

Comments of the Irish Family Planning
Association in respect of the Third Periodic
Report of Ireland under the International
Covenant on Civil and Political Rights
(ICCPR)

June 2008

A IFPA Credentials

The IFPA submits these remarks based on its reproductive rights advocacy experience within Ireland and its experience providing reproductive health care services to women. Since 1969, the IFPA has worked to promote and protect basic human rights in relation to reproductive and sexual health, relationships and sexuality. The IFPA provides the highest quality reproductive health care at its clinics and counselling centres, including non-directive pregnancy counselling, family planning and contraceptive services, medical training for doctors and nurses, free post-abortion medical check-ups, and educational services.

IFPA counsellors, doctors and other staff and volunteers have extensive knowledge of the extreme physical and emotional hardship of forced continuation of pregnancy. In accordance with the law, the IFPA has never in its history provided any abortion services. The IFPA believes that abortion is an intimate aspect of private life, intricately linked with human rights values and principles that protect a woman's sexual rights, the right to control her own body, and the liberty and security of her person. These values are unacceptably infringed upon by the forced continuation of pregnancy and the medical hardship that occurs when access to safe, legal abortion services and information is impeded by the State.

B Introduction

The Irish ban on abortion is among the most restrictive in the world. This ban, alongside the failure of the state to clarify the law on its operation, constitutes a violation of Articles 2, 3, 6, 7, 17 and 24 of the International Covenant on Civil and Political Rights.

C The Right to Life

Article 6 of the Covenant protects the right to life. The Human Rights Committee has specifically requested that

*IFPA Submission to the
Human Rights Committee June 2008*

State Parties provide information on any measures taken by the State to help women prevent unwanted pregnancies and, to ensure that they do not have to undergo life-threatening clandestine abortions.¹

Abortion is criminalised under Irish law. Section 58 of the Offences against the Person Act, 1861 states:

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

Section 59 of the Offences against the Person Act, 1861 states:

"Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years....."

There is also a constitutional ban on abortion. Article 40.3.3 of The Irish Constitution states:

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

"This subsection shall not limit freedom to travel between the State and another state."

"This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions

¹ General Comment No. 28: Equality of rights between men and women (article 3): 29/03/2000. CCPR/C/21/Rev.1/Add. 10, General Comment No. 28 (General Comments). Paragraph 10.

*IFPA Submission to the
Human Rights Committee June 2008*

as may be laid down by law, information relating to
services lawfully available in another State."

The current constitutional and criminal law provisions disproportionately favour the interest of the foetus over the rights of pregnant women, thereby endangering women's health and well-being. The Irish Constitutional provision which equates the life of the woman with that of the "unborn" is unclear. The constitutional provision fails to define the term "unborn" a phrase which may refer to a foetus from the moment of conception, from the point of viability or may even include a foetus so severely malformed as to have no hope of being born alive. The availability of legal in vitro fertilisation, as well as methods of contraception and emergency contraception that may work after implantation further confuses what constitutes the "unborn" under Irish law.

In the past number of years Irish police (the Gardai) have found evidence of a return to illegal, unsafe abortion not observed in Ireland since the early 1950's. Such illegal activity has been prevalent mainly among an immigrant population that faces greater restrictions on travel and often lacks funds. Illegal abortion places women's health and lives at risk and the Government has rightly taken legal action to stop such illegal services.²

Access to the internet has resulted in a new method of obtaining illegal abortions in Ireland in that it is possible for women to access medical abortions via websites. The public health implications of this are clear and present

² See media reports such as that of the 23rd November 2007 'Irish Times' which reported findings from an inquest which included that a woman from the Philippines had "a chemical and instrument induced abortion". The woman at the centre of the report has reportedly left Ireland but Gardai are said to have alerted immigration officers in the event that she re-enters the country and have considered issuing a European arrest warrant. However, the DPP advised that there was not enough evidence on which to charge the woman and no warrant could therefore be issued. Gardai also contacted Interpol to ascertain the woman's whereabouts. (Irish Times 23/05/08). Also reported in the Irish Times on 2nd June, 2007, was the case of an Irish woman who travelled to Poland for an abortion in 2007. Police raided the house where the doctor was performing an illegal abortion. The woman was detained and treated but no criminal charges were brought against her. In 2006, the Irish Independent reported the case of a Lithuanian woman who paid €500-€800 to a woman who spoke Russian for 'medication' that would cause an abortion. (Irish Independent 30/11/2006). The woman was 36 weeks pregnant when she induced a miscarriage in a field. An inquest was unable to determine whether the foetus had been born alive and no charges were pressed against the woman. In 2004, Gardai were investigating reports that a Romanian woman paid a Moldovan woman the sum of €500 for an abortion. The Romanian woman's partner had called the Gardai because she had undergone the procedure without his knowledge. Detectives raided the apartment and found a suction pump and anaesthetic chemicals. (The Irish Times 08/07/2004).

