

Ireland's Second Universal Periodic Review—Ireland's Restrictive Regulation of Abortion

Context

Article 40.3.3 of the Constitution (the Eighth Amendment) affords constitutional protection to the biological existence of a foetus on a basis of equality with the right to life of a pregnant woman.¹

As interpreted by the Irish Supreme Court, this provision prohibits abortion in all circumstances, except where there is a risk to the pregnant woman's life, as distinct from her health.²

The Committee on the Rights of the Child (CRC), the Economic, Social and Cultural Rights Committee (CESCR) and the Human Rights Committee (HRC), in 2016, 2015 and 2014 respectively, called for legislative and constitutional change to bring Ireland's laws into compliance with human rights requirements. The Committee on the Elimination of Discrimination Against Women (CEDAW) has called on Ireland to facilitate a national dialogue on the right to reproductive health, including its very restrictive abortion laws.³

Repeal of Article 40.3.3 and decriminalisation of abortion are necessary steps towards an abortion regime that is compliant with international human rights standards. If these reforms are made, meaningful national dialogue on a new regulatory regime can follow.

Developments

At its first Universal Periodic Review in 2011, Ireland received six recommendations in relation to its restrictive abortion laws.⁴ Notwithstanding the 2010 ruling of the European Court of Human Rights (ECtHR) in *A, B and C v Ireland*⁵ that the State must give legal effect to the limited constitutional right, all were rejected.

In 2013, Ireland enacted the Protection of Life During Pregnancy Act,⁶ which purports to give legal effect to the ECtHR's judgment. But the Act fails to make access to abortion practical and effective.⁷

Depending on the circumstances, it may require up to three doctors to certify that an abortion can proceed. A review procedure can take up to 10 days and require assessment of the woman by up to three additional doctors.

Despite the view of the WHO and international human rights standards that abortion should not be criminalised,⁸ harsh criminal sanctions apply other than where a woman's life is at risk. The maximum sentence is 14 years imprisonment.⁹

Neither the Act nor the guidance issued to doctors on its implementation bring Ireland into compliance with the Covenant. The guidance document makes no reference to women's right to health or to or to bodily

integrity or autonomy in medical decision-making. Pregnant women can be denied care.

Impact of Ireland's abortion laws

At least 3,700 women travel to the UK for abortions each year.¹⁰ When a woman chooses abortion in circumstances where the pregnancy presents risks to her physical or mental health, or well-being, the burden of organising a termination is placed entirely on her. Regardless of her circumstances, she must bear all the financial costs. The denial of abortion in Ireland causes real harms to pregnant women:

- Under Ireland's restrictive laws, doctors can be prevented from making clinical decisions in the best interests of pregnant women's health. The medically unsound distinction between risk to life and risk to health requires doctors to allow a pregnant woman's health to deteriorate until her life is at risk before performing a lawful abortion.
- Doctors cannot refer women to abortion services in other states, even when there is a health risk. Women must self-refer. Some women travel to an abortion clinic, only to find that it is inappropriate to their health needs.
- Women experience abandonment by the health system and, in the case of women who receive a diagnosis of a health condition or a severe foetal anomaly from a hospital, an ejection from the health services.
- The need to travel for abortion services imposes financial, physical and psychological burdens on women. All costs are borne by the pregnant woman. These burdens disproportionately affect vulnerable and disadvantaged women and girls.
- Not all women can travel. Many women struggle to raise the necessary funds. Non-Irish women, especially undocumented and asylum-seeking women, must incur great expense and delay because they need travel documents to enter another state and return to Ireland. Some women, unable to obtain these documents and/or funds, parent against their wishes.
- Increasing numbers of women risk prosecution by accessing medication online to self-induce abortion. They do so without proper medical supervision. If complications arise, fear of prosecution may deter women from seeking medical help.
- Women experience stigma when they travel to avail of a procedure that is accessible in most European countries, but criminalised in Ireland.

