REPORT OF THE EXPERT GROUP ON THE

JUDGMENT IN *A, B AND C V IRELAND*

NOVEMBER 2012

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PREFACE

It may be useful by way of introduction to the report of the expert group to say a word about about the context of our work.

Abortion is a difficult painful issue in this country and elsewhere. The reasons are not hard to understand. Intense ethical, religious, social, political and intimate personal issues coincide. There are difficulties about the issue and there are difficulties about discussing the issue. Treatment options can be the subject of controversy not by reason of their nature or effect but because of how they are defined. It is 30 years since the 8th Amendment was enacted following a bitter political debate and amid controversy about the meaning and effect of the new constitutional provision. It is 20 years since the Supreme Court came face to face with the issue in the urgent and fraught circumstances of the X case. The Supreme Court by 4-1 majority allowed a child to have an abortion in the rare and extreme circumstances that arose. The Court interpreted the Constitution and specifically the newly inserted Article 40.3.3º. That decision has remained controversial.

The European Court of Human Rights concluded that that there is an existing constitutional right which was identified by the Supreme Court in the X Case decision and it is logical and rational that the right should be available and enforceable. There should be a formal, accessible, transparent procedure. Article 47 of the Convention requires implementation of the Strasbourg judgment.

There are groups who think that the X case was wrongly decided and that there should be another referendum to row back on the right to an abortion, especially in case of suicide. Two referendums tried to remove suicide as a ground and were defeated. There are still some advocates of another vote by the People.

Some people question the evidential basis of the decision in X and its present applicability in light of modern research. Medicine and psychiatry are not frozen in time. Further studies and investigations will add to knowledge. Whatever one's opinion of the X case, some tragic predicament was going to come to a court and give rise to controversy. That is the nature of the question. Nobody can predict all the medical and psychiatric conditions in which the issue may arise.

Others want to extend the right to apply to more cases. Tragic situations arise such as fatal foetal abnormalities which are generally thought to be outside the scope of the principle in X.

The X case decision is the law of the State, as declared by its highest court. It is binding on all lower courts and generally. Although it could have done so and has been criticised in the Supreme Court for failing in that regard, the legislature has not put in place any formal system to provide for the exercise of this constitutional right.

Our function was not to take these considerations into account. We came together as a group from different backgrounds and different personal and professional perspectives. The expert group consisted of people with expertise in the medical, legal and administrative fields. Obviously it is not possible for us to adjudicate on legal or medical controversies and it is absolutely not our business to try to decide political controversies. The members of the group who are doctors are not settling legal issues, the lawyers are not deciding medical controversies and the administrators are not adjudicating on the medical or legal questions.

We are aware that the matter we are asked to consider, which is essentially a technical question or a series of technical questions, is part of a larger discussion or controversy.

I want to express my thanks and appreciation to the members of the group who have worked together diligently and have given their time and expertise so generously on this important undertaking. And all the members join me in expressing our gratitude to the administrative team from the Department of Health who gave us outstanding support and assistance in producing the report.

Sean Ryan

SUMMARY OF REPORT

In December 2009 the European Court of Human Rights (ECtHR) heard a case brought by three women in respect of the alleged breach of their rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) in regard to abortion in Ireland (the *A, B and C v Ireland*[1] case).

The judgment of the Court in *A, B and C v Ireland* confirmed that Article 40.3.3° of the Constitution is not inconsistent with the Convention. The European Court of Human Rights accepted that Article 40.3.3° of the Irish Constitution, as interpreted by the Supreme Court, provides that it is lawful to terminate a pregnancy in Ireland if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by a termination of the pregnancy. This has not been altered by this judgment.

The Court found that:

- There had been no violation of their rights under the Convention in respect of the first and second applicants, Ms A and Ms B, and it dismissed their applications.
- There had been a violation of the applicant's right to private and family life contrary to Article 8 of the Convention in the case of the third applicant, Ms C. The Court held that there was no accessible and effective procedure to enable her to establish whether she qualified for a lawful termination of pregnancy in accordance with Irish law.

The Government established the Expert Group 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 over-riding need for expeditious action.

This report provides background information on the topic of termination of pregnancy in Ireland, and details the outcome of the discussions of the Group.

Chapter 1 is the Introduction and sets out the terms of reference of the Expert Group.

Chapter 2 gives an overview of the current legal provisions governing termination of pregnancy in Ireland.

Chapter 3 outlines the historical background to the legal developments that have taken place on abortion over the last 30 years or so.

[1] [2010] ECHR 2032

Chapter 4 describes the European Court of Human Rights judgment in *A, B and C v Ireland* and its legal implications.

Chapter 5 presents the principles adopted by the Expert Group for the implementation of the judgement in *A, B and C v Ireland*.

Chapter 6 sets out procedural options. These options include the test to be applied to determine entitlement to termination of pregnancy in Ireland, the criteria for doctors responsible for the decision-making process, and a formal appeals process.

Chapter 7 outlines the implementation options for the procedure presented in the previous chapter and the legal implications of the judgment. Statutory and non-statutory options are examined and discussed with reference to constitutional, legal, and procedural considerations.

Chapter 8 is the Conclusion.

Appendix I – Membership of the Expert Group

Appendix II – Terms of Reference

Appendix III – Overview of international law on abortion

CHAPTER 1

INTRODUCTION

1.1 Background

Article 40.3.3° of the Constitution was inserted by the Eighth Amendment in 1983 and is as follows:

> *'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*.'

The Supreme Court decided in 1992 in *Attorney General v X*[2] (the *X* case) that the Constitution permitted abortion in certain limited and particular circumstances, namely, where there was a real and substantial risk to the life of the woman which could only be removed by terminating the pregnancy. The case in which the judgment was given concerned a girl of 14 years of age and the threat to her life was from suicide.

The *X* case is the background to the decision by the European Court of Human Rights in the case of *A, B and C v Ireland*. The ECtHR decided that the State was in breach of the Convention in failing to give effect to the right identified by the Supreme Court in the *X* case.

This judgment did not alter or extend the law on abortion in Ireland. The right in question already exists and has done since the enactment of the amendment in Article 40.3.3° of the Constitution and indeed in the law before that.

Ireland is a signatory to the Convention and is obliged to give effect to the judgments of the European Court of Human Rights. It follows that the State is now required to implement this judgment. The Government established this Expert Group to advise on how to give effect to the judgment.

1.2 The Expert Group

The Group consisted of people with relevant expertise in the areas of medicine, law, professional regulation and administration. The remit of the Group was to assist the Government in making decisions concerning the implementation of the judgment in *A, B and C v Ireland*.

[2] [1992] 2 I.R. 1

1.3 The Terms of Reference

1. To examine the judgment in A*, B and C v Ireland* of the European Court of Human Rights;

2. To elucidate its implications for the provision of health care services to pregnant women in Ireland;

3. 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 over-riding need for speedy action[3].

Under the terms of reference set out above, it was not the function of the Group to specify how the judgment of the European Court of Human Rights should be implemented. The Group's task was to provide options, not to recommend one particular solution. The report endeavours to set out options that are practical and consistent with the Constitution and law of the State.

Neither was it the task of the Expert Group to consider or recommend changes to abortion law in the State; those are policy questions on which it had no function.

The only brief that the Minister gave this Group was to deal with the requirements of the European Court of Human Rights judgment and to advise the Government on how to give effect to existing constitutional provisions.

1.4 How the Report is Organised

The report seeks to put the issues to be considered in context by setting out the historical and legal background and by giving some information about the situation in other countries[4]. Then it addresses the practicalities of implementation by considering principles, substantive measures and modes of effecting them.

[3] For the complete terms of reference of the Expert Group please see Appendix II.
[4] Please see Appendix III.