serious problems for women themselves and medical personnel treating them. It is clear that women for whom travelling for a safe and legal abortion is not an option will find alternative ways of terminating a pregnancy. The public health consequences for women in these situations include: incomplete abortion, haemorrhage, sepsis, uterine perforation, intra abdominal injury, psychological trauma and death. These women are also more likely to delay in presenting to hospital with complications and are less likely to attend for post abortion care.

In 1992 the Irish Supreme Court interpreted the law to allow abortion when the woman's life is endangered by continuation of pregnancy. However, in practice abortion is largely unavailable in Ireland in almost all circumstances. This is a result of ambiguity about when a physician may legally perform a life-saving abortion. The State repeatedly has neglected to offer implementing legislation or to propose a referendum to facilitate access to lifesaving abortion. More recently, the government indicated at Ireland's examination under the Convention on the Elimination of Discrimination Against Women³ that there are no plans to legislate for abortion on the grounds of the 'X' case.

Figures from the United Kingdom Department of Health show that over 6,000 women providing Irish addresses had terminations in the U.K. each year. This figure is based upon the number of women providing Irish addresses and vastly undercounts the actual number of women travelling, some of whom may give false addresses in England or travel to other countries where abortion is less expensive. Others travel to countries such as the Netherlands or Spain to access safe and legal abortion services. The jeopardising of women's health and their lives by virtue of this ban on abortion services constitutes a breach of Article 6 of the Covenant.

D Freedom from Torture, Cruel Treatment and Punishment

Article 7 of the Covenant protects the right to be free from torture, cruel treatment and punishment. The Committee has emphasised that the prohibition contained in this article extends to acts that cause mental as well as physical pain and suffering.⁴ The Committee have further

³ Ireland's Examination under the Convention on the Elimination of All Forms of Discrimination Against Women 2005.

⁴ General Comment No.20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/92. CCPR General Comment No. 20 (General Comments). Paragraph 5.

emphasised that this is particularly egregious in the case of a minor.

The Committee has also requested information from State Parties on whether the State gives access to safe abortion to women who have become pregnant as a result of rape.⁵ Under Irish law and practice at present, it is not possible to obtain an abortion in the case of fatal foetal anomaly or in the case of rape.

Recent cases in which women with fatal foetal anomalies were denied a therapeutic abortion demonstrate the cruel and degrading treatment to which such women are subjected in the name of protecting foetal rights. In April 2007, a pregnant woman in her teens known as 'Miss D' petitioned the High Court for declarations against the State and the Health Service Executive (Ireland's social services) in order to allow her to travel to the UK for an abortion. 'Miss D' was under the care of the State by virtue of an interim care order. Pregnant and living with her boyfriend, 'Miss D' discovered on 23 April, her seventeenth birthday, having attended hospital for a scan that she was carrying an anencephalic foetus: a fatal condition whereby a large part of the skull and brain is missing. 'Miss D' decided that she wished to terminate her pregnancy. The Health Service Executive wrote to the police to request that they arrest D if she attempted to leave the country. It also requested that the Passport Office refuse to issue D with a passport. The High Court ruled that 'Miss D' could travel abroad for a termination in line with her constitutionally protected right to travel. However, this case sharply illustrates the lack of guidelines and procedures in relation to when an abortion (or as in this case the right to travel for an abortion) is legally permissible under Irish law. This confusion is untenable and breaches a plethora of international human rights norms.⁶ A written decision is still awaited in this case which was heard by the Irish High Court over a year ago.

