have constitutional provisions similar to the Eighth Amendment?**

Globally, very few countries have comparable restrictions regarding access to abortion within their Constitutions.

### **Chile: Article 19**

The Constitution guarantees all persons:

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<sup>28</sup> See *ICCL Submission to the Joint Committee on Health and Children On Protection of Life During Pregnancy (Heads of Bill) May 2013*, available at <http://http://iccl.ie/iccl-submission-to-the-joint-committee-on-health-and-children-on-protection-of-life-during-pregnancy-%28heads-of-bill%29-2013.html>.

<sup>29</sup> *Attorney General (SPUC) v. Open Door Counselling Limited and Well Woman Centre* [1988] 1 IR 593, 597.

<sup>30</sup> *McGee v. Attorney General* [1975] IR 284.

<sup>31</sup> *Ryan v. Attorney General* [1965] 1 IR 264, *The State (C) v Frawley* [1976] 1 IR 362.

<sup>32</sup> Enright, M. (11 September 2014), "On Repealing the Eighth Amendment", Repeal the 8<sup>th</sup> conference, Dublin.

1. The right to life and to the physical and mental integrity of the person.
2. The law protects the life of the unborn.
3. The death penalty may only be instituted for a crime established in a law approved by a qualified quorum.
4. The application of any illegitimate force [apremio] is forbidden.

### **El Salvador: Article 1**

El Salvador recognizes the human person as the origin and the end of the activity of the State, which is organized to attain justice, judicial security, and the common good. In that same manner, it recognizes as a human person every human being since the moment of conception.

In consequence, it is the obligation of the State to secure for the inhabitants of the Republic, the enjoyment of liberty, health, culture, economic well-being and social justice.

### **Philippines: Article 2, Sec 12**

The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the young for civic efficiency and the development of moral character shall receive the support of the Government.

### **Hungary: Article II**

Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.<sup>33</sup>

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<sup>33</sup> This is a provision of the new [constitution of Hungary](#), enacted in 2011, although so far the abortion law has not changed and liberal access to abortion remains possible.

### 3. EUROPEAN CONVENTION ON HUMAN RIGHTS

#### What is the European Convention on Human Rights?

The European Convention on Human Rights (the Convention) is a binding international human rights treaty which protects human rights and fundamental freedoms.<sup>34</sup> All of the rights and freedoms protected by the Convention are set out in a number of articles including the right to life (Art 2), freedom from torture, cruel, inhuman or degrading treatment or punishment (Art 3), the right to privacy and family life (Art 8), the right not to be discriminated against (Art 14), and freedom of thought, conscience and religion (Art 9) among many others.

#### Where does the Convention apply?

The Convention was signed and ratified by all of the Member States of the Council of Europe, including Ireland.<sup>35</sup> The Council of Europe is an international organisation focused on promoting human rights, democracy and the rule of law in Europe. It includes 47 member states, 28 of which are members of the European Union.<sup>36</sup>

#### Who is protected by the Convention?

Any person within the 47 Member States of the Council of Europe who believes that his or her rights under the Convention have been violated by a Council of Europe Member State can take a case under the Convention.<sup>37</sup>

#### How is a case taken under the Convention?

A person who believes that their rights under the Convention have been violated can take a case to the courts in the relevant Member State. The courts can determine whether the action complained of amounts to a violation of that State's obligations under the Convention. This is important because under the Convention, States can enjoy a 'margin of appreciation' in how they apply some of the rights guaranteed by the Convention. This means that a particular right may be understood and applied in different ways in the laws of different countries.

Ireland incorporated the Convention into our domestic law under the European Convention on Human Rights Act 2003. Since then, people in Ireland can ask the courts to determine if the State has violated a person's rights protected by the Convention.<sup>38</sup> If the courts find that there has been a violation of the Convention, it can order that the State pays compensation to the individual. The courts may also find that a piece of legislation which gave rise to the violation is incompatible with the Convention.

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<sup>34</sup> European Convention on Human Rights available at [www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>35</sup> Ireland signed the Convention in 1953

<sup>36</sup> Council of Europe Official Website available at: <http://www.coe.int/en/>

<sup>37</sup> The European Court of Human Rights – The Court, in Brief available at: [http://www.echr.coe.int/Documents/Court\\_in\\_brief\\_ENG.pdf](http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf)

<sup>38</sup> European Convention on Human Rights Act 2003 available at: <http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html>

If a case satisfies all of the criteria for admissibility (and this usually means that the case must be taken to the national courts first) it may be taken to the European Court of Human Rights (the ECtHR/Strasbourg Court). The Court was established by the Convention to ensure that the rights protected by the Convention are upheld. If the Court finds that a country has violated the rights of an individual that decision is binding on the country in question. A country which has been the subject of a judgment by the Court is obliged by the Convention to execute that judgement to ensure that its laws do not violate the Convention in the future. In other words, a decision by the Strasbourg Court against a Member State is legally binding and must be enforced.<sup>39</sup>

### **Are all decisions of the Court binding on all Member States?**

The Strasbourg Court deals with a large number of cases in relation to the many different articles of the Convention. Where the Strasbourg Court makes a decision about a particular Member State, that decision will not necessarily apply to the laws in all other Member States. However, when deciding whether there has been a violation of a particular right, a domestic court may take account of how the Strasbourg Court decided an issue for another Member State and follow the judgment of the Court. This ensures that the rights protected under the Convention are applied in a consistent manner by all Member States while allowing some leeway to States in their interpretation of the rights guaranteed by the Convention.

### **Has the European Court of Human Rights ever decided a case regarding abortion against Ireland?**

In 2010, the Court found that Ireland had violated Article 8 (right to private and family life) in the case of *A, B & C v Ireland*.<sup>40</sup> This was a case taken by three separate women in relation to the failure of the State to provide for lawful abortion. The first two applicants, A and B, did not succeed. The applicant C had been diagnosed with cancer. Prior to learning she was pregnant; she undertook a series of medical tests which were not advised for pregnant women. C wished to terminate the pregnancy due to several risk factors but could not find a doctor to tell her if continuing with the pregnancy would result in 'a real and substantial risk to her life' due to the cancer or what the impact of the medical tests she had undertaken would likely be on the foetus she was carrying.

The Court found that, in relation to applicant C, the fact that there was no legislative framework governing the provision for an abortion in Ireland in cases where a woman's life was at risk (which was theoretically permitted in law following the decision of the Supreme Court in 1992 in the *X* case), amounted to a violation of Article 8 (right to private and family life). In its judgment the Court noted that the supposed right to access an abortion in certain very narrow circumstances was very different than what occurred in practice in Ireland.

"The Court considers that the uncertainty generated by the lack of legislative implementation of Article 40.3.3, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in **a striking discordance between the theoretical right to a lawful abortion**

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<sup>39</sup> Article 46 of the ECHR.

<sup>40</sup> *A, B & C v Ireland* (25579/05) 16 December 2010.