CHAPTER 2

RELEVANT LEGAL PROVISIONS AND CASES

2.1 Legal Provisions and Case Law Governing the Termination of Pregnancy in Ireland

2.1.1 Offences Against the Person Act 1861

Abortion is prohibited under the Criminal Law by Section 58 (as amended) of the *Offences Against the Person Act 1861* ('the 1861 Act'):

> *'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 not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable to be kept in penal servitude for life.'*

Section 59 of the 1861 Act states that:

> *'Whoever 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.'*

2.1.2 Health (Family Planning) Act 1979

Section 10 of the *Health (Family Planning) Act 1979* recites the statutory prohibition of abortion and states as follows:

> *'Nothing in this Act shall be construed as authorising –*
>
> *a) The procuring of abortion,*
>
> *b) The doing of any other thing the doing of which is prohibited by Section 58 or 59 of the Offences Against The Persons Act 1861 (which sections prohibit the administering of drugs or the use of any instruments to procure abortion) or,*
>
> *c) The sale, importation into the State, manufacture, advertising or display of abortifacients.'*

2.1.3 The Eighth Amendment to the Constitution (1983)

A referendum was held in 1983, resulting in the adoption of a provision which became Article 40.3.3° of the Irish Constitution, the Eighth Amendment. Article 40.3.3° provides as follows:

> *'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.'*

2.1.4 Attorney General v X & Others[5]

The interpretation of the Eighth Amendment was further considered in the *X* case, which arose in 1992. The Supreme Court held that if it were established

[5] See also section 3.3 for a discussion of the *X* case.

as a matter of probability, that there was a real and substantial risk to the life, as distinct from the health, of the mother and that this real and substantial risk could only be averted by the termination of her pregnancy, such a termination was lawful.

2.1.5 The Thirteenth and Fourteenth Amendments 1992

Following on from the *X* decision there were three proposed amendments to the Constitution placed before the people by way of referendum in November 1992. Two of those three proposals were adopted; they were known as the 13th and 14th Amendments.

The 13th Amendment to the Constitution (added to Article 40.3.3°) was designed to ensure that a woman could not be prevented from leaving the jurisdiction for an abortion abroad and it reads as follows:

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

The 14th Amendment (also added to Article 40.3.3°) allows for the provision in Ireland of information on abortion services abroad and provides as follows:

'This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.'

The current text of Article 40.3 of the Constitution**:**

'1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

3° 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 as may be laid down by law, information relating to services lawfully available in another state.'

2.1.6 The Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995

Section 2 of the 1995 Act defines 'Act information' as information that (a) is likely to be required by a woman for the purpose of availing herself of services provided outside the State for the termination of pregnancies; (b) relates to such services or to persons who provide them.

Section 1 confirms that 'a person to whom Section 5 applies' means a person who engages in, or holds himself, herself or itself out as engaging in, the activity of giving information, advice or counselling to individual members of the public in relation to pregnancy. Section 5 of the 1995 Act provides as follows:

'Where a person to whom Section 5 applies is requested, by or on behalf of an individual woman who indicates or on whose behalf it is indicated that she is or maybe pregnant, to give information, advice or counselling in relation to her particular circumstances having regard to the fact that it is indicated by her or on her behalf that she is or may be pregnant –

a) It shall not be lawful for the person or the employer or principal of the person to advocate or promote the termination of pregnancy to the woman or to any person on her behalf,

b) It shall not be lawful for the person or the employer or principal of the person to give Act information to the woman or to any person on her behalf unless –

i. The information and the method and manner of its publication are in compliance with sub paragraphs (i) and (ii) of Section 3 (1)(a) and the information is given in a form and manner which do not advocate or promote the termination of pregnancy,

ii. at the same time, information (other than Act information), counselling and advice are given directly to the woman in relation to all the courses of action that are open to her in relation to her particular circumstances aforesaid, and

iii. the information, counselling and advice referred to in sub paragraph (ii) are truthful and objective, fully inform the woman of all courses of action that are open to her in relation to her particular circumstances aforesaid and do not advocate or promote, and are not accompanied by any advocacy or promotion of, the termination of pregnancy.'

Section 8 of the 1995 Act:

'1. It shall not be lawful for a person to whom Section 5 applies or the employer or principal of the person to make an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the State for the termination of pregnancies.

2. Nothing in subsection (1) shall be construed as prohibiting the giving to a woman by a person to whom section 5 applies….. of any medical, surgical, clinical, social or other like records or notes relating to the woman.…'

2.1.7 The European Convention on Human Rights Act 2003

The 2003 Act came into force on the 31st December 2003 and Section 5 of the 2003 Act states as follows:

'1. In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of Section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

2. A declaration of incompatibility -

a) Shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and

b) Shall not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the

declaration relates in any proceedings before the European Court of Human Rights.'

Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms is the right to respect for private and family life:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.'

Summary Table of Current Legal Provisions

Year	Title	Relevance
1861	Offences Against the Person Act	Prohibits abortion
1979	Health (Family Planning) Act	Recites prohibition of abortion
1983	8th Amendment to the Constitution	Acknowledges right to life of the unborn with due regard to the equal right to life of the mother
1992	*X* Case	Sets out criteria for lawful abortion
1992	13th and 14th Amendments to the Constitution	Ensures right to travel for an abortion Allows for provision of information on abortion services abroad
1995	Regulation of Information (Services outside the state for termination of pregnancies) Act 1995	Regulates for the provision of abortion information
2003	European Convention on Human Rights Act 2003	Transposes European Convention of Human Rights into Irish law

CHAPTER 3

HISTORICAL BACKGROUND

3.1 Legal Provisions pre-1983

3.1.1 Offences Against the Person Act 1861

Abortion is a felony under the **1861** *Offences Against the Person Act*[6] and a sentence of penal servitude for life can be imposed for the offence.

3.1.2 The Constitution

Prior to the adoption of the Eighth Amendment to the Constitution in 1983, Article 40.3 of the Constitution read as follows:

> *'1° The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*
>
> *2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in he case of injustice done, vindicate the life, person, good name and property rights of every citizen.'*

3.1.3 Health (Family Planning) Act 1979

Section 10 of the *Health (Family Planning) Act* ***1979***[7] recited the provisions of the *Offences Against the Person Act.*

3.2 The First Referendum on Abortion and Subsequent Developments

3.2.1 First Referendum

In **1983**, the first of Ireland's referendums on the subject was held, and during the 1980s several landmark court cases were taken. The referendum introduced a new section in Article 40.3 to guarantee the right to life of the 'unborn', and to prevent abortion becoming lawful in Ireland. Article 40.3.3° reads as follows:

> *'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.'*

3.2.2 SPUC v Open Door Counselling & Dublin Well Woman Centre

In **1986**, the Society for the Protection of the Unborn Child (SPUC) obtained an injunction in the High Court restraining two organisations, Open Door Counselling and the Dublin Well Woman Centre, from providing women with information which encouraged or facilitated an abortion[8]. The Supreme Court refused to overturn the injunction, so the organisations took the case to the European Court of Human Rights. In October **1992**, the European Court of Human Rights ruled that Ireland had violated Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,

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[6] http://www.legislation.gov.uk/ukpga/Vict/24-25/100/contents
[7] http://www.irishstatutebook.ie/1979/en/act/pub/0020/print.html
[8] *SPUC v. Open Door Counselling and the Dublin Well Woman Centre*

which protects the right to freedom of expression[9]. It pointed out that the organisations were providing information on services lawfully available in other states and that these services could be crucial to a woman's health and well-being.