This case is illustrative of the ways in which the ban on abortion operates to violate women's rights under Articles 2, 6, 7, 17 and 24 of the ICCPR. Reliance is placed on the Committee's decision in *KL v Peru* concerning a young

⁵ General Comment No. 28: Equality of rights between men and women (article 3): 29/03/2000. CCPR/C/21/Rev.1/Add. 10, General Comment No. 28 (General Comments). Paragraph 10.

⁶ The International Conference on Population and Development Programme of Action, the Beijing Platform for Action, the Convention on the Elimination of Discrimination Against Women, Against Women, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the International Covenant on Economic, Social and Cultural Rights.

Peruvian minor who was denied a termination having discovered that the foetus she was carrying was anencephalic. In that case, the author argued that 'the refusal to provide a legal abortion service left her with two options which posed an equal risk to her health and safety: to seek clandestine (and hence highly risky) abortion services, or to continue a dangerous and traumatic pregnancy which put her life at risk'.⁷

In an Irish context, women who can afford to travel and/or have legal permission to do so, dependent on their immigration status, for example, can exercise the option of travel to another State in order to access safe abortion services. Alternatively, when a woman must travel outside the state to access to abortion in cases of severe foetal anomaly she is usually denied access to vital genetic analysis of foetal remains to determine implications for future pregnancies.

The lack of such services domestically constitutes a breach of their rights under Articles 2, 6, 7, 17 and 24 of the Covenant. In finding a violation of Article 7 of the Covenant in *KL v Peru*, the Committee noted that the effects of the denial of a therapeutic abortion on the author of the complaint 'could have been foreseen, since a hospital doctor had diagnosed anencephaly in the foetus, yet the hospital director refused termination. The omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced'.⁸

A case brought by an Irish woman, challenging the constitutional ban on abortion to the European Court of Human Rights was recently declared inadmissible on the grounds of non-exhaustion of domestic remedies.⁹ The woman known as D became pregnant with twins. One of these died in the womb, and the second was found to suffer abnormalities. D travelled to Britain and had an abortion. She argued that having to do so breached her rights under Articles 3 (Freedom from torture, inhumane and degrading treatment) and 8 (Right to respect for family and private life) and 14 (Right to enjoyment of Convention rights and freedoms without discrimination) of the European Convention on Human Rights. The Court ruled on the question of admissibility in this case in 2007 and

⁷ Communication No. 1153/2003 at paragraph 3.3

⁸ Ibid at paragraph 6.3

⁹ Decision as to the Admissibility of Application No. 26499/02 by D against Ireland. The European Court of Human Rights (Fourth Section), sitting on 6 September 2005 and 27 June 2006.

found that D had failed to exhaust domestic remedies and had not therefore met the admissibility test. Specifically the Court said:

“Indeed, as argued by the Government, the *X* case illustrated the potential of the constitutional courts to develop the protection of individual rights by way of interpretation and the consequent importance of providing those courts with the opportunity to do so: this is particularly the case when the central issue is a novel one, requiring a complex and sensitive balancing of equal rights to life and demanding a delicate analysis of country-specific values and morals. Moreover, it is precisely the interplay between the equal right to life of the mother and the “unborn”, so central to Article 40.3.3, that renders it arguable that the *X* case does not exclude a further exception to the prohibition of abortion in Ireland. The presumption in the *X* case was that the foetus had a normal life expectancy and there is, in the Court’s view, a feasible argument to be made that the constitutionally enshrined balance between the right to life of the mother and of the foetus could have shifted in favour of the mother when the “unborn” suffered from a abnormality incompatible with life. The Court also notes the subsequent rejection (in 1992 and 2002) of the proposed amendments to the Constitution to restrict the effect of the judgment in the *X* case”¹⁰

Thus the Irish government argued that it may have been permissible for D to petition the domestic higher courts to obtain a declaration that a termination under her circumstances was constitutionally permissible. The implication, given the government’s refusal to legislate for the ‘*X*’ case is that the government considers it the duty of the courts to decide these issues rather than the legislature. However, as with ‘*X*’ even when the courts have defined the constitutionally permissible indications for abortion the government has failed to realise these rights through legislation.