**in Ireland on grounds of a relevant risk to a woman’s life and the reality of its practical implementation.”**

The Court also found that the criminalisation and severe penalties attached to a conviction for procuring and conducting an unlawful abortion for both women and medical practitioners had a significant ‘chilling effect’ and interfered with the medical consultation between a woman and her doctor.

### **What happened as a result of the decision in *A, B and C v Ireland*?**

The decision of the Strasbourg Court meant that Ireland was obliged to enact new legislation to govern the provision of lawful abortion in Ireland.<sup>41</sup> It was also obliged to repeal the criminal law penalising a woman and her doctor, an offence which had attracted a penalty of up to life imprisonment. In direct response to the decision of the judgment, the Government enacted the Protection of Life during Pregnancy Act 2013<sup>42</sup> which sets out the very narrow grounds when a woman can lawfully access an abortion in Ireland as a result of the Supreme Court’s interpretation of the Art 40.3.3 of the Irish Constitution, in the 1992 ‘X’ case.<sup>43</sup>

### **How did Ireland undertake this process?**

Following the decision of the Strasbourg Court in *A, B and C v. Ireland* the Government established the Expert Group on the Judgment in *A, B and C v. Ireland* comprising of persons with appropriate medical, legal, regulatory and administrative expertise to advise on how to implement the judgment. The Expert Group was asked to recommend a series of options on how to implement the judgment taking into account the constitutional, legal, medical, and ethical considerations involved in the formulation of public policy in this area and the overriding need for expeditious action. A report was produced outlining the Group’s recommendations.<sup>44</sup>

Following the publication of the Expert Group’s report, the Government undertook a round of public hearings in January 2013 by the Joint Oireachtas Committee on Health and Children.<sup>45</sup> The Committee produced a detailed report on the hearings for the Minister for Health.<sup>46</sup> Following the production of the General Scheme of the Protection of Life during Pregnancy Bill 2013, the Committee held a further round of public hearings in May 2013 to which the ICCL again made a detailed submission. A further report was produced by the

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<sup>41</sup> Ibid

<sup>42</sup> Protection of Life During Pregnancy Act 2013

<sup>43</sup> *Attorney General v X* [1992] IR 1 1

<sup>44</sup> Report of the Expert Group on the judgment in *A, B & C v. Ireland*, available at: [www.health.gov.ie/wp-content/uploads/2014/03/Judgment\\_ABC.pdf](http://www.health.gov.ie/wp-content/uploads/2014/03/Judgment_ABC.pdf)

<sup>45</sup> Chaired by Mr Jerry Buttimer TD (now Senator). The Irish Council for Civil Liberties was invited to make an oral presentation to the Committee in Seanad Eireann. ICCL board member and barrister Mr Alan DP Brady BL and ICCL Policy and Research Manager Mr Stephen O’Hare made a presentation to the hearings together with representatives from other leading medical, legal and non-governmental organisations.

<sup>46</sup> Report on Health Hearings on the Implementation of the Government decision following the publication of the Expert Group Report on *A, B, & C vs Ireland*. Vol One.

[http://www.oireachtas.ie/parliament/media/Volume\\_1\\_142239.pdf](http://www.oireachtas.ie/parliament/media/Volume_1_142239.pdf) and Vol Two. [http://www.oireachtas.ie/parliament/media/Volume\\_2\\_142403.pdf](http://www.oireachtas.ie/parliament/media/Volume_2_142403.pdf).



Committee for the Minister for Health.<sup>47</sup> The legislation was finally enacted in July 2013 and entered into force on 1 January 2014.

It should be noted that prior to the first hearings in January 2013 the urgent need to produce legislation to regulate lawful abortion in Ireland was given added impetus following the public outcry at the death of Ms Savita Halappanavar at Galway University Hospital in November 2012. The tragic nature of Ms Halappanavar's death, in which she had sought but been denied a termination of a pregnancy, a material factor according to the Coroner in her eventual death,<sup>48</sup> should be viewed as a galvanising force in the political decision to finally enact legislation to give effect to the judgment of the Supreme Court 21 years earlier in the 'X' case.

### **Have there been any other cases in relation to abortion taken against Ireland?**

In *D v Ireland* the applicant claimed that her rights under the Convention had been violated in relation to a decision to seek a termination of a pregnancy which resulted in a fatal foetal anomaly which meant that the foetus would not survive outside the womb.<sup>49</sup> However, the Strasbourg Court found that the applicant had failed to exhaust all of the domestic legal remedies available to her in Ireland and ruled that the case was inadmissible and could not be considered by the Court.

### **Are there any other European Court of Human Rights cases on abortion that are relevant to Ireland?**

Although the decision in *A, B and C v Ireland* is the only decision of the Strasbourg Court directly relating to Ireland, and is therefore binding, there have been a number of other important decisions not binding on Ireland which nevertheless demonstrate how the Strasbourg Court views certain restrictions on abortion in member states. These decisions may well inform how the Court would view any similar cases taken in the future by women in Ireland and also how domestic courts may interpret the rights guaranteed by the Convention when considering whether a violation has occurred in a particular or similar case.

Three cases relating to Poland, another predominantly Catholic jurisdiction where access to abortion is restricted, are particularly noteworthy.

#### **1. *Tysiac v Poland*<sup>50</sup>**

In Poland abortion is legal only in cases where a woman's life or health are at risk from continuing with a pregnancy, in cases of rape or in cases of severe foetal malformation. In this case, a woman diagnosed with a degenerative eye condition sought access to but was denied a therapeutic abortion. The woman had learned that if she continued with her pregnancy she would risk losing her eyesight. However, the gynaecology and obstetrics department of a public hospital in Warsaw refused to terminate Ms Tysiac's third pregnancy on therapeutic

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<sup>47</sup> Report on Protection of Life during Pregnancy Bill 2013 (Heads of) following the hearing of 17, 20 and 21 May 2013 Vol One <http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Volume1.pdf> and Vol Two <http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Voluime-2.pdf>

<sup>48</sup> <http://www.irishtimes.com/news/health/savita-halappanavar-jury-returns-unanimous-medical-misadventure-verdict-1.1365716>.

<sup>49</sup> *D v Ireland*, 2006 Application No. 26499/02.

<sup>50</sup> *Tysiac v. Poland* (5410/03) 24 September 2007.

grounds. The subsequent birth resulted in Ms Tysiac suffering a major deterioration to her eyesight constituting a severe disability. Upholding her complaint the Strasbourg Court found that the application of Polish law had violated Ms Tysiac's rights under Article 8 (right to private and family life), and in particular that Poland had not demonstrated that "*Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case*". This means that when reviewing the provisions of Polish law on abortion the Strasbourg Court found that there was an insufficient legal remedy for Ms Tysiac to determine whether she was entitled to a lawful abortion or not on the grounds of the risk to her health.

## **2. RR v. Poland<sup>51</sup>**

In this case a woman suspected that her foetus was severely malformed and sought the relevant genetic tests to determine the extent of the condition. The result of the tests would inform her decision on whether to continue or to terminate the pregnancy. The woman's doctors refused to carry out the necessary genetic tests until after the term limit for accessing an abortion had been passed. This made it impossible for the woman to access a lawful termination despite the outcome of the tests which showed that the foetus was severely malformed.