3.2.3 SPUC v Grogan and Others

SPUC also took a case against several students' unions in **1989** when they published information about British family planning clinics in student handbooks[10]. When SPUC sued these student groups, the students argued that the right under European Community law to receive medical services legally provided in another member state includes the right to receive information about such services. In *SPUC v Grogan*, the Supreme Court took a similar position to that in the Open Door case, and held that it was unlawful to disseminate information which had the effect of facilitating the commission of an abortion. This included publishing the addresses and telephone numbers of foreign abortion services. Again, similarly to the Open Door case, the case was taken to Europe. In **1991**, the European Court of Justice ruled that abortion qualified as a service under Article 60 of the European Treaty[11] and that therefore, a member state could not prohibit the distribution of information by agencies with a commercial relationship with abortion clinics abroad.

However, in the second part of its ruling, the Court found that since the student groups had no direct links with abortion services outside of Ireland, they could not claim protection of European Community law:

> *'It is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.'* [12]

3.2.4 Treaty on European Union

After the judgments on the cases involving SPUC and the provision of information on abortion, the next significant development in the area was the signing by Ireland of the *Treaty on European Union* (or the 'Maastricht Treaty') in **1992**[13]. Special provision was made in the Treaty to recognise Ireland's position on the unborn. Protocol 17 to the Treaty therefore states that:

> *'Nothing in the Treaty on European communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3° of the Constitution of Ireland.'*

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[9] *Open Door Counselling, Dublin Well Woman Ltd & Others v. Ireland* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695666&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[10] *SPUC v Grogan and others* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61990J0159:EN:HTML

[11] *SPUC v. Grogan and others (European Court of Justice)*

[12] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61990J0159:EN:HTML

[13] http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0094000019

3.3 The *X* case

In *Attorney General v X* in **1992**, the Supreme Court considered the meaning of the Eighth Amendment in the circumstances that arose in the case. '*X*' was a 14 year old girl who became pregnant as a result of an alleged rape. The girl and her parents wished to travel abroad so that she could have an abortion. The issue of having scientific tests carried out on retrieved foetal tissue so as to determine paternity was raised with An Garda Síochána. The Director of Public Prosecutions was consulted and in turn informed the Attorney General. An injunction was obtained *ad interim* to restrain the girl from leaving the jurisdiction or from arranging or carrying out a termination of the pregnancy.

The High Court granted an interlocutory injunction and the case was appealed to the Supreme Court. A majority of the Supreme Court rejected the view of the High Court that the risk that the mother would take her own life, if not permitted to have an abortion, was of a lesser and different order of magnitude than the otherwise certain death of the unborn. McCarthy J in the Supreme Court said that this was not the correct test to apply. He said that it was not a question of balancing the life of the unborn against the life of the mother. If it were, the life of the unborn would virtually always have to be preserved, since the termination of the pregnancy means the death of the unborn. No matter how high the probability that the mother will die, it is not a certainty. He said it was not 'a question of risk of a different order of magnitude; it can never be otherwise than a risk of a different order of magnitude.'[14]

The Court also rejected the test posited by the State that a termination could only be permitted where the continuation of the pregnancy constituted a risk of immediate or inevitable death to the mother, as insufficiently vindicating the mother's right to life. The majority also rejected the test posited by Hederman J in his dissenting judgment that the evidence required to justify an abortion

> '…*must be of such weight and cogency as to leave open no other conclusion but that the consequences of the continuance of the pregnancy will to an extremely high degree of probability cost the mother her life and that any such option must be based on the most competent medical advice available.*' [15]

A majority of the members of the Supreme Court held that if it were established as a matter of probability, that there was a real and substantial risk to the life, as distinct from the health, of the mother and that this real and substantial risk could only be averted by the termination of her pregnancy, such a termination was lawful.

The Supreme Court accepted the evidence that had been adduced in the High Court that the girl had threatened to commit suicide if compelled to carry her pregnancy to full term and deemed that this threat of suicide constituted a

[14] *Attorney General v X* at page 80.
[15] *Attorney General v X* at page 75.

real and substantial risk to the life of the mother. On this basis the High Court injunction was lifted.

3.4 The Second Referendum on Abortion and Subsequent Developments

3.4.1 Second Referendum

The second referendum on abortion in Ireland was held on 25th of November **1992**. The electorate were asked to vote on three proposed amendments to the Constitution. The Twelfth Amendment, which was designed to exclude the risk of suicide as a ground for lawful abortion, was defeated. The proposed text of the Twelfth Amendment read as follows:

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

However, the right to travel and the right to information were accepted and Article 40.3.3° of the Constitution was further amended to reflect the position.[16]

3.4.2 Regulation of Information (Services outside State for Termination of Pregnancies) Act, 1995

Following the referendum, the issue of information on abortion was dealt with in legislation. The *Regulation of Information (Services outside State for Termination of Pregnancies) Act,* ***1995***[17] makes it clear that in general, the provision of abortion information is unlawful in Ireland except in very restricted circumstances.

3.4.3 Constitution Review Group Report

In **1996**, the report of the Constitution Review Group was published[18]. Its terms of reference were to review the Constitution and to establish the areas where constitutional change might be necessary. Reviewing Article 40.3.3°, the Group considered that:

> *'The state of the law, both before and after the X case decision, gives rise to much dissatisfaction. …the law should…specify in what circumstances a pregnancy may legitimately be terminated and by whom.'*

The Review Group (1996) considered five options:

> *'a). introduce an absolute constitutional ban on abortion*
> *b). redraft the constitutional provisions to restrict the application of the X case decision*
> *c). amend Article 40.3.3° so as to legalise abortion in constitutionally defined circumstances*
> *d). revert, if possible, to the pre-1983 situation*
> *e). regulate by legislation the application of Article 40.3.3°*

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[16] http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf

[17] http://acts.oireachtas.ie/zza5y1995.1.html

[18] http://www.constitution.ie/reports/crg.pdf

It concluded that while in principle the issues should be dealt with by constitutional amendment,

> '…*there is no consensus as to what that amendment should be and no certainty of success for any referendum proposal for substantive constitutional change in relation to this subsection.*'

Therefore, the Group recommended introducing legislation as the only practical solution. This should cover matters including

> '…*definitions, protection for appropriate medical intervention, certification of 'real and substantial risk to the life of the mother' and a time-limit on lawful termination of pregnancy.*'

3.4.4 A. & B. v. Eastern Health Board & C

This case concerned a thirteen-year-old, 'C', who became pregnant as the result of rape. In **1997** the High Court accepted psychiatric evidence showing that a real and substantial risk, in the form of suicide, existed to C's life, and it therefore concluded that a direction authorising travel for the purposes of termination of pregnancy was lawful.

3.4.5 Medical Council Guidelines 1998

The Medical Council *Guide to Ethical Conduct and Behaviour* (**1998**), section 26.5 stated that:

> *'The deliberate and intentional destruction of the unborn child is professional misconduct. Should a child in utero suffer or lose its life as a side-effect of standard medical treatment of the mother, then this is not unethical. Refusal by the doctor to treat a woman with a serious illness because she is pregnant would be grounds for a complaint and could be considered to be professional misconduct.'*

3.4.6 Green Paper on Abortion

In order to analyse and consider options for resolving the issues around abortion, a Cabinet Committee was set up to oversee the drafting of a Green Paper on the area, published in **1999**[19]. Preparatory work for the Green Paper was carried out by an interdepartmental group of officials and submissions were invited from interested members of the public, professional and voluntary organisations. Over 10,000 submissions were received, as well as petitions containing 36,500 signatures. Oral submissions were also heard.

The Green Paper on Abortion set out seven options on the substantive issue of abortion.

> *'1. An absolute constitutional ban on abortion*
> *2. An amendment of the constitutional provisions so as to restrict the application of the X case*
> *3. The retention of the status quo*
> *4. The retention of the constitutional status quo with legislative restatement of the prohibition on abortion*
> *5. Legislation to regulate abortion in circumstances defined in the X case*
> *6. A reversion to the pre-1983 position*
> *7. Permitting grounds beyond those specified in the X case.'*

[19] http://www.taoiseach.gov.ie/index.asp?docID=238

The Green Paper was then referred to the All-Party Oireachtas Committee on the Constitution by the Government in **September 1999**, for its consideration and recommendations.