Recommendations of international and national human rights monitoring bodies

Each time a UN Treaty Monitoring Body reviews Ireland's abortion laws, trenchant criticisms are issued.

The CRC in 2016, the CESCR in 2015, the HRC in 2008 and 2014, the Committee Against Torture (CAT) in 2011 and the CEDAW in 1999 and 2005 have all concluded that Ireland's abortion laws are irreconcilable with women's human rights on a number of grounds:¹¹

- The extremely restrictive legal regime whereby abortion is lawful only to save the life of a woman and the denial of abortion on any other grounds, including a woman's health, rape, incest or fatal foetal anomaly (CRC, CESCR, HRC, CAT, CEDAW).
- The impact on women and doctors of the lack of clarity on the precise legal meaning of "real and substantial risk to life" (CRC, CESCR, HRC, CAT, ECtHR).
- The failure of the 2013 abortion legislation to fully give effect to the right to abortion to save a woman's life (CRC, CESCR, HRC).
- The criminal sanctions that apply to women who have abortions in Ireland and those who assist them (CRC, CESCR, HRC, CAT).
- The strict restrictions on the provision of information on abortion services in other states and on healthcare provider referrals for abortion services (HRC, CESCR).
- The need for women who seek abortion to travel to other jurisdictions to avail of these services and the consequent psychological, financial and health burdens that these women incur (CESCR, HRC; ECtHR, CEDAW).
- The discriminatory impacts of the law on vulnerable groups of women—minors, undocumented women, migrant women and women living in poverty, especially those who are unable to travel for abortions abroad due to lack of funds or immigration status (CESCR, HRC, CAT).
- The harmful, discriminatory effects of Ireland's abortion laws on adolescent girls' rights (CRC).

The UN Special Rapporteur on the right to health has also stated that barriers arising from criminal laws and other laws and policies affecting abortion must be removed in order to ensure the full enjoyment of the right to health. The Rapporteur also highlighted that criminalisation of reproductive health services has no health benefits and shifts the burden of realising the right to health from the state onto the pregnant woman.¹² Ireland's national human rights institution, the Irish Human Rights and Equality Commission (IHREC) has also criticised the legislation on a number of grounds, including its complicated and discriminatory procedural barriers to lawful abortion access.¹³

Public Opinion

Although five constitutional referendums have been held on abortion and all proposals to further restrict the law have been rejected, the Irish people have never been offered an opportunity to expand abortion

access.¹⁴ Irish public opinion favours reform of Ireland's restrictive abortion laws. Recent opinion polls consistently show significant support for broader abortion access:

- A March 2016 poll¹⁵ found that 87% of Irish people want abortion access expanded and 71% believe abortion should be decriminalised;
- The same poll found that 69% want the expansion of the abortion laws to be a government priority¹⁶;
- Almost three-quarters (73%) believe the Government should hold a referendum on the repeal of Article 40.3.3 (the Eighth Amendment);
- A February 2016 poll¹⁷ found that 64% of Irish people favour the repeal of Article 40.3.3;
- A January 2016 poll¹⁸ found that 78% of respondents supported abortion in cases of rape or incest and 76% in cases of fatal foetal anomaly;
- A July 2015 poll¹⁹ found that two thirds (67%) of Irish people believe the Government should decriminalise abortion and 81% were in favour of widening the grounds for abortion;
- In the same poll, 70% agreed that under international human rights law, women have a right to access abortion if their life or health is at risk, and in cases of rape, incest and fatal foetal anomaly. 65% agreed that Ireland's abortion ban makes women have unsafe abortions.

Political environment

And **76 of 158** members of Parliament also support a referendum. A further **39** are committed to or have publicly voiced their support for a Citizens' Assembly, which would be tasked with looking at constitutional reform in this area.