In its judgment, the Strasbourg Court found that the woman had been severely humiliated and mistreated by the medical services to the point that it violated her rights under Art 3, prohibition on cruel, inhuman or degrading treatment. The Court followed the reasoning it had adopted in *A, B and C v Ireland* in 2010 stating once again that "*the lack of accessible and effective procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Poland, on grounds referred to in this provision and the reality of its practical implementation*".

## **3. P & S v. Poland<sup>52</sup>**

In this case the Court once again found that the treatment a woman had been subjected to by medical services and other relevant authorities had resulted in inhuman or degrading treatment contrary to her rights under the Convention. Taking the case, P was a 14 year old girl who became pregnant as a result of rape. Although P obtained a certificate from the prosecutor certifying that her pregnancy resulted from unlawful sexual intercourse, which under Polish law gave her a right to access a legal abortion she was severely hampered by the authorities in her attempts to secure an abortion. This included receiving misleading and distorted information from three different hospital about the requirements for obtaining an abortion, the disclosure of her identity to the press, and coercive tactics by police, anti-choice groups and representatives of the Catholic Church. Some doctors invoked 'conscientious objection' as a reason to refuse treatment without referring P to another provider or hospital which was a legal requirement. At one point, P was removed from the custody of her mother S, the other applicant in the case arising from allegations that S was coercing P into having an abortion. When P was finally granted access to an abortion it was done in a clandestine manner with no post-abortion care provided.

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<sup>51</sup> *RR v. Poland* (27617/04) 28 November 2011.

<sup>52</sup> *P & S v. Poland* (57375/08) 30 January 2013.

In its judgment the Strasbourg Court found that there had been a violation of both Article 3 (prohibition on inhuman or degrading treatment) and Article 8 (right to private and family life).<sup>53</sup> With regard to Article 3 the Strasbourg Court highlighted the particular and special vulnerability of a teenage girl in such circumstances against the apparent coercive and manipulative tactics of the authorities in their attempt to prevent her from accessing a lawful abortion. In relation to Article 8 the Courts noted a violation in relation to the claim of ‘conscientious objection’ [See Section 7 – Conscientious Objection] and in relation to her status as a minor. In particular, the Court noted that although a minor, the applicant should be afforded the right to self-determination in relation to her own reproductive choices. In its reasoning the Strasbourg Court stated that “legal guardianship cannot be considered to automatically confer on the parents of a minor the right to take decisions concerning the minor’s reproductive choices, because proper regard must be had to the minor’s personal autonomy in this sphere.” This statement will likely have implications for future decisions of the Strasbourg Court in determining the rights of minors to access reproductive services such as access to contraception and abortion.

### **What do these cases mean for Ireland’s current or future laws on abortion?**

These cases are not directly binding on Ireland. However, it is likely that in any future cases concerning access to lawful abortion in Ireland, whether under current or reformed legislation, the Strasbourg Court will be guided by its reasoning in these decisions as it was by the reasoning it employed in 2010 in *A, B & C v Ireland* when deciding *RR v Poland* in 2011.

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<sup>53</sup> *Ibid.*

## 4. INTERNATIONAL HUMAN RIGHTS

### **Are there other international human rights treaties that affect Ireland?**

Ireland is a member of the United Nations (UN). The UN has set out our human rights obligations in a range of treaties. Ireland has ratified (agreed to be bound by) six of the core UN human rights treaties. Each treaty protects a set of rights. When a State ratifies the treaty it agrees to implement these rights in its own country. Ireland has ratified the following UN human rights treaties:

- Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Covenant on Civil and Political Rights (ICCPR)
- UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT)
- Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Rights of the Child (CRC)

This means that Ireland has voluntarily pledged to uphold all of the rights contained in these treaties including in relation to equality, women's reproductive rights, freedom of thought, conscience and religion, freedom from inhuman and degrading treatment, the right to privacy and many others.

### **Who is responsible for ensuring that Ireland honours its obligations?**

Committees of independent experts are charged with overseeing the implementation of each human rights treaty. Every number of years the Irish Government must report to the respective committee to update it on how it is protecting the rights under the relevant treaty. The Committee examines the information provided to it and issues *Concluding Observations* on how the State is protecting the rights and how it should improve its protection of human rights at home. Concluding Observations are not legally binding judgments like a decision from the European Court of Human Rights, but rather recommendations designed to assist and guide the State in fulfilling its human rights obligations.

### **Have any of these treaty bodies made recommendations to Ireland on abortion?**

Yes. Numerous UN Committees have expressed their concern and made recommendations to Ireland on its abortion laws. This includes the UN Committee on the Elimination of All Forms of Discrimination Against Women in 2005,<sup>54</sup> the UN Committee Against Torture in 2011,<sup>55</sup> the

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<sup>54</sup> Committee on Elimination of Discrimination Against Women, Concluding Observations: Ireland, CEDAW/C/IRL/4-5/CO.

<sup>55</sup> Committee against Torture, Concluding Observations: Ireland, CAT/C/IRL/CO/1.

UN Human Rights Committee in 2014,<sup>56</sup> the UN Committee on Economic, Social and Cultural Rights in 2015,<sup>57</sup> and the UN Committee on the Rights of the Child in 2016.<sup>58</sup>

In order to understand what the various UN human rights committees have said about Ireland's abortion laws it may be useful to look at each of these treaty bodies in turn:

### **1. Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)**

Ireland was last examined under CEDAW in 2005. The UN Committee on the Elimination of All Forms of Discrimination against Women, which is responsible for overseeing the implementation of CEDAW, recommended that Ireland:

“continue to facilitate a national dialogue on women's right to reproductive health, including on the very restrictive abortion laws”.<sup>59</sup>

Ireland will be examined by the UN Committee on the Elimination of All Forms of Discrimination against Women again in February 2017. The Committee will assess the extent to which Ireland has made progress on implementing its obligations under CEDAW.

### **2. UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT)**

Ireland was last examined under UNCAT in 2011. The UN Committee against Torture, which is responsible for overseeing the implementation of UNCAT recommended that Ireland:

“clarify the scope of legal abortion through statutory law and provide for adequate procedures to challenge differing medical opinions as well as adequate services for carrying out abortions in the State party, so that its law and practice is in conformity with the Convention”.<sup>60</sup>

It is expected that Ireland will be examined by the UN Committee against Torture again in 2017. The Committee will assess the extent to which Ireland has made progress on implementing its obligations under the UNCAT.

### **3. International Covenant on Civil and Political Rights (ICCPR)**

Ireland was last examined under the ICCPR in 2014. The UN Human Rights Committee, which is responsible for overseeing the implementation of the ICCPR, expressed its “concern regarding the highly restrictive circumstances under which women can lawfully have an abortion in [Ireland] owing to Article 40.3.3 of the Constitution and its strict interpretation by [the Irish State].”<sup>61</sup>

In particular, the UN Human Rights Committee expressed its concern at:

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<sup>56</sup> Human Rights Committee, Concluding Observations on the fourth periodic report of Ireland, CCPR/C/IRL/CO/4.

