



WOMEN'S EQUALITY AND ARTICLE 40.3.3 OF THE IRISH CONSTITUTION

For an electronic version of this paper please visit www.iccl.ie

Article 40.3.3 of the Irish Constitution and the criminalisation of abortion

The ICCL supports the removal of [Article 40.3.3 of the Irish Constitution](#). In addition, the ICCL supports the decriminalisation of abortion and the introduction of legislation providing for abortion services that are accessible to all women and girls in Ireland. Our references to women and girls should be understood to include people of all genders who may become pregnant.

Since the foundation of the State, women and girls in Ireland have suffered grave and systematic human rights violations resulting from [discriminatory laws](#) and [draconian punishments](#) based on their sex and reproductive capacity. Article 40.3.3 of the Constitution and the [criminalisation of abortion with a penalty of up to 14 years' imprisonment](#) save where there is a 'real and substantial risk of loss of the woman's life' continue this pattern of discrimination.

Ireland's current legal regime prioritises foetal interests over many basic rights of women and girls. The ICCL shares the view of the [Irish Human Rights and Equality Commission \(IHREC\)](#) that Irish law should be reformed to respect, protect and fulfil the rights of women and girls to health, dignity, bodily integrity and autonomy, and equal treatment. At a minimum, the human rights of women and girls demand that abortion is available where their health requires it. Laws that establish strict grounds-based criteria for accessing abortion can cause discrimination, humiliation and increased anguish as women and girls are required to prove their eligibility to the satisfaction of others. Therefore, the ICCL shares the [IHREC's position](#) that 'a new framework for access to abortion in Ireland should place the decision-making process primarily in the hands of the pregnant woman in consultation with her physician'. The ICCL agrees with [international human rights experts](#) that abortion should be available within a defined timeframe on request, and beyond that as a matter of healthcare policy. [Within the European Union](#), the majority of countries provide for abortion on request in the first trimester of pregnancy and afterwards according to various criteria that are assessed by healthcare practitioners including risk to health.

The ICCL's history of campaigning on this issue

The ICCL opposed the Eighth Amendment to the Constitution in 1983 on the grounds that it would cause confusion and be unworkable in practice, and that it would not prevent women living in Ireland from needing and seeking abortions. In 1992 the ICCL opposed the referendum proposal to prohibit abortion where a woman's life was at risk by suicide, and supported the constitutional amendments that guaranteed the freedom to travel and the freedom to impart and obtain information about abortion services abroad. The ICCL published a [detailed policy paper in 2001](#)

arguing against a further proposed constitutional amendment to prohibit abortion in cases of suicide risk. The paper criticised the government's failure to address honestly the needs of the thousands of women who travelled abroad each year for abortion and the discrimination suffered by women and girls who were unable to travel.

In recent years the ICCL has made submissions to the [UN Human Rights Council](#), the [UN Human Rights Committee](#), the [UN Committee on the Elimination of Discrimination Against Women](#) and the [UN Committee Against Torture](#) calling for the repeal of Article 40.3.3 of the Constitution, the decriminalisation of abortion, and the introduction of legislation providing for access to abortion in Ireland. The ICCL's submission to the Citizens' Assembly in 2016 is available [here](#).

Numerous international human rights bodies have recommended changes to Ireland's abortion laws in response to evidence provided by organisations including the ICCL, as recorded in the Concluding Observations of the [UN Human Rights Committee](#), the [UN Committee on Economic, Social and Cultural Rights](#), the [UN Committee on the Elimination of Discrimination Against Women](#) and the [UN Committee on the Rights of the Child](#).

Ongoing Human Rights Violations

Ireland's current approach to abortion **threatens the lives of women and girls**. The [HSE's investigation](#) into the death of Savita Halappanavar concluded that because of Article 40.3.3 and the criminalisation of abortion, doctors were unsure of how close to death Ms Halappanavar needed to be before they could lawfully intervene to save her life. The European Court of Human Rights case of *A, B and C v Ireland* showed that for similar reasons doctors would not advise a pregnant woman with cancer about the potential impact on her prognosis of continuing her pregnancy versus terminating it. The [Protection of Life During Pregnancy Act 2013 \(PLDPA\)](#) has been enacted since these cases. However, the threat of a 14 year jail sentence for unlawful abortions is likely to make doctors reluctant to provide abortion care even in circumstances that the legislation technically allows for. The [UN Human Rights Committee](#) and [medical professionals in Ireland](#) have noted that it is not clear what a 'real and substantial risk of the loss of the woman's life' means and that the PLDPA is therefore difficult to apply in practice.