3.4.7 All Party Oireachtas Committee on the Constitution

The All Party Oireachtas Committee invited written submissions on the options in the Green Paper, and received approximately 105,000 communications, 92% of which took the form of signatures to petitions. The Committee also conducted hearings with leading medical specialists, national interest groups on both sides of the debate, representatives of the major religious bodies in Ireland and individuals and groups with a special interest.

The Committee found that no option of the seven listed above commanded unanimous support[20]. It therefore set out the three options found to command the most substantial levels of support among the Committee. These approaches were:

> *'1. To concentrate on the plan to reduce the number of crisis pregnancies and the rate of abortion and to leave the legal position unchanged.*
> *2. To support the plan to reduce the number of crisis pregnancies, accompanied by legislation which will protect medical intervention to safeguard the life of the mother, within the existing constitutional framework.*
> *3. To reduce the number of crisis pregnancies, to legislate to protect best medical practice while providing for a prohibition on abortion, and consequently to accommodate such legislation by referendum to amend the Constitution.'*

Following presentation of this report in **2000**, a Ministerial Sub-Committee on Abortion was established. No publication issued from the Sub-Committee.

3.4.8 Crisis Pregnancy Agency

As recommended by the *All Party Oireachtas Committee on the Constitution: Fifth Progress Report on Abortion*, the Department of Health and Children set up the Crisis Pregnancy Agency in **2001**. The Agency was to prepare and implement a strategy to address the issue of crisis pregnancy in Ireland. The aims of the strategy were to:

- reduce the number of crisis pregnancies by the provision of education, advice and contraceptive services;
- reduce the number of women with crisis pregnancies who opt for abortion by offering services and supports which make other options more attractive;
- provide counselling and medical services after crisis pregnancy.

The Crisis Pregnancy Agency was integrated into the HSE in **2010**, and continues to operate as the HSE Crisis Pregnancy Programme[21]. It is a national programme tasked with developing and implementing a national strategy to address the issue of crisis pregnancy in Ireland. It has also developed a research programme to foster greater understanding of the contributory factors and solutions to crisis pregnancy at the individual,

[20] http://www.taoiseach.gov.ie/index.asp?locID=357&docID=754
[21] http://www.crisispregnancy.ie/

community, policy and societal level. The Crisis Pregnancy Programme is currently working towards the implementation of its third strategy.

3.5 The Third Referendum on Abortion and Subsequent Developments

3.5.1 Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001

On the 2nd October **2001**, the Government announced a package of proposals for constitutional and legislative reform in relation to abortion, in the form of the *Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001*[22].

The Bill proposed a prohibition on abortion except in circumstances where there was a risk to the life - as distinct from the health - of the mother. Under the proposed legislation, a threatened suicide would be excluded as a risk to life, thus limiting the effect of the *X* case judgment:

> *'…abortion does not include the carrying out of a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman's life other than by self-destruction.'*

The Bill also provided that the right to life of the unborn would be protected only 'after implantation in the womb of a woman' thus making it clear that existing medical practice in areas such as contraception and *in vitro* fertilisation would not be affected by the prohibition on abortion. A twelve-year prison sentence was proposed for any woman who performed an abortion on herself or for any person who aided or abetted her in performing an abortion.

3.5.2 Third Referendum

A referendum was held on the *Protection of Human Life in Pregnancy Bill* in March **2002**. It was defeated.

3.5.3 Medical Council Guidelines 2004

The Medical Council's *Guide to Ethical Conduct and Behaviour* (**2004**)[23] stated that

> *'The Council recognises that termination of pregnancy can occur when there is real and substantial risk to the life of the mother.'*

The Guidelines also supported the view that

> *'…there is a fundamental difference between abortion carried out with the intention of taking the life of the baby, for example for social reasons, and the unavoidable death of the baby resulting from essential treatment to protect the life of the mother.'*

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[22] http://www.oireachtas.ie/documents/bills28/bills/2001/4801/b48b01d.pdf

[23] Irish Medical Council (2004). *A Guide to Ethical Conduct and Behaviour; Sixth Edition*. Dublin: Irish Medical Council. http://www.medicalcouncil.ie/_fileupload/standards/Ethical_Guide_6th_Edition.pdf

3.6 Most Recent Developments

3.6.1 D v. Ireland

In **2005**, a woman 'D' took a case in the European Court of Human Rights claiming that her inability to obtain an abortion in Ireland was a breach of her human rights[24]. D had discovered after fourteen weeks of pregnancy that one of the twins she was carrying had died in the womb and the other had a lethal foetal abnormality (Trisomy 18 or Edwards Syndrome). Under Irish law, however, she could not seek an abortion in Ireland or be medically referred to procure one abroad. Instead she travelled privately to Britain to undergo the procedure.

During the initial hearing on the case, which took place in Strasbourg in September 2005, D's decision not to pursue her case in the Irish courts was justified by her lawyer on the grounds of confidentiality. Her case rested on six articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. These included the obligation to respect human rights; the prohibition of inhumane or degrading treatment; the right to respect for private and family life; the right to receive information; the right to an effective remedy; and the prohibition of discrimination under the Convention.

In July **2006**, the case was refused admission for hearing by the European Court of Human Rights on the grounds that the applicant had not exhausted domestic remedies by bringing the case to the Irish courts. In rejecting her application, the Court said that the *X* case had shown that Irish courts were capable of protecting individual rights by way of interpretation. It suggested that there was a feasible argument to be made that the constitutionally enshrined balance between the right to life of the mother and the foetus could have shifted in favour of the mother when the unborn suffered from an abnormality incompatible with life.

3.6.2 Miss D v District Judge, HSE, Ireland and Attorney General

A similar case, this time concerning a pregnant minor, came up in May **2007**, when seventeen year old 'Miss D' brought a case against the Health Service Executive (HSE) when it tried to stop her travelling to Britain to have an abortion[25]. Miss D was four months pregnant at the time of the hearing, and had learned that the foetus had anencephaly, a neural tube defect resulting in the absence of a major portion of the brain, which is usually fatal within three days of birth. Miss D had been in the care of the HSE for some months, but was refused permission to leave the State to have an abortion and was told that the HSE had notified the Gardaí that she was not permitted to leave the State. Unlike the *C* case in 1997, Miss D said she was not suicidal, although she was deeply traumatised by the fact that her baby had no chance of survival.

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[24] *D v. Ireland (*Application no. 26499/02)
http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=806535&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[25] *D (A Minor) v. District Judge Brennan, the Health Services Executive, Ireland and the Attorney General,* unreported judgment of the High Court.

The Court ruled that that there was no law or constitutional impediment preventing Miss D from travelling for the purpose of terminating the pregnancy, and said that the actions of the HSE social worker in telling the Gardaí that Miss D must be prevented from travelling were without foundation in law. However, the Judge stressed that the case was about the right to travel alone; no comment was made by the Court about the substantive issue of abortion and as Miss D was not suicidal, the question of her having an abortion in Ireland was not raised.