<sup>57</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations on the third periodic report of Ireland, E/C.12/IRL/CO/3.

<sup>58</sup> Committee on the Rights of the Child, Concluding Observations on the combined third and fourth periodic reports of Ireland, CRC/C/IRL/CO/3-4.

<sup>59</sup> Committee on Elimination of Discrimination Against Women, Concluding Observations: Ireland, CEDAW/C/IRL/4-5/CO, para. 397.

<sup>60</sup> Committee against Torture, Concluding Observations: Ireland, CAT/C/IRL/CO/1, para. 26.

<sup>61</sup> Human Rights Committee, Concluding Observations on the fourth periodic report of Ireland, CCPR/C/IRL/CO/4, para. 9.

“(a) the criminalization of abortion under section 22 of the Protection of Life During Pregnancy Act 2013, including in cases of rape, incest, fatal foetal abnormality and serious risks to the health of the mother, which may lead to up to **14 years of imprisonment**, except in cases that constitute a “real and substantive risk” to the life of a pregnant woman;

(b) the lack of legal and procedural clarity concerning what constitutes “real and substantive risk” to the life, as opposed to the health, of the pregnant woman;

(c) the requirement of excessive degree of scrutiny by medical professionals for pregnant and suicidal women leading to further mental distress;

(d) the discriminatory impact of the Act on women who are unable to travel abroad to seek abortions;

(e) the strict restrictions on the channels via which information on crisis pregnancy options may be provided to women and the imposition of criminal sanctions on health-care providers who refer women to abortion services outside the State party under the Regulation of Information (Services Outside the State For Termination of Pregnancies) Act, 1995; and

(f) the severe mental suffering caused by the denial of abortion services to women seeking abortions due to rape, incest, fatal foetal abnormality or serious risks to health.”<sup>62</sup>

The UN Human Rights Committee recommended that Ireland:

“(a) Revise its legislation on abortion, **including its Constitution**, to provide for additional exceptions in cases of rape, incest, serious risks to the health of the mother, or fatal foetal abnormality;

(b) Swiftly adopt a guidance document to clarify what constitutes a “real and substantive risk” to the life of the pregnant woman;

(c) Consider making more information on crisis pregnancy options available through a variety of channels, and ensure that health-care providers who supply information on safe abortion services abroad are not subject to criminal sanctions.”

#### **4. International Covenant on Economic, Social and Cultural Rights (ICESCR)**

Ireland was last examined under ICESCR in 2015. The UN Committee on Economic, Social and Cultural Rights which is responsible for overseeing the implementation of ICESCR, expressed its concern at:

“the criminalization of abortion, including in the cases of rape and incest and of risk to the health of a pregnant woman; the lack of legal and procedural clarity on what constitutes a real substantive risk to the life, as opposed to the health, of the pregnant woman; and the

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<sup>62</sup> Human Rights Committee, Concluding Observations on the fourth periodic report of Ireland, CCPR/C/IRL/CO/4, para. 9.

discriminatory impact on women who cannot afford to obtain an abortion abroad or access to the necessary information.”<sup>63</sup>

It also expressed its concern at the limited access to information on sexual and reproductive health.

The UN Committee on Economic, Social and Cultural Rights recommended that Ireland:

“take all the steps necessary, **including a referendum on abortion**, to revise its legislation on abortion, including the Constitution and the Protection of Life During Pregnancy Act 2013, in line with international human rights standards; adopt guidelines to clarify what constitutes a real substantive risk to the life of a pregnant woman; publicize information on crisis pregnancy options through effective channels of communication; and ensure the accessibility and availability of information on sexual and reproductive health.”<sup>64</sup>

## **5. Convention on the Rights of the Child (CRC)**

Ireland was last examined under the CRC in January 2016. The UN Committee on the Rights of the Child, which is responsible for overseeing the implementation of the CRC, noted its concern at:

“the Protection of Life during Pregnancy Act 2013, which allows for abortion only when there is a “real and substantial risk” to the life of the mother and criminalizes abortion even in instances where the pregnancy results from rape or incest, or in cases of severe foetal impairment. Furthermore, the Committee is concerned that the term “real and substantial risk” prevents doctors from being able to provide services in accordance with objective medical practice. The Committee is also concerned at the severe lack of access to sexual and reproductive health education and emergency contraception for adolescents.”<sup>65</sup>

The UN Committee on the Rights of the Child recommended that Ireland:

“(a) Decriminalize abortion in all circumstances and review its legislation with a view to ensuring access by children to safe abortion and post-abortion care services; and ensure that the views of the pregnant girl are always heard and respected in abortion decisions;

(b) Develop and implement a policy to protect the rights of pregnant teenagers, adolescent mothers and their children and combat discrimination against them;

(c) Adopt a comprehensive sexual and reproductive health policy for adolescents and ensure that sexual and reproductive health education is part of the mandatory school

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<sup>63</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations on the third periodic report of Ireland, E/C.12/IRL/CO/3, para. 30.

<sup>64</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations on the third periodic report of Ireland, E/C.12/IRL/CO/3, para. 30.

<sup>65</sup> Committee on the Rights of the Child, Concluding Observations on the combined third and fourth periodic reports of Ireland, CRC/C/IRL/CO/3-4, para. 57.

curriculum and targeted at adolescent girls and boys, with special attention to the prevention of early pregnancy and sexually transmitted infections;

(d) Take measures to raise awareness of and foster responsible parenthood and sexual behaviour, with particular attention to boys and men.”

### **Can individuals make a complaint if they believe their rights have been infringed under these treaties?**

Yes. UN Committees may also consider complaints from individuals in UN Member States.<sup>66</sup> A person may make a complaint to one of the Committees where they feel that their rights under the relevant treaty (such as those listed above) have not been protected by their country and where they have not been able to access justice at home. The Committee will examine the complaint and issue findings on whether the relevant State has breached the individual’s human rights.

On a number of occasions, individuals from Ireland have brought complaints to a Committee and the Committee has issued a decision.

### **Has anyone ever made a complaint in relation to Ireland’s abortion laws?**

Yes. In 2012, Ms Amanda Mellet made a complaint to the UN Human Rights Committee, on the basis of Ireland’s abortion laws (case of *Mellet v. Ireland*).<sup>67</sup> In 2016, the UN Human Rights Committee concluded that Ireland’s abortion laws subjected Ms Mellet to severe emotional and mental pain and suffering by denying her access to abortion services in Ireland. Ms Mellet was denied an abortion in Ireland upon learning that her pregnancy had a fatal foetal impairment. Ms Mellet subsequently travelled to the UK for an abortion. The Committee concluded that Ms Mellet’s right to freedom from cruel, inhuman and degrading treatment had been violated as well as her right to privacy and right to non-discrimination due to the State’s failure to provide her with the services she required. The Committee found that Ms Mellet’s suffering was aggravated by the obstacles she encountered in accessing the information she required in relation to appropriate medical options and found that her right to information had also been violated.<sup>68</sup>

The Government subsequently offered €30,000 to Ms Mellet in compensation.