In 2005, the Irish Family Planning Association facilitated a group of women living in Ireland to prepare and take a case to the European Court of Human Rights (*A, B & C v Ireland*) challenging Ireland’s abortion ban. The complaint alleges breaches of Articles 2 (protection of the right to life), 3 (freedom from inhuman and degrading treatment),

¹⁰ Ibid at paragraph 90

8 (protection of the right to family life) and 14 (protection for equal enjoyment of convention rights) of the Convention.

E The Right to Equality and Non-discrimination

Article 3 of the ICCPR protects the equal rights of men and women to the enjoyment of the totality of Civil and Political Rights protected by the Covenant. Ireland's abortion ban constitutes a *prima facie* breach of this guarantee in a number of respects.

The Irish abortion law discriminates on the basis of sex because men are able to access the full range of medically necessary health care, including contraception, sterilisation, and treatment for sexually transmitted diseases. In contrast, legal barriers to abortion, a medical treatment required only by women, constitutes a violation of non-discrimination norms.

Women and girls in a crisis pregnancy situation face huge difficulty in accessing accurate information on their options. Currently, the IFPA and other groups cannot provide information on abortion to women over the phone or via the Internet. This information can only be made available in non-directive counselling sessions. Consequently rural women face the added burden of having to travel to get advice on abortion. This is a violation of human rights norms and standards because some women are not being provided with the necessary information to make the right health choices for them or to access health services.

Depending on the stage of gestation it costs approximately €1,000 to travel to Britain for an abortion. This poses severe financial hardship for women from marginalised backgrounds, including women living on welfare benefits and low income. This is particularly significant as the law thus facilitates unequal access to abortion dependent on the socio-economic circumstances of the pregnant woman. Again this is a violation of human rights norms. Gynaecologists advise that abortion in the first trimester is significantly preferable to a later abortion, from the point of view of the woman's health. One consequence of the abortion trail to Britain, and the ongoing difficulties with access to counselling and information, is Irish abortions are performed later after the first trimester compared with abortions where the woman was a resident of England and Wales resulting in the inaccessibility to women in Ireland

to the benefits of scientific progress – in this case less invasive abortion procedures.

Domestically, the ‘C’ case and the ‘Miss D’ case have demonstrated that minors, women with mental incapacity or women who are wards of court have particular difficulties in accessing safe and legal abortion services. They have restricted rights as compared with other women and this places them in an invidious position and this constitutes a breach of Article 24 (Rights of Children) of the Covenant which requires States to implement measures to protect minors in view of their status as minors.

Migrant women are more inclined to access unsafe, clandestine abortion services due to the pressures of organising funding and travel arrangements. The ban therefore results in discriminatory impact on women resident in Ireland.

The ban on abortion is discriminatory but it also results in discriminatory practices by virtue of the lack of guidelines for medical staff in relation to the legality or otherwise of providing a therapeutic abortion.

F The Right to Privacy

Article 17 of the Covenant protects the right to privacy and includes freedom from arbitrary interference with same. Women’s right to privacy under the Covenant encompasses the protection of their reproductive rights. The denial of abortion services to women, particularly in cases of rape and foetal anomaly constitutes an arbitrary interference with their right to privacy and their fundamental right to make decisions on the number and spacing of their children.

The restrictions on privacy are arbitrary and are not based on a domestic consensus in relation to abortion in Ireland. A referendum defeated in March 2002 had aimed to further restrict access to abortion by excluding suicide as a justification for life-saving abortion. The domestic consensus in Ireland supports liberalising abortion laws, particularly for women in extreme circumstances such as when continuation of pregnancy poses a threat to a woman's health, when pregnancy is a result of rape or incest, or when the foetus is severely malformed. Irish voters have never been given the option of voting for legalisation of abortion. Moreover, many women in Ireland who need abortion services are disenfranchised because they are minors or non-citizens who cannot vote in referenda. Yet substantial government polling data

suggests that the majority of the population favours greater access to abortion in Ireland.¹¹

The Irish Supreme Court has rightly criticised the constitutional provision for its lack of guidelines for life-saving abortions and its failure to consider the woman's circumstances. The law makes no provision for a woman who is pregnant as a result of rape or incest, experiencing severe foetal malformation, or at risk of permanent bodily harm such as blindness, diabetes, infections, kidney or heart disease, all of which may all result from continuation of pregnancy for some women. The law completely disregards the woman's age, her mental capacity, and her other life circumstances.