3.6.3 Medical Council Guidelines 2009

The most recent version of the Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (**2009**)[26] sets out the position on abortion as follows:

> *'21.1. Abortion is illegal in Ireland except where there is a real and substantial risk to the life (as distinct from the health) of the mother. Under current legal precedent, this exception includes where there is a clear and substantial risk to the life of the mother arising from a threat of suicide. You should undertake a full assessment of any such risk in light of the clinical research on this issue.*
>
> *21.2. It is lawful to provide information in Ireland about abortions abroad, subject to strict conditions. [It is not lawful to encourage or advocate an abortion in individual cases.]*
>
> *21.3. You have a duty to provide care, support and follow-up services for women who have an abortion abroad.*
>
> *21.4. In current obstetrical practice, rare complications can arise where therapeutic intervention (including termination of a pregnancy) is required at a stage when, due to extreme immaturity of the baby, there may be little or no hope of the baby surviving. In these exceptional circumstances, it may be necessary to intervene to terminate the pregnancy to protect the life of the mother, while making every effort to preserve the life of the baby.'*

[26] Medical Council (2009). *Guide to Professional Conduct and Ethics for Registered Medical Practitioners; 7th Edition*. Dublin: Medical Council. http://www.medicalcouncil.ie/Professional-Standards/Professional-Conduct-Ethics/The-Guide-to-Professional-Conduct-and-Ethics-for-Registered-Medical-Practitioners-7th-Edition-2009-.pdf

CHAPTER 4

A, B AND C V IRELAND

4.1 Introduction

In August 2005 a group of three women (A, B and C) living in Ireland lodged a complaint to the European Court of Human Rights alleging that restrictions on abortion in Ireland were in breach of their human rights. All of the applicants were women who unintentionally became pregnant and who travelled to the UK for abortions.

4.2 Applicants

The first applicant, A, was a woman living in poverty and the mother of four children who were in care. She became pregnant accidentally. At that time, she was attempting to reunite her family, and felt unable to cope with a fifth child. She travelled to the UK for an abortion.

The second applicant, B, was a single woman who became pregnant when emergency contraception failed. She did not consider that she could care for a child at that time in her life, and travelled to the UK for an abortion.

The third applicant, C, had been treated for cancer for three years. At the time she became unintentionally pregnant she was in remission and, being unaware of this fact, went for a series of follow-up tests related to her illness which were contraindicated during early pregnancy. She was unable to obtain clear medical advice as to the effect of the pregnancy on her health/life or as to the effect of the medical treatment on the foetus, and feared the possibility that the pregnancy might lead to a recurrence of the cancer. She decided to have an abortion and travelled to the UK for the procedure.

4.3 The Case

The Irish Family Planning Association (IFPA) supported the women, who took the case on the basis that their rights under the European Convention on Human Rights were violated when they were forced to terminate their pregnancies outside the State.

All three applicants complained that the restriction on abortion stigmatised and humiliated them and risked damaging their health in breach of Article 3 of the Convention[27].

They further complained, under Article 8[28], that the national law on abortion is not sufficiently clear and precise, since the constitutional term 'unborn' is

[27] Article 3 protects individuals from inhumane or degrading treatment

vague and the criminal prohibition is open to different interpretations. It was also claimed that the restriction was discriminatory and in breach of Article 14[29] in that it placed an unnecessary burden on them, as women, and particularly on the first applicant, as a woman in difficult circumstances.

C complained that the restriction on abortion and the lack of any clear legislation or guidelines regarding the circumstances in which a woman may have a lawful abortion to save her life were a barrier to her obtaining proper medical advice and treatment, and infringed upon her right to life under Article 2 of the Convention[30].

It was complained that the State had failed to provide all three applicants with an effective domestic remedy[31].

4.4 State's Position

The State submitted that the application be deemed inadmissible primarily on the basis that the Applicants failed to exhaust their domestic remedies.

4.5 Judgment

In its judgment of 16th December, 2010, the Grand Chamber of the European Court of Human Rights refused the applications of A and B. The Court found that A and B had sought abortions for reasons of health and/or wellbeing. Having regard to the fact that Irish law permitted travel abroad for the purposes of abortion, and appropriate access to information and health care was provided, the Court did not consider that the prohibition on abortion in Ireland for reasons of health and/or wellbeing exceeded the margin of appreciation accorded to Member States, and struck a fair balance between the privacy rights of A and B, and the rights invoked on behalf of the unborn, which were based upon profound moral views of the Irish people about the nature of life.

The Court held that there had been a violation of Article 8 in respect of C.

In coming to this conclusion, the Court observed, in relation to Article 40.3.3° that:

> *'…[w]hile a constitutional provision of this scope is not unusual, no criteria or procedures have been subsequently laid down in Irish law, whether in legislation, case law or otherwise, by which that risk is to be measured or determined, leading to uncertainty as to its precise application. Indeed, while this constitutional provision (as interpreted by the Supreme Court in the X case) qualified sections 58 and 59 of the earlier 1861 Act…those sections have never*

[28] Article 8 regards the right to privacy in all family, home and personal interests and entitlement to no public interference from any public authority in exercising this right
[29] Article 14 affords rights and freedoms without discrimination on any grounds
[30] Article 2 protects the right to life of an individual
[31] Article 13 guarantees an effective remedy before a national authority

been amended so that, on their face, they remain in force with their absolute prohibition on abortion and associated criminal offences thereby contributing to the lack of certainty for a woman seeking a lawful abortion in Ireland.'[32]

The Court continued:

'Against this background of substantial uncertainty, the Court considers it evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both woman and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act. Both the third applicant and any doctor ran a risk of serious criminal conviction and imprisonment in the event that a decision taken in a medical consultation, that the woman was entitled to an abortion in Ireland given the risk to her life, was later found not to accord with Article 40.3.3° of the Constitution.'[33]

Rejecting the State's argument that an individual woman's right to a lawful abortion could be established during the process of medical consultation and/or through litigation before the domestic courts, the Court continued

'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 lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation.'[34]

The Court concluded

'…the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which C could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3° of the Constitution.'[35]

The Court found that the lack of an effective procedure in Ireland, which meant that she could not determine her entitlement to a lawful abortion in Ireland, caused considerable suffering and anxiety to C, who was confronted with the fear that her life was threatened by her pregnancy, and awarded her pecuniary damages of €15,000.

4.6 Obligation of Ireland Consequent upon the Judgment

The European Convention for the Protection of Human Rights and Fundamental Freedoms is an international agreement which Ireland has signed and ratified and which is consequently legally binding upon Ireland.

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[32] *A, B and C v Ireland* at paragraph 253.
[33] *A, B and C v Ireland* at paragraph 254.
[34] *A, B and C v Ireland* at paragraph 264.
[35] *A, B and C v Ireland* at paragraph 267.

Article 46 of the Convention provides:

'Article 46 - Binding force and execution of judgments

1. *The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.*
2. *The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.'*

The duty to comply with the judgments of the European Court of Human Rights is an integral part of the scheme of the Convention. In *Papamichalopoulos v Greece*[36] the Court held:

'[A] judgment in which the Court finds a breach of the Convention imposes on the respondent state a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.'

The implementation of the judgment is being monitored by the Committee of Ministers of the Council of Europe. An Action Plan, setting out the measures Ireland will take to implement the judgment, was submitted to the Committee of Ministers in June 2011. The Action Plan committed Ireland to establishing an Expert Group to address the issue, drawing on appropriate medical and legal expertise with a view to making recommendations to Government on how the matter should be properly addressed.

4.7 Implications of the State's Obligations under the judgement of *A, B and C v Ireland*

Arising from the judgment, Ireland is under a legal obligation to put in place and implement a legislative or regulatory regime providing effective and accessible procedures whereby pregnant women can establish whether or not they are entitled to a lawful abortion in accordance with Article 40.3.3° of the Constitution as interpreted by the Supreme Court in the *X* case, and, by necessary implication, access to abortion services in the State. It would obviously be insufficient for the State to interpret the Court's judgment as requiring only a procedure to establish entitlement to termination without also giving access to such necessary treatment.

The Court noted that since the *X* case, no criteria or procedures have been subsequently laid down in Irish law, whether in legislation, case law or otherwise by which that risk to a woman's life is to be measured or determined, leading to uncertainty as to its precise application.