### **What else has the UN said about abortion?**

The UN has a number of other mechanisms in relation to human rights standards. The first is that each Committee can issue General Comments on particular human rights issues which set out in general terms how states should honour their commitments to human rights standards. The UN Committee on Economic Social and Cultural Rights has recently issued a General Comment on the right to sexual and reproductive health. The second is a peer review mechanism known as the Universal Periodic Review (UPR). It will be useful to look at each of these mechanisms in turn.

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<sup>66</sup> Where that State has agreed to be bound by the individual complaints mechanism.

<sup>67</sup> *Mellet v Ireland*, CCPR/C/116/D/2324/2013.

<sup>68</sup> Articles 2(1), 3, 17, 19, 26.



## **1. UN Committee on Economic, Social and Cultural Rights, General Comment No. 22 on the right to sexual and reproductive health**

Each UN Committee publishes General Comments which elaborate on the rights protected in the relevant treaty and are aimed at assisting States in fulfilling their human rights obligations.

In May 2016, the UN Committee on Economic, Social and Cultural Rights published its General Comment No. 22 on the right to sexual and reproductive health.

This right forms part of the right to the highest attainable standard of physical and mental health in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

As noted by the UN Committee on Economic, Social and Cultural Rights in General Comment 22:

“The right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one’s body and sexual and reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the Covenant.”<sup>69</sup>

States have a number of immediate obligations with regard to sexual and reproductive health rights:

“States parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual and reproductive health. This requires States to repeal or reform laws and policies that nullify or impair the ability of certain individuals and groups to realize their right to sexual and reproductive health. There exists a wide range of laws, policies and practices that undermine autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, for example criminalization of abortion or restrictive abortion laws. States parties should also ensure that all individuals and groups have equal access to the full range of sexual and reproductive health information, goods and services, including by removing all barriers that particular groups may face.”<sup>70</sup>

The Committee made clear that states must adopt a number of legal and policy measures, including liberalising “restrictive abortions laws” and “to guarantee women and girls access to safe abortion services and quality post-abortion care, including by training health-care

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<sup>69</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.GC/22.

<sup>70</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.GC/22, para. 34.

providers; and to respect the right of women to make autonomous decisions about their sexual and reproductive health”.<sup>71</sup>

Furthermore, the Committee also stressed that States “must refrain from censoring, withholding, misrepresenting or criminalizing the provision of information on sexual and reproductive health, both to the public and to individuals. Such restrictions impede access to information and services, and can fuel stigma and discrimination”.<sup>72</sup>

General Comment 22 also outlines a State’s obligation to “take measures to eradicate practical barriers to the full realization of the right to sexual and reproductive health, such as disproportionate costs and lack of physical or geographical access to sexual and reproductive health care”.<sup>73</sup> This means that States are obliged to ensure that sexual and reproductive healthcare services are accessible and affordable.

## **2. The Universal Periodic Review (UPR)**

The UPR was created by the UN in 2006. It is a unique process of the UN which involves a review of the human rights record of all UN Member States every 4.5 years. The UPR is unique in that it is a peer review process. Each Member State of the UN can make recommendations to the State under review. The State under review, the UN and civil society organisations, all prepare reports which provide information on the human rights situation on the ground and inform the review. The National Human Rights Institution (for example the Irish Human Rights and Equality Commission) may also provide information.

The State under review sends government representatives (usually a Minister and other senior civil servants) to the UN where the State engages in an interactive dialogue. Each UN Member State may ask questions and make recommendations to the State under review. The State under review may accept or reject the recommendations made to it. A final report with all of the recommendations is drawn up. The State is then given 4.5 years to implement recommendations, after which point the UPR of the State takes place again and the State must report on how it has implemented the recommendations from its previous review as well as answering any questions that are put to it.

Ireland was reviewed for the second time under the UPR in May 2016. 17 recommendations were made to Ireland with specific reference to its abortion laws. The majority of these recommendations were made by Ireland’s European counterparts and included recommendations such as:

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<sup>71</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.GC/22, para. 28.

<sup>72</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.GC/22, para. 41.

<sup>73</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.GC/22, para. 46.

“Repeal legislation that criminalizes abortion and eliminate all punitive measures, in particular Article 40.3.3 of the Irish Constitution.”<sup>74</sup>

“Take forward the democratic process of repealing the Eighth Amendment of the Irish Constitution with a clear timeline, and take all necessary steps to decriminalise abortion in all circumstances, in accordance with the recommendations of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child.”<sup>75</sup>

Sixteen recommendations relating to abortion were not supported by the State.<sup>76</sup> One recommendation was accepted which related to the holding of consultations on Article 40.3.3:

“Conduct consultations involving all stakeholders, including civil society organisations, in order to examine whether Article 40.3.3 of the Constitution could be revised and the legal framework related to abortion broadened.”<sup>77</sup>

In its response to the recommendations it did not support, the State noted:

“The Constitution can only be amended following a referendum of the people. The Government established a Citizens Assembly to review the Eighth Amendment of the Constitution (Article 40.3.3) and report back to Parliament with recommendations. The Assembly will be chaired by a Justice of the Supreme Court and will be comprised of 100 citizens randomly chosen from the population.”<sup>78</sup>

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<sup>74</sup> Iceland, para. 136.18.

<sup>75</sup> Denmark, para. 136.19.

<sup>76</sup> Report of the Working Group on the Universal Periodic Review: Ireland, A/HRC/33/17 and addendum A/HRC/33/17/Add. 1. available at:

<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Pages/ListReports.aspx> (Accessed: 20 September 2016).

<sup>77</sup> Switzerland, Article 135. 136

<sup>78</sup> Report of the Working Group on the Universal Periodic Review, Ireland, Addendum, A/HRC/33/17/Add.1, para. 136.11

## 5. DECRIMINALISATION

### **What are the current penalties available for accessing abortions outside the terms of the 2013 Act?**

Under section 22 (2) of the Protection of Life During Pregnancy Act 2013, a pregnant woman or her healthcare professional may face imprisonment up to 14 years if it is found that an abortion was conducted outside the terms of the 2013 Act.

### **Why was a criminal offence included in the 2013 Act?**

The Protection of Life during Pregnancy Heads of Bill which was considered by the Oireachtas noted in its Explanatory Memorandum that continued criminalisation was necessary to reflect the State's constitutional obligation arising from Article 40.3.3.