Ireland's abortion laws further **deny women and girls the right to health**. According to Article 40.3.3 and the PLDPA, pregnant women and girls are not entitled to access abortion where necessary to preserve their health, as distinct from their life. In [recent evidence to the Oireachtas](#), Dr Rhona Mahony (Master of the National Maternity Hospital) explained that pregnant women and their doctors are currently prevented from making 'sound clinical decisions in good faith' about their health. Dr Mahony argued that 'It should not be a requirement that she is dying prior to these decisions being made'.

In addition, the criminalisation of abortion [causes harm to the health of women and girls](#) who continue to seek abortions despite the legal prohibition. Criminalisation forces some women and girls into unsafe situations, for example, by traveling home from procedures abroad without fully recovering. As acknowledged by the UN Human Rights Committee in the cases of *Mellet v Ireland* and *Whelan v Ireland* and as [evidenced elsewhere](#), the stigma and the lack of support arising from criminalisation also cause intense suffering to many women and girls.

Women's and girls' inability to exercise control over their reproductive health **interferes with their right to privacy and autonomy**, as confirmed by the [UN Working Group on discrimination against women in law and in practice](#) and the [UN Human Rights Committee](#). Irish law further interferes with

women's and girls' privacy through the [prohibition on arranging or publishing information about abortion services abroad](#).

Article 40.3.3 routinely **prevents women and girls from having the right to refuse medical treatment during pregnancy**. Medical treatment without informed consent generally violates the rights to dignity and to freedom from torture and cruel, inhuman and degrading treatment. Denial of the opportunity to refuse medical treatment also interferes with the rights to privacy, autonomy and bodily integrity.

In the 2014 [case of Ms Y](#), a panel of doctors determined that the life of an asylum-seeking woman who had been raped was at risk by suicide. Ms Y went on hunger strike in a desperate attempt to convince the State authorities to allow her access an abortion. Instead of receiving abortion care, a High Court order was granted allowing for Ms Y to be forcibly fed and hydrated and she was subjected to caesarean section several weeks after her condition was determined to be life-threatening. In [PP v HSE](#), medical professionals intervened to keep the body of a woman who was clinically dead functioning in an effort to preserve the life of her foetus aged between 13 and 15 weeks. Despite the treatment's 'devastating' effects on the woman's body and the trauma caused to her family, and despite numerous doctors agreeing that there were no medically or ethically based reasons for such treatment, it was only discontinued when a High Court order was made.

According to [several studies](#), pregnant women in Ireland are frequently denied the option of refusing tests and invasive procedures during labour. The [HSE's National Maternity Strategy](#) states that while ordinarily a woman has the right to refuse medical treatment, 'where there are implications for the health or life of the baby, as defined by her team of health care professionals, then the HSE's National Consent Policy recommends that legal advice should be sought'.

Ireland's abortion laws cause **cruel, inhuman or degrading treatment** to many women and girls. In [Mellet v Ireland](#), the UN Human Rights Committee found that Ireland had subjected a woman to 'intense physical and mental suffering' because she was forced to travel abroad to terminate her pregnancy having received a diagnosis of fatal foetal abnormality. The Committee recognised that the woman 'had her physical and mental anguish exacerbated' because she could not receive medical care and insurance coverage for her treatment in Ireland; because she was separated from the support of her family while undergoing treatment; because her financial situation required her to travel home while not fully recovered; because she was subjected to the shame and stigma associated with the criminalisation of abortion of a fatally ill foetus; and because she could not obtain the information she needed about her appropriate medical options from known and trusted medical providers. The Committee repeated these findings in [Whelan v Ireland](#).

The [European Court of Human Rights has recognised](#) that subjecting women and girls to onerous legal requirements to prove eligibility for an abortion can cause intense humiliation and suffering sufficient to amount to inhuman and degrading treatment. [Psychiatrists in Ireland have acknowledged](#) that, at present, the ability to obtain a lawful abortion (where life is at risk) depends on the views of professionals who may disagree and delay, causing profound anguish to women and girls.

All of the above human rights violations are evidence of **systematic discrimination against women and girls** in Ireland. Women and girls are subjected to these rights violations because of their sex and reproductive capacity. What is more, Ireland's abortion laws **discriminate in particular against women and girls who have fewer resources and those who depend upon the State or others for care**. As the [ICCL argued in 2001](#), the freedom to travel under Article 40.3.3 of the Constitution does not amount to a right to travel abroad such as would require the State to provide assistance to pregnant women and girls who are unable to travel abroad for abortions.