UPR Cycle II

Proposed Recommendations

The IFPA respectfully suggests that the following measures are recommended to Ireland:

- Repeal Article 40.3.3 of the Constitution.
- Take all necessary steps to bring Ireland's laws on abortion into compliance with international human rights standards in law and in practice.
- Decriminalise abortion by repealing sections 22 and 23 of the Protection of Life During Pregnancy Act 2013.
- Repeal the Abortion Information Act 1995.

References

¹ Article 40.3.3, Bunreacht Na hEireann, 1937, Available at https://www.constitution.ie/Documents/Bhunreacht_na_hEireann_we_b.pdf. It 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."

² Attorney General v X, [1992] IESC 1; [1992] 1 IR 1.

³ CEDAW 2005, *supra* note iv.

⁴ 108.4. Bring its abortion laws in line with ICCPR (Norway); 108.5. Introduce legislation to implement the European Court of Human Rights judgement in the A, B and C versus Ireland case (United Kingdom); 108.6. Take measures to revise the law on abortion with a view to permitting termination of pregnancy in cases where pregnancy is a result of rape or incest, or in situations where the pregnancy puts the physical or mental health or wellbeing of the pregnant woman or the pregnant girl in danger (Denmark); 108.7. Allow abortion at least when pregnancy poses a risk to the health of the pregnant woman (Slovenia); 108.8. Adopt legislative measures that guarantee greater integration of women as well as safeguards for their personal rights and reproductive health care and reform the Offences against the Person Act of 1861 to decriminalize abortion under certain circumstances (Spain); 108.9. Ensure that the establishment of an expert group on abortion matters will lead to a coherent legal framework including the provision of adequate services (Netherlands).

⁵ A, B and C v Ireland, [2010] ECHR 2032 Application no 25579/05.

⁶ PLDPA 2013, *supra* note iii.

⁷ The 1979 ECtHR case of *Airey v. Ireland*, 6289/73 established that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".

⁸ World Health Organisation: Safe abortion: technical and policy guidance for health systems. 2nd edition 2012 1,18 (2nd ed., 2012), Available at:

http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf. The WHO states that any "...legal restrictions on sexual and reproductive health services are likely to have serious implications for health". They assert that "restricting legal access to abortion, for example, does not decrease the need for abortion, but it is likely to increase the number of women seeking illegal and unsafe abortions, leading to increased morbidity and mortality." Legal restrictions also lead many women to seek services in other states or countries, which is costly, delays access and creates social inequities."; World Health Organisation, 2015, 'Sexual health, human rights and the law'. p.16, Available at:

http://apps.who.int/iris/bitstream/10665/175556/1/9789241564984_eng.pdf?ua=1. See Committee on the Rights of the Child, 71st Session, Concluding observations on the combined third and fourth periodic reports of Ireland UN Doc CRC/C/IRL/CO/3-4, 29 January 2016 (Hereinafter "CRC 2016"); United Nations Committee on Economic, Social and Cultural Rights, 55th session, 1 – 19 June 2015, Concluding Observations: Ireland, UN Doc E/C.12/IRL/CO/3, 19th June 2015 (Hereinafter "CESCR 2015"); Human Rights Committee, 111th Session. Concluding observations on the fourth periodic report of Ireland, UN Doc CCPR/C/IRL/CO/4, 19 August 2014 (Hereinafter "HRC 2014"); United Nations Committee against Torture, 46th session, 9 May - 3 June 2011 Concluding Observations: Ireland, UN Doc CAT/C/IRL/CO/1, 17 June 2011 (Hereinafter "CAT 2011"); Report of the Special Rapporteur the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. UN Doc A/66/254. 3 August 2011 (Hereinafter "Special Rapporteur 2011 Report"); UN Committee on the Elimination of Discrimination against Women, 33rd session, Concluding Comments: Ireland, UN Doc CEDAW/C/IRL/CO/4-5, 13 July 2005 (Hereinafter "CEDAW 2005"); UN Committee on the Elimination of Discrimination against Women, 21st session, Report of the Committee on the Elimination of Discrimination against Women, UN Doc A/54/38/Rev.1, 7-25 June 1999 (Hereinafter "CEDAW 1999").