### **What do international human rights bodies say about criminalisation?**

Under Article 12 of its General Recommendation 24, the Committee for the Elimination of All Discrimination against Women provides that punitive provisions imposed on women who undergo abortions should be removed.<sup>79</sup> Its rationale centres on the argument that abortion is a medical procedure that only women need and States have an obligation not to put barriers in place that prevent women's access to appropriate health care. The Committee has explicitly cited laws that criminalise medical procedures only needed by women and that punish women who undergo these procedures.<sup>80</sup>

In 2011, the UN Committee against Torture has indicated that Ireland may be in breach of the Convention should the risk of criminal prosecution and imprisonment continue to face women and their physicians with respect to accessing abortion.<sup>81</sup>

In 2014, the UN Human Rights Committee also highlighted Ireland's criminal sanctions stating:

“(a) the criminalization of abortion under section 22 of the Protection of Life During Pregnancy Act 2013, including in cases of rape, incest, fatal foetal abnormality and serious risks to the health of the mother, which may lead to up to 14 years of imprisonment, except in cases that constitute a “real and substantive risk” to the life of a pregnant woman”

### **Does criminalisation protect foetal existence?**

Protecting unborn life is a valid social goal and could be better guided by investment in maternity and pregnancy-related care and provision of sexual and reproductive education.

Criminalisation does not protect foetal life, as evidenced by the numbers of Irish women who travel to have abortions abroad and the number of women who are reported to have

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<sup>79</sup> 31(c)

<sup>80</sup> For example under general recommendation 24, see <http://www2.ohchr.org/english/bodies/cedaw/index.htm>.

<sup>81</sup> Committee against Torture, Forty-sixth Session, 9 May - 3 June 2011, UN Doc CAT/C/IRL/CO/1, para 26.

accessed the abortion pill. Criminalisation adds stigma and increases the distress of the women involved.

**What is the ICCL view on decriminalisation?**

The ICCL considers that decriminalisation should be a top priority for any reform of abortion laws in Ireland. The potential application of a criminal penalty of this magnitude to a pregnant woman is grossly disproportionate to the legitimate aim of seeking to prohibit unlawful termination of pregnancy. By retaining a penal sanction, Ireland will remain in violation of settled international human rights law on criminalisation of abortion services and those women who require them. The use of the criminal code in this manner impacts considerably on the ability of health professionals to carry out their roles in the best interests of patients, compelling them to operate within a criminal rather than best medical practice framework.

## 6. CONSCIENTIOUS OBJECTION

The ICCL believes that the practice of conscientious objection is best dealt with by the governing standards body of each medical profession. Where it is deemed necessary to include provisions on conscientious objection in legislation, medical practitioners should be obliged to document where a conscientious objection has been made and that this be noted for future reference with appropriate safeguards put in place to ensure that women can avail of service unhindered by the refusal of individual medical practitioners to provide a lawful service on moral or religious grounds.

The ICCL also believes that, where a refusal is made, arrangements are made to transfer a woman to the care of a willing practitioner without delay, in line with both international human rights law and guidance from medical professional organisations.

### What is Conscientious Objection?

This term ‘conscientious objection’ is sometimes used in discussion about the practice of medical practitioners who refuse to conduct a medical procedure, such as an abortion, because of deeply held moral or religious beliefs or on the basis of conscience.

The right to freedom of thought, conscience and religion is very important. It is protected in a number of ways by the Irish Constitution and by the European Convention on Human Rights. However, the freedom to manifest one’s religion or belief, such as by practicing conscientious objection, may be limited in law where it is justified to do so and where such a limitation is necessary to protect the rights of others.

The European Convention on Human Rights states that such limitations must be (1) established by law, (2) necessary and proportionate; and (3) pursue a legitimate aim. The meaning of ‘a legitimate aim’ includes that it is in the interests of public safety to limit the right; or that limiting the right would protect public order, health or morals; or that limiting the right would protect of the rights and freedoms of others.<sup>82</sup>

Can the practice of ‘conscientious objection’ as it relates to the provision of services, including medical services, be limited?

Yes. A number of human rights and constitutional courts have considered these issues in detail. In many cases courts have agreed that allowing institutions or individual practitioners to refuse to provide services that are lawfully available may impact negatively on the rights of others and can be limited. This may include a court directing that additional protections are put in place to ensure that individuals, such as women who seek a lawful abortion, are not prevented arbitrarily and unnecessarily from doing so.<sup>83</sup>

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<sup>82</sup> Art 9(2) ECHR.

<sup>83</sup> International Network of Civil Liberties Organisations (INCLO), 2015, *Drawing the Line: Tackling Tensions between religious Freedom and Equal Treatment*, Available at <http://www.iccl.ie/attachments/download/413/INCLO-Report-Drawing-the-Line-EQ-vs-FoR.pdf>.

## **What kind of issues have been decided by these courts in relation to abortion services?**

Courts have considered whether it is appropriate to limit the rights of a) institutions and b) individual practitioners to providing abortions, to undertaking duties that relate to the provision of abortion and to providing information or referrals to other service providers who will perform an abortion.<sup>84</sup> Courts have looked at the issues from the point of view of the service provider with a deeply held moral or religious belief and from the point of view of the woman wishing to access a lawful abortion.

### **Institutions**

#### **What happens when an institution, such as a hospital, refuses to provide abortion services allowed by law?**

Courts have considered whether religiously affiliated hospitals should be afforded an exemption to providing abortion services on religious or conscience grounds. In a decision by the Colombian Constitutional Court, a largely Catholic jurisdiction where abortion is limited to very specific circumstances, the Court recognised the importance of protecting freedom of thought, conscience and religion but also where limitations on these rights may be placed.

“[Religious exemptions can] trigger or unleash consequences for third persons. It is therefore impossible to characterize conscientious objection as a right that affects solely those who exercise it. When one objects for reasons of conscience, a legal duty has necessarily been breached. . . . The question then becomes what are the limits to conscientious objection – which *prima facie* may seem justified – given the negative impact it can have on the rights of third persons.”<sup>85</sup>

The case concerned the refusal of religiously affiliated hospitals which operated in the public hospital system, from providing abortion services which were allowed by law. The Court found that, for the purpose of claiming an exemption to providing abortion services, an institution was not an individual but a legal entity and did not enjoy the same right to practice ‘conscientious objection’ as an individual. The Court found that the hospital could not experience ‘intimate or deeply held convictions’. In its reasoning the Court noted that if an institution were to impose restrictions on medical personnel who may be willing to carry out a lawful procedure this would, in effect, unnecessarily limit the freedom of these employees who may be coerced by the institution’s restrictive position. While the Court’s decision did not focus specifically on the consequences for patients it highlighted its concern for the harm women may endure if those opposed to abortion on faith based grounds were permitted to impose their own preferences on other members of staff willing to perform this lawfully permissible procedure.<sup>86</sup>

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<sup>84</sup> *Ibid.*

<sup>85</sup> *Sentencia T-388/09* at 5.1, from INCCLO 2015, p 30

<sup>86</sup> *Ibid.*

A similar decision was reached by the French Constitutional Council in a case concerning legislation permitting abortion in France.<sup>87</sup> Prior to the introduction of updated abortion legislation, France's code of public health had permitted 'heads of Departments in public health establishments to refuse to allow terminations to be practiced in their department'. Upholding the legislation which had repealed this public health provision, the French Constitutional Council found that while a department head might possess some right of free exercise, a person in such a position could not prevent an entire department from providing a lawfully available service as to do so would be "at the expense of [the conscience] of other doctors and medical staff working in this area."