G Right to an Effective Remedy

Article 2 of the Covenant provides that States shall ensure an effective remedy for those whose rights are violated under the Convention. It also provides that each State Party shall undertake the necessary steps to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the Convention.

As was argued in *KL v Peru*, the IFPA submits that Ireland has failed to comply with Article 2 in neglecting to take steps to ensure that an exception could be made to the rule criminalizing abortion, so that, in cases where the physical and mental health of the mother was at risk, she could undergo an abortion in safety'. As noted above, the failure of the government to legislate for the 'X' decision to allow a termination in cases where the woman's life is at risk due to suicide, has resulted in this indication not being available in Ireland, despite its confirmed legality by the country's Supreme Court. This is a clear and systematic violation of Article 2.

¹¹ In sharp contrast to the Government's policy of a near-total ban on abortion, a national survey of the population (ages 18 - 45), conducted by the State's Crisis Pregnancy Agency in 2003, found that 51% thought that a woman "should always have a choice to have an abortion, regardless of the circumstances, 8% felt woman should never have this choice, 2% had no opinion and the remaining proportion (39%) of participants felt there should be choice in certain circumstances. A 2007 survey of public opinion on abortion conducted by the Safe and Legal Abortion Campaign indicated that 43% agreed with the proposition that termination should be available on the basis of a woman's right to choose, 69% in situations of rape, and 75% in the case of fetal anomaly incompatible with life. Agreement with the availability of a termination in each of the specified situations tends overall to be higher than average amongst the younger age cohorts (the under 35's) . In addition, an Irish Times Behaviour & Attitudes poll on women published in September 2007 A total of 54 per cent of women believe the Government should act to permit abortion. While support was found to be highest among young and single women, a majority of most age groups were found to favour allowing abortion.

The author in *KL v Peru* also argued that there was no 'administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion'¹². It is submitted that the same breach of Article 2 applies in respect of Ireland's abortion laws, particularly as they relate to cases of foetal anomaly and risk of the life of the mother due to the risk of suicide. In one case the government are refusing to implement the Supreme Court's decision and in the other they are neglecting to take steps to clarify the law and decriminalise therapeutic abortions. Remedies for individual women are burdensome and ineffective, requiring them to access legal advice and resources and litigate within a sufficient timeframe to secure a meaningful remedy.

Far more effective and humane means exist to protect foetal life than the current law, including: provision of adequate pre-natal care and parenting care, availability of contraception to allow for spacing of children, and adequate social support for impoverished families.

The government took steps towards adopting this more beneficial approach when it created the Crisis Pregnancy Agency ("CPA") in 2001. This agency aims to reduce the number of crisis pregnancies and abortions through social assistance programmes rather than by criminalisation alone.

The CPA was a positive development in addressing some of the policy matters concerning reproductive health care, yet the agency's mandate is limited. Moreover, the CPA is limited in its funding and objectives. This government agency is not a substitute for access to necessary reproductive medical care.

H Conclusion

In sum, the Government's continued disregard for international human rights norms in its abortion policies has resulted in Irish women continuing to have a higher percentage of later abortions, receiving less pre-abortion and follow-up medical care, and suffering from the stigma created by the criminalisation of abortion.

I Recommendations

The IFPA recommends that the Government:

¹² Paragraph 2.8

*IFPA Submission to the
Human Rights Committee June 2008*

- Develop greater access to abortion services for all women within the State, particularly when a woman's health is at risk, she is pregnant as a result of rape or incest or there is evidence of severe foetal anomaly;
- Offer the voters an opportunity to remove from the Constitution the 1983 Amendment equating the life of the woman with that of the foetus and effectively banning abortion;
- Clarify the language of the 1983 Constitutional Amendment as to whether the "unborn" references the foetus at the point of viability, from the moment of conception or at some other point during pregnancy;
- Provide comprehensive information on reproductive health, clarify the law regarding the provision of abortion information and implement legislation to require unbiased pregnancy counselling;
- Improve access to appropriate family planning services and information, including providing improved services for testing for sexually transmitted diseases.

Ends.