Indeed, while the constitutional provision in Article 40.3.3° (as interpreted by the Supreme Court in the *X* case) qualified sections 58 and 59 of the 1861 Act, those sections have never been amended, so that, arguably, they remain in force with their absolute prohibition on abortion and associated serious criminal offences, thereby contributing to the lack of certainty for a woman seeking a lawful abortion in Ireland.

[36] 31 October 1995, 16 EHRR 440, para. 34

Finally, implementing the judgment could not be considered to involve significant detriment to the Irish public, since it would amount to rendering effective a right already accorded, after referendum, by Article 40.3.3° of the Constitution.

In summary, the State is under obligation to do the following:

A. Provide effective and accessible procedures to establish a woman's right to an abortion as well as access to such treatment.

B. Establish criteria or procedures in legislation or otherwise for measuring or determining the risk.

C. Provide precision as to the criteria by which a doctor is to assess that risk.

D. Set up an efficient independent review system where a patient disputes her doctor's refusal to certify that she is entitled to a lawful abortion or where there is a disagreement between doctors as to whether this treatment is necessary.

E. Address sections 58 and 59 of the *Offences Against the Person Act, 1861*.

CHAPTER 5

GENERAL PRINCIPLES

5.1 Introduction

The general principles that should apply to the implementation of the European Court of Human Rights judgment begin with an acknowledgement that there is an existing constitutional right as identified and explained in the *X* case judgment of the Supreme Court[37]. The State is entitled and, indeed, obliged to regulate and monitor the exercise of that right so as to ensure that the general constitutional prohibition on abortion is maintained. However, the measures that are introduced to give effect to this existing constitutional right should not act as obstacles to any woman who is legitimately entitled to seek a termination on lawful grounds.

5.2 Principles

Principle 1*. The entitlement to have the right to lawful termination of pregnancy ascertained should be established*

The entitlement to have one's right to lawful termination of pregnancy ascertained is the crux of the judgment and it requires that effective and accessible procedures be established. Medical diagnosis is not always such a simple or clear cut process as to exclude differences of opinion. Women have a right to receive a definite answer in the matter, unlike the circumstances experienced by C (see section 4.2). When there is a difference of opinion between the woman and her doctor or between different doctors consulted[38], there should be a formal review process that could be invoked by or on behalf of the woman so that it could be established as a matter of law whether the particular case presented a sufficient risk to the woman's life such that a lawful termination of pregnancy may be performed.

Principle 2. *The State's constitutional obligations under Article 40.3.3° should be reflected in the options proposed to implement this judgment*

The constitutional obligation on the State is by its laws to respect, and as far as practicable, defend and vindicate the right to life of the unborn. These provisions must be borne in mind in the mode of implementation of the judgment.

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[37] Article 40.3.3° of the Irish Constitution, as interpreted by the Supreme Court in the X case, provides that it is lawful to terminate a pregnancy in Ireland if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only avoided by a termination of the pregnancy.

[38] *A, B and C v Ireland* at paragraph 253.

The options proposed suggest ways in which the State can ensure not only that the right to life of the woman is protected, but also that requirements are put in place to ensure that due regard is given to the right to life of the unborn, and that the dignity of the foetus is respected in cases where this can be achieved without compromising the woman's right to life.

One of the most sensitive and difficult issues arising out of the *X* case is the approach to termination of pregnancy which should be taken in the case of a woman whose continued pregnancy threatens her life and whose foetus is, or may be, capable of an independent existence. Arguments have sometimes been advanced to the effect that, from the legal perspective, the judgment in *Attorney General v X* establishes a right to the intentional killing of the foetus at any gestational age.

The wording of Article 40.3.3° and the judgments in the *X* case make it clear that the life of the unborn must be vindicated where practicable. McCarthy J, in discussing how the rights in the Article are to be treated, says as follows:

> *'It is not a question of setting one above the other but rather of vindicating, as far as practicable, the right to life of the girl/mother (Article 40, s.3.sub-s. 2), whilst with due regard to the equal right to life of the girl/mother, vindicating as far as practicable, the right to life of the unborn (Article 40, s.3, sub-s.3).'*[39]

In the circumstances of the *X* case, that meant an abortion but that will not be the result in a situation in which the baby can be delivered without compromising the woman's right to life. This means that where a woman has a pregnancy that places her life at risk and her foetus is or may be viable, she may have a right to have the pregnancy brought to an end but not a right to insist that the life of her foetus be deliberately ended. Health professionals involved in the delivery of this medical treatment will be governed by their clinical judgment as to the most appropriate means to provide it, i.e. whether by early delivery with subsequent appropriate neonatal care, or in cases where it is not practicable to vindicate the life of the foetus, termination of pregnancy, cognisant of the constitutional protection afforded to the unborn under Article 40.3.3°. This analysis is in accordance with current clinical practice and an obstetrician's medical obligation to care for both his/her patients, i.e. the pregnant woman and the foetus.

Principle 3. ***Termination of pregnancy should be considered a medical treatment regardless of whether the risk to the life of the woman arises on physical or mental health grounds***

Given the circumstances in which a right to a lawful termination of pregnancy would arise, i.e. when there is a real and substantial risk to the life of the woman which can only be averted by the termination of her pregnancy, this procedure would necessarily fall under the category of medical treatment[40].

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[39] *Attorney General v X*. at page 79.

[40] As the protection to the unborn provided under the Constitution has been deemed by the Supreme Court not to include an embryo that has not implanted in the womb (see *Roche v*

The *C* case judgment has also described termination of pregnancy in the circumstances described above as medical treatment.[41]

The Supreme Court in the *X* case specifically recognised risk of suicide as a legitimate basis for permitting termination of pregnancy where the other criteria were satisfied. This principle was upheld in two subsequent referendums on the issue.

Arising from this principle, it follows that standard medical practice will be maintained. In addition, patients will have a right to a second or subsequent opinion in relation to any/all members of their treating team, as per standard practice. This is a routine feature of the patient/doctor relationship and will continue to be the case when dealing with the assessment for a lawful termination of pregnancy.

Principle 4*. It will always be a matter for the patient to decide if she wishes to proceed with a termination following a decision that it is clinically appropriate medical treatment*

Once a clinical decision has been made as to appropriate treatment, it remains a matter for the patient to give informed consent.

Additional factors will apply in those cases involving pregnant minors and their capacity to consent to medical treatment.

Summary of Principles:

1. The entitlement to have the right to lawful termination of pregnancy ascertained should be established.
2. The State's constitutional obligations under Article 40.3.3° should be reflected in the options proposed to implement this judgment.
3. Termination of pregnancy should be considered a medical treatment regardless of whether the risk to the life of the woman arises on physical or mental health grounds.
4. It will always be a matter for the patient to decide if she wishes to proceed with a termination following a decision that it is clinically appropriate medical treatment.

Roche & ors [2009] IESC 82), measures taken to treat ectopic pregnancy are not considered pertinent to this discussion.

[41] Geoghegan J. at paragraph 14.

CHAPTER 6

PROCEDURE FOR DETERMINING ENTITLEMENT AND ACCESS TO TERMINATION OF PREGNANCY

6.1 Introduction

The options in this Chapter reflect the steps necessary to implement the European Court of Human Rights judgment in light of the *X* case and the requirements of the Constitution.

In view of the ruling of the ECtHR in the *A, B and C v Ireland* case and the need for clarity in this area, much of the work of the Expert Group involved the exploration of ways in which entitlement to a legal termination of pregnancy could be determined. Several approaches emerged from this explorative exercise which in turn led to the formation of a number of options. These options are described below. When different approaches were identified by the Group, these are highlighted with a brief discussion on their advantages and disadvantages.

6.2 Test to Be Applied

One of the requirements of the judgment in *A, B and C v Ireland* is to establish criteria or procedures in legislation or otherwise for measuring or determining the risk to the life of a woman, and to provide precision as to the criteria by which a doctor is to assess that risk[42].