These cases demonstrate that courts can and will place limits on who is permitted to exercise 'conscientious objection' in order to protect the rights of individuals and practitioners who may wish to avail of, or conduct, lawfully permissible services such as lawful abortion.

## **Individuals**

### **What happens when an individual, such as a medical practitioner, refuses to provide abortion services allowed by law?**

Courts in different jurisdictions have considered claims to conscience by individual medical practitioners and the resultant impact that such refusals can have on women attempting to access abortion services allowed by law.<sup>88</sup>

The case from the Colombian Constitutional Court mentioned above set limitations on what institutions could claim in relation to the practice of conscientious objection. In its decision, the Court also set clear limitations on the right of individual health care practitioners to refuse to provide abortion because of religious objections.<sup>89</sup> In its decision the Court stated that 'conscientious objection' is permissible

"only when it is feasible for another healthcare professional to provide voluntary termination of pregnancy and it is provided in a manner that protects the rights of the pregnant women who [seek] an abortion".

It reaching its decision the Court reasoned that:

"Healthcare professionals can object to terminating a pregnancy for reasons of conscience if, and only if, there is a guarantee that the pregnant woman will have access to the procedure in conditions of quality and safety, that she will face no additional barriers that interfere with her ability to access necessary healthcare

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<sup>87</sup> Conseil Constitutionnel [CC] [Constitutional Council] decision no. 2001-446 DC, June 27, 2001 (Fr.), available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/a2001446dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2001446dc.pdf).

<sup>88</sup> International Network of Civil Liberties Organisations (INCLO), 2015, *Drawing the Line: Tackling Tensions between religious Freedom and Equal Treatment*, Available at <http://www.iccl.ie/attachments/download/413/INCLO-Report-Drawing-the-Line-EQ-vs-FoR.pdf>

<sup>89</sup> *Sentencia T-388/09* at 5.1, from INCLO 2015, p 30



services and that her fundamental constitutional rights to life, sexual and reproductive health, personal integrity and human dignity will be respected.”<sup>90</sup>

In reaching this decision the Court emphasised that the free exercise of liberties is protected only to the extent that it does not result in “abuse or unjustified, disproportionate or arbitrary interference with the rights of other individuals.” The Court also stated that individuals practicing medicine in the public sphere “must recognise their duty to promote conduct that is supportive, just and equitable and respectful of the general public good.” This is because, as the Court noted, health care practitioners have a “special role within society.”<sup>91</sup>

### **Should medical practitioners refusing to carry out a lawful abortion be obliged to refer a woman to another *willing* practitioner?**

Yes. In its recent General Comment on the right to sexual and reproductive health (2 May 2016)<sup>92</sup> the UN Committee on Economic, Social and Cultural Rights stipulated that unavailability of goods and services due to ideologically based policies or practices, such as the refusal to provide services based on conscience, must not be a barrier to accessing services. When considering how a public health care system should be structured in relation to reproductive rights, the Committee noted that “an adequate number of health care providers willing and able to provide such services should be available at all times in both public and private facilities and within reasonable geographical reach.”<sup>93</sup>

The Committee also noted that where health care practitioners are allowed to invoke ‘conscientious objection’, states must appropriately regulate this practice to ensure that it does not inhibit anyone’s access to sexual and reproductive health care, including by requiring referrals to an accessible provider capable of and willing to provide the services being sought.<sup>94</sup> This means that when a health care practitioner refuses to conduct a lawful abortion they are obliged to refer a woman to, or provide adequate information on, a practitioner who will perform the procedure.

The European Court of Human Rights (ECtHR) has also considered this question in a number of cases. In *P&S v Poland*, the Strasbourg court held that Poland had violated the European Convention of Human Rights (ECHR) by failing to ensure that exemptions given to medical practitioners to the provision of medical services on the grounds of religion did not hinder women’s access to lawful reproductive healthcare services.<sup>95</sup> In particular, the Court held that Poland had violated its own law on refusals which permitted healthcare professionals to refuse to perform medical procedures such as abortion but required that they refer patients to willing physicians. In reaching its conclusion, the court noted that member states are “are

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> UN Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) Available at.

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11)

<sup>93</sup> Ibid para 14.

<sup>94</sup> Ibid para 43.

<sup>95</sup> *P & S v. Poland* (57375/08) 30 January 2013

obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health care professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.”<sup>96</sup>

### **Does the Irish law on abortion deal with ‘conscientious objection’?**

Yes. The current law governing limited access to abortion in Ireland, the Protection of Life during Pregnancy Act 2013, contains a section entitled ‘Conscientious Objection’ which sets out when a medical practitioner, nurse or midwife may legally refuse to carry out an abortion on the grounds of conscientious objection.<sup>97</sup> Under the legislation a practitioner, nurse or midwife may refuse to carry out an abortion where a woman’s life is at risk from physical illness and where a woman’s life is at risk from the threat of suicide. However, the law also stipulates that a person who has a conscientious objection “shall make such arrangements for the transfer of care of the pregnant woman concerned as may be necessary to enable the woman to avail of the medical procedure concerned.” This means that the individual claiming a conscientious objection must ensure that the woman can access a lawful abortion by referring her to a willing physician.

### **What about in times of emergency?**

In its recent General Comment on the right to sexual and reproductive health the UN Committee on Economic, Social and Cultural Rights also noted that laws allowing for ‘conscientious objection’ must not inhibit the performance of services (including abortion) in urgent or emergency situations.<sup>98</sup> No provision is made in section 12 of the Protection of Life during Pregnancy Act 2013 for medical practitioners, nurses or midwives to claim a conscientious objection to carrying out an abortion where there is a risk of loss of life from physical illness in an emergency situation. Provisions for conscientious objection relate only to non-emergency risk from physical illness and non-emergency risk of suicide. This means that a medical practitioner attending an emergency must carry out or assist in carrying out an abortion where it is deemed necessary to save the life of a woman. This provision is consistent with the guidance provided to doctors under the Medical Council’s *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*.<sup>99</sup> In a section of the guide governing ‘Conscientious Objection’ doctors are advised that:

10.1 As a doctor, you must not allow your personal moral standards to influence your treatment of patients.

10.2 If you have a conscientious objection to a course of action, you should explain this to the patient and make the names of other doctors available to them.

10.3 Conscientious objection does not absolve you from responsibility to a patient in emergency circumstances.

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<sup>96</sup> Ibid.

<sup>97</sup> Section 17, Protection of Life During Pregnancy Act 2013.

<sup>98</sup> CESCR, General Comment 22 para 43.