⁹ Protection of life During Pregnancy Act, 2013, section 22 available at <http://www.irishstatutebook.ie/2013/en/act/pub/0035/sec0022.html#ec22> (Hereinafter "PLDPA 2013").

¹⁰ Statistics from the UK Department of health. <https://www.gov.uk/government/statistics/report-on-abortion-statistics-in-england-and-wales-for-2014>

¹¹ See Committee on the Rights of the Child, 71st Session, Concluding observations on the combined third and fourth periodic reports of Ireland UN Doc CRC/C/IRL/CO/3-4, 29 January 2016 (Hereinafter "CRC 2016"); United Nations Committee on Economic, Social and Cultural Rights, 55th session, 1 – 19 June 2015, Concluding Observations: Ireland, UN Doc E/C.12/IRL/CO/3, 19th June 2015 (Hereinafter "CESCR 2015"); Human Rights Committee, 111th Session. Concluding observations on the fourth periodic report of Ireland, UN Doc CCPR/C/IRL/CO/4, 19 August 2014 (Hereinafter "HRC 2014"); United Nations Committee against Torture, 46th session, 9 May - 3 June 2011 Concluding Observations: Ireland, UN Doc CAT/C/IRL/CO/1, 17 June 2011 (Hereinafter "CAT 2011"); Report of the Special Rapporteur the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. UN Doc A/66/254. 3 August 2011 (Hereinafter "Special Rapporteur 2011 Report"); UN Committee on the Elimination of Discrimination against Women, 33rd session, Concluding Comments: Ireland, UN Doc CEDAW/C/IRL/CO/4-5, 13 July 2005 (Hereinafter "CEDAW 2005"); UN Committee on the Elimination of Discrimination against Women, 21st session, Report of the Committee on the Elimination of Discrimination against Women, UN Doc A/54/38/Rev.1, 7-25 June 1999 (Hereinafter "CEDAW 1999").

¹² Report of the Special Rapporteur the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. UN Doc A/66/254. 3 August 2011. Page 1.

¹³ Irish Human Rights Commission. Observations on the Protection of Life During Pregnancy Bill 2013. Available at http://www.ihrec.ie/download/pdf/ihrc_observations_protect-429tion_of_life_in_pregnancy_bill_2013.pdf. Published July 2013.

¹⁴ Abortion in Ireland: Legal Timeline. Available at: <https://www.ifpa.ie/Hot-Topics/Abortion/Abortion-in-Ireland-Timeline>.

¹⁵ RED C Research and Marketing Poll, 'Amnesty International/Red C poll reveals Irish public want expanded access to abortion to be a political priority for incoming government,' 4 March 2016 <https://www.amnesty.ie/news/amnesty-international-red-c-poll-reveals-irish-public-want-expanded-access-abortion-be-political>

¹⁶ Excluding 'don't knows' and those who were neutral.

¹⁷ Irish Times/Ipsos MRBI Poll, 'Majority for repeal of Eighth Amendment, poll shows', 23 February 2016 <http://www.irishtimes.com/news/politics/majority-for-repeal-of-eighth-amendment-poll-shows-1.2544564>

¹⁸ RED C Research and Marketing Poll, 'Majority want to see abortion in certain circumstances to be legal in Ireland', 21 January 2016 <https://www.newstalk.com/election2016/48-of-people-believe-the-8th-Amendment-should-be-removed-according-to-poll>

¹⁹ RED C Research and Marketing Poll, 'New poll finds two-thirds majority in Ireland want abortion decriminalised,' 8 July 2015, <https://www.amnesty.ie/news/new-poll-finds-two-thirds-majority-ireland-want-abortion-decriminalised>.