The Supreme Court in the *X* case held that the correct test was that a termination of pregnancy was permissible if it was established as a matter of probability that:

1) there is a real and substantial risk to the life of the mother; and
2) this risk can only be averted by the termination of her pregnancy.

It is not necessary for medical practitioners to be of the opinion that the risk to the woman's life is inevitable or immediate.

Although the medical decisions may be difficult in particular cases, the complexities will not arise from the words of the test but from diagnostic and treatment issues. Implementing the decision does not, therefore, require another definition of the test. Neither is it necessary or desirable to seek to explain it with synonymous terms.

As part of the test, the treating doctors will have to consider whether it is practicable to preserve the life of the unborn in the process of terminating the pregnancy without compromising the right to life of the woman, and evidence

[42] *A, B and C v Ireland* at paragraph 253.

of this consideration must be documented. (See discussion at Principle 2 in Chapter 5 above).

The diagnosis of the medical specialists as to whether the woman satisfies the test in the *X* case should be made expeditiously/or within a defined time limit, and should be formally notified to the woman.

6.3 Qualifications of Doctors Involved in the Process

As a termination of pregnancy will only ever be deemed lawful if it meets the test above, doctors are considered the only appropriate decision-makers in the matter. In addition, doctors responsible for the diagnostic process must have received sufficient training and be engaged in clinical practice at the appropriate level to be able to make a decision in complex medical cases.

The Medical Council Register of Doctors has six divisions - Specialist, General, Trainee and Supervised, Internship Registration and Visiting EEA Practitioners Division. Doctors on the Specialist Division of the Medical Council Register have completed a formal training and evaluation process and generally occupy consultant posts in hospitals or practice as lead clinicians in General Practice (Primary Care Physicians). Doctors in the other divisions of the Medical Register or non-medical health care professionals (e.g. Nurses/Midwives and Clinical Psychologists) could have a valuable input by way of conferring with and informing the Specialist doctors responsible for the decision-making process.

It would not be appropriate to establish a finite list of medical specialties permitted to be involved in the process. Due to the unpredictability and complexity of rare medical cases it is not desirable to limit the fields of expertise that could be relevant in the diagnostic process.

A number of options regarding the personnel to be responsible for the decision-making process are presented below.

Option 1 – Medical Practitioners eligible for Specialist registration, but not actually registered

The key criteria for an appropriate decision-maker in the circumstances under review are clinical knowledge and training. A situation might arise where, for whatever reason, a medical practitioner is not actually registered on the Specialist Division of the Medical Council Register but does possess the necessary knowledge and experience to diagnose and carry out the necessary treatment. In this scenario, it might be considered unhelpful to limit the doctor's ability to diagnose and provide a life-saving treatment.

Advantages	**Disadvantages**
• This approach would broaden the availability of clinical decision-makers while at the same time maintaining high standards for	• If a doctor is not registered on the Specialist Division of the Medical Council Register, there is no formal assurance of his/her

participation in this process.	clinical expertise. Lack of Specialist registration, therefore, removes a set of safeguards.

Option 2 – Medical Practitioners to be on the Specialist Register
Specialist registration would be required to ensure that all doctors involved in termination of pregnancy procedures fulfil precise and formal criteria as regards levels of knowledge and skills.

Advantages	Disadvantages
• The Medical Council Register of Doctors provides a formal way of ascertaining the level of knowledge and skill of clinicians, and sets standards around the maintenance of key competencies in the clinical arena. Therefore, limiting participation in decision-making only to those doctors on the Specialist Division of the Register would provide an additional safeguard in the protection of clinical standards.	• Situations may arise where the clinicians with in-depth information regarding the case under review are not entered on the Specialist Division of the Register, and this requirement would preclude them from being decision-makers. Such a scenario could lead to delays in reaching a diagnosis and limit access to treatment.

6.4 Number and Role of Doctors

6.4.1 Number of Doctors
The number of doctors required to make the decision whether a woman is entitled to a lawful termination of pregnancy is a key element of the decision-making process. Factors to be considered include the need to provide sufficient expertise to make a satisfactory clinical assessment, to access this expertise in a timely manner regardless of geographical location, to create a supportive working environment for medical practitioners involved in these decisions, and to facilitate treatment of the medical condition where it requires termination of a pregnancy.

The possibility of one doctor making the decision on his/her own was not considered a viable option, as it is a scenario that would rarely arise in the course of normal medical practice where doctors usually work as part of a team or consult with colleagues as a matter of course. Emergency situations are the exception here, and these are considered separately (please see Section 6.5).

On other hand, it was generally considered that two doctors with the relevant training and expertise appropriate to the case would be sufficient for making a clinical decision as to the risk to the life of the woman, whether the risk arose because of a physical or mental health condition. However, more doctors could be involved in the process by way of informal consultations amongst

colleagues, or multi-disciplinary team assessment, as often occurs in complex medical cases at present.

Without wishing to be prescriptive about the specialties to be involved in the process of determining entitlement to termination of pregnancy, as considered in the previous section, the role of certain specialities in this process warrants specific mention.

6.4.2 The Role of General Practitioners

General Practitioners often have a long-term relationship with their patients and therefore have in-depth knowledge of a patient's personal circumstances. The GP may be able to provide valuable insight into her clinical history; knowledge which might be particularly useful when assessing a real and substantial risk to life through suicide. Therefore, it may be appropriate that GPs are consulted as a matter of best practice in the course of the diagnostic process. This would provide access to their knowledge of the patient, while at the same time not burdening the GP with making a clinical decision on entitlement to termination of pregnancy which would fall outside of the scope of general practice.

6.4.3 The Role of Obstetricians/Gynaecologists[43]

In the vast majority of cases terminations will be carried out by obstetrician/gynaecologists. When the medical problem giving rise to an entitlement to termination arises from obstetric/gynaecological causes, or when the obstetrician is an existing member of a multidisciplinary treating team, no issue should arise as to their willingness to carry out the procedure, aside from reasons of conscientious objection (see discussion in Section 6.9) However, in certain cases, e.g. in relation to cancer or psychiatric illness, the obstetrician would not necessarily be involved in the diagnosis or have the expertise required to do so, although his/her services would be required to carry out the procedure if it was deemed necessary.

6.4.4 The Role of Psychiatrists

Finally, the role of the psychiatrist is key where a termination of pregnancy is prescribed as appropriate treatment in case of suicidal ideation/intent. There are recognised clinical challenges in correctly diagnosing expressed suicide intent, for instance, the absence of recognised clinical markers. Therefore, it could be argued that this is a more subjective process and requires more safeguards to be put in place for the protection of both the woman and the unborn. The need to keep up to date with clinical research on this issue is highlighted in the Medical Council Guidelines referred to in section 3.6.3 with a view to ensuring that the decision is evidence-based.

Options in relation to the number of doctors to be involved are set out overleaf.

[43] For the sake of brevity, any reference to an obstetrician shall be understood to include an obstetrician/gynaecologist.

Option 1 – Two doctors of relevant specialty

This approach would see the potential separation of the decision-making process from the implementation of treatment when deemed necessary to save a woman's life. In this scenario, only the medical practitioners with the relevant clinical expertise would be involved in reaching a diagnosis. In cases where an obstetrician is not already part of the decision-making process, the patient would then be referred to a consultant obstetrician for appropriate treatment.