<sup>99</sup> Medical Council, 2009, *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*. Available at <https://www.medicalcouncil.ie/News-and-Publications/Publications/Professional-Conduct-Ethics/Guide-to-Professional-Conduct-and-Behaviour-for-Registered-Medical-Practitioners-pdf.pdf>

**What should happen to a medical practitioner who professes a conscientious objection to abortion?**

Everyone can conscientiously object to practices which go against their moral or religious beliefs. However, the way this manifests itself in public may be subject to limitation and regulation by the State in order to ensure that no harm is done to others as individual rights holders and as users of lawfully permissible services.

It is the view of the ICCL that where a medical practitioner professes a conscientious objection to providing a service, that individual should voluntarily withdraw or be withdrawn from being in a position to refuse to provide lawfully available services in the future. This includes serving on panels who may be charged with deciding on access to abortion services or serving as an authorising agent for such services. This would protect other rights holders and services users, in these cases women and girls, from enduring the harm, stigma, inconvenience and/or discrimination of being denied services lawfully available in the State.

## **7. FUTURE LEGAL FRAMEWORK**

### **If the Eighth Amendment were repealed, how does ICCL consider access to abortion should be regulated?**

The ICCL wishes to see legislation passed by the Oireachtas which would effectively regulate access to abortion in Ireland in a manner which corresponds to the needs of Irish women and complies with international human rights law.

While the decision to have an abortion rests firmly within the private medical sphere between a woman and her doctor, the ICCL considers that a formalistic approach to any future abortion framework would be most effective in order to protect the rights of women and to ensure their health and safety. This is primarily so, as presently, Irish doctors do not provide abortion services and therefore, it is likely that a cultural shift will be required within the profession to regularise training on and delivery of abortion services.

Without providing a clear legal framework around when and how abortions can be performed would most likely lead to uncertainty for some medical professionals. Those professionals and their representative bodies have consistently highlighted the unworkability in medical practice of the current law due to its lack of clarity.

Furthermore, access to services is a key principle underlying the jurisprudence of the European Court of Human Rights in relation to abortion rights under Article 8 (right to private and family life). Setting out identifiable and effective pathways in law and policy is a requirement of the Court when assessing compliance with Convention standards. If the Eighth Amendment were to be repealed and the Irish abortion regime were to remain unregulated, it would be incumbent upon the State to take steps to ensure that doctors were providing appropriate abortion services to women when requested. Providing an appropriate legislative framework with health policy at its centre and cognisant of medical practice requirements would, in the opinion of the ICCL, be the most effective manner in which to protect the human rights of women in Ireland who require abortion services.

### **What type of legal framework should be adopted?**

The ICCL considers that the Citizens' Assembly should include in its deliberations the type of legal framework which may follow should Article 40.3.3 be removed from the Constitution. As stated above, the Protection of Life During Pregnancy Act 2013 will remain the law if Article 40.3.3 were to be repealed. However, this legislation was formulated within the strict context of the constitutional principles set down in Article 40.3.3. In order to protect the human rights of women and ensure progressive reform of maternity services in Ireland, the ICCL considers that new legislation covering access to abortion services must be brought forward.

At a minimum, human rights law and standards require:

1. Decriminalisation of abortion services;
2. Abortion services provided by law must be accessible;

3. Provision should be made for conscientious objections which ensure expeditious access to abortion services and do not stigmatise pregnant women;
4. Abortions should be regulated by law in circumstances of:
  - a. Rape or sexual assault;<sup>100</sup>
  - b. Incest;
  - c. Fatal foetal anomaly;
  - d. Health grounds.

Recognising that the recommendations of the Citizens' Assembly will be made available to an Oireachtas Committee,<sup>101</sup> the ICCL considers that the Assembly should be informed by the expertise of national and international experts, including the World Health Organisation (WHO) on the broad range of factors which underpin effective and safe access to abortion. These include:

1. Counselling services;
2. Defined limits to access based on duration of pregnancy;
3. Provision of abortion services without reasons within gestational time limits. Often referred to as "abortion upon request", the WHO reports that nearly a third of UN Members States allow abortion upon the "free and informed request of the pregnant woman".<sup>102</sup>

### **How is abortion regulated in other EU countries?**

The overwhelming European consensus allows abortion on a range of grounds, including risk to a woman's life, risk to a woman's health and well-being, in cases of rape and incest, and in cases of fatal foetal anomaly. In most EU countries abortion is provided without restrictions up to 10 to 14 weeks gestation (up to 18 weeks in Sweden). In most countries abortion can be carried out beyond this point subject to certain restrictions.<sup>103</sup>

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<sup>100</sup> The ICCL notes that a woman who experiences rape or sexual assault is a victim of crime and should not be required to "prove" the perpetration of a crime against her in order to access abortion services. All victims of crime in Ireland enjoy rights and protections under the Victims' Directive, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=EN> (due to be transposed in 2017 by the forthcoming Victims of Crime Bill).

<sup>101</sup> Seanad Éireann, Notice of Motion establishing a Citizens' Assembly, 11 July 2016. Dáil Éireann, Notice of Motion establishing a Citizens' Assembly, 12 July 2016.

<sup>102</sup> World Health Organization (2012), *Safe abortion: technical and policy guidance for health systems*, Second Ed., p. 93. Gestational time limits for abortion on request varies; however, the limits imposed in the majority of countries which provide this access for women range between 12 weeks and 14 weeks. Sweden provides abortion upon request for 18 weeks.

<sup>103</sup> The Centre for Reproductive Rights has produced and regularly updates a map on the World's Abortion Laws. See <http://worldabortionlaws.com/>.



## 8. CONCLUDING REMARKS AND RECOMMENDATIONS

The ICCL welcomes the opportunity to make a number of recommendations to the Citizens' Assembly on the matter the Eighth Amendment, Article 40.3.3 Irish Constitution and the subsequent legislative framework which would govern access to abortion in Ireland.

### *1. Article 40.3.3*

The ICCL urges the members of the Citizens' Assembly to recommend repeal of the 8<sup>th</sup> Amendment to the Irish Constitution, Art 40.3.3.

The ICCL further recommends that laws governing the provision of and access to, abortion in Ireland are best addressed through the parliamentary legislative process and not enshrined in the Constitution.

### *2. Governing Legislative Framework on Abortion*

The ICCL recommends that future regulation governing access to abortion in Ireland is developed upon a legislative framework which guarantees all women in Ireland, regardless of their economic or social status, access medical services, including abortion services, according to best medical practice, and in compliance with human rights standards, in Irish hospitals and clinics.

### *3. Regulation of Abortion*

The ICCL recommends that legislation regulating access to abortion must include unimpeded access to abortion services in cases of rape, incest, foetal anomaly and health grounds.

### *4. Decriminalisation of abortion*

The ICCL recommends that all legislative provisions which have the effect, either directly or indirectly, of criminalising women or health care professionals in relation to procuring or performing an abortion are repealed.

### *5. Conscientious Objection*

The ICCL also recommends that measures are put in place to ensure that a claim to conscientious objection by individuals or institutions will not impede access to the full range of lawful abortion services for women, including the provision of information and referral in a timely and expeditious manner.