Advantages	**Disadvantages**
• Only the relevant specialists would be responsible for determination of entitlement to a lawful termination of pregnancy. • Limiting the number of doctors responsible for decision-making would keep the process as close as possible to the normal doctor/patient relationship and would avoid creating unnecessary and unwelcome burdens on the patient and the treating doctor(s). • This approach would potentially speed up the decision-making process when obstetric or gynaecological issues are not relevant to the diagnosis, as the treating team would not need to source an obstetrician, where one is not present/available in a particular location, e.g. mental health hospitals. • This option would also avoid limiting access to the process caused by the uneven availability of experts in particular specialties across the country. • This approach would ensure consistency and avoid stigmatising mental health issues.	• Logistical delays could occur when the diagnosing team does not have immediate access to the services of an obstetrician to carry out the medical procedure. • Difficulties may arise in securing the services of an obstetrician if s/he is not part of the decision-making process.

Option 2 – Two doctors, one of whom is an Obstetrician

Another option would be to require that one of the medical specialists responsible for the decision-making process is an obstetrician in all cases, even when this expertise is not strictly relevant to the diagnosis. This option gives the obstetrician, as the health professional who is going to carry out the

procedure, the capacity to acquire confirmation that the medical treatment is appropriately recommended.

Advantages	Disadvantages
• Involving the obstetrician as a decision-maker rather than a technician can ease access to the treatment when deemed to be necessary. It would save the treating team or the patient having to seek an obstetrician to perform the medical procedure.	• In a case of risk to life from suicide, the obstetrician would not have sufficient specialist training to input into the diagnostic process. • Again, in cases of risk to life from suicide, the treating team would have to source an obstetrician where one is not present/ available in a particular location, e.g. mental health hospitals. This search could cause a delay in the decision-making process.

Option 3 – Two doctors of relevant specialty plus an Obstetrician

There may be clinical challenges in correctly diagnosing expressed suicide intent. Therefore, it could be argued that a risk to life from suicide warrants extra safeguards. In such cases, two psychiatrists would be involved in addition to an obstetrician/gynaecologist.

Advantages	Disadvantages
• The woman and her doctors may be more secure in the diagnosis and decisions.	• This proposal would put an extra burden on a patient and her treating doctor(s), meaning that three doctors would be required for the final decision in certain cases. • The diagnosis of expressed suicide intent is a routine process for psychiatrists and it would therefore be hard to justify formally requiring a second psychiatrist when this does not occur when a pregnancy is not involved. • Access to a necessary medical treatment could be curtailed due to geographical and service delivery issues. • This option also risks stigmatising mental health conditions and making them a 'separate case'.

6.5 Emergencies

If a doctor carries out a termination in circumstances where the risk to life of the woman is imminent and inevitable rather than real and substantial, he/she should not have any liability because of the failure to follow prescribed procedures. In extremely rare circumstances where the risk is imminent and it is not possible to seek the advice and assistance of additional medical personnel, the opinion of one medical practitioner should suffice. However, it is debatable whether this type of scenario needs to be provided for explicitly or whether clinical practice can simply continue to operate as it does at the moment.

Option 1 – Make special provisions for emergencies
Special provisions should be outlined for emergencies. Inasmuch as legal clarity is required for the rare circumstances when the risk to the life of the woman is real and substantial but **not** imminent, legal recognition should also be given to those even rarer occasions when the risk to life is imminent.

Advantages	Disadvantages
• This approach would ensure clarity and consistency and would remove the 'chilling effect'[44] of existing criminal provisions on termination of pregnancy under the 1861 Act.	• It may be undesirable to interfere with well established clinical practices in relation to emergency situations.

Option 2 – Do not make special provisions for emergencies
A second approach is not to make any specific provisions for emergency scenarios and allow medical practitioners to operate in accordance with established clinical practice guidelines.

Advantages	Disadvantages
• Medical practitioners would continue to provide whatever life-saving treatment is clinically required without any undue interference from an administrative perspective.	• The lack of legal clarity in these cases, and the fact that following established procedures viz. termination of pregnancy might not always be possible, could have a 'chilling effect' on doctors who would be worried about exposing themselves to the risk of criminal prosecution under the 1861 Act.

6.6 Locations

There are considerations to be taken into account in determining the locations where terminations of pregnancy should take place. They include safety standards, geographical access and the need to have due regard to the right

[44] See *A, B and C v Ireland* judgment at paragraph 254.

to life of the unborn, amongst others. Ultimately, the locations should be certified by the Minister for Health or other appropriate health control agency. The Minister for Health seems to be the most appropriate authority, as he is responsible to the public and to the Oireachtas for the operation of the system. The Minister must, therefore, stipulate the criteria for licensing and regulating institutions in which terminations of pregnancy are permitted and for assessing the facilities with ongoing monitoring.

Consistent with the State's obligation, as far as practicable, to defend and vindicate the right to life of the unborn, terminations at the fringes of viability, even when survival is not anticipated, should take place in medical facilities which have neonatal intensive care units, and carried out at such a time and in a manner as to maximise the foetal chances of survival, without compromising the right to life of the woman.

6.7 Formal Review Process

The establishment of a formal framework providing for an accessible, effective and timely review mechanism is one of Ireland's obligations under the judgment in *A, B and C v Ireland*.

The judgments of the Court in *A, B and C v Ireland* and *Tysiąc v Poland*[45] provide guidance as to the rights of a pregnant woman who believes she may be entitled to a lawful termination of pregnancy, but whose medical advisers do not believe a termination to be required in order to avert a threat to her life.

6.7.1. A, B and C v Ireland

The Court in *A, B and C v Ireland* emphasised the necessity for a review mechanism in cases in which there is a difference of medical opinion as to whether a woman requires an abortion or when the woman disputes the medical diagnosis. It rejected the contention that

> *'…the normal process of medical consultation could be considered an effective means of determining whether an abortion may be lawfully performed in Ireland on the grounds of risk to life'*[46]

and stated that there must a be 'framework' whereby

> '…*any difference of opinion between the woman and her doctors or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman and her doctor, could be examined and resolved through a decision which would establish as a matter of law whether a case presented a qualifying risk to a woman's life such that a lawful abortion might be performed.'* [47].

6.7.2 Tysiąc v Poland

The judgment in *Tysiąc v Poland,* which was decided in March 2007, is of particular relevance in setting out the detailed requirements envisaged by the Court. The Court indicated that a right to legal abortion must be supported by

[45] (2007) 45 EHRR 42.
[46] *A, B and C v Ireland* at paragraph 255.
[47] *A, B and C v Ireland* at paragraph 253.

procedural safeguards to ensure the law is correctly applied, and the need for such safeguards is particularly acute in cases where there is a disagreement as to whether the preconditions for a legal abortion are satisfied in any particular case.

In the Court's view, 'in such situations the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman's position'[48]. It continued

> *'In this connection, the Court reiterates that the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human right be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measures and the relevant evidence... In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures.. In circumstances such as those in issue in the instant case, such a procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered. The competent body should also issue written grounds for its decision.*
>
> *In this connection the Court observes that the very nature of the issues involved in decisions to terminate a pregnancy is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion.'*[49]

6.7.3 Review Process Requirements and Attributes

In light of the above it would appear that the review mechanism put in place must have, *inter alia*, the following attributes. It must be:

- before an independent body,
- competent to review (i) the reasons for the decision and (ii) the relevant evidence,
- the procedures should include the possibility for the woman to be heard
- it should issue written reasons for its decision
- decisions must be timely.

These requirements dovetail with what is required under Irish law when considering the attributes of a body that will make decisions which affect the rights of individuals: the body must be independent and free of bias; it must have the necessary competence and expertise; it must offer a fair hearing, and issue a timely reasoned decision.

Any implementation measures arising from these options should contain specific provisions enabling these criteria to be met. The details are a matter for administration, and some suggestions are indicated below, but the general principle should be that the system is formally established, functions pursuant to clear guidelines and procedures and should operate in addition to the woman's existing entitlement to seek a second opinion. Moreover, the woman

[48] *Tysiąc v Poland* at paragraph 116.
[49] *Tysiąc v Poland* at paragraph 117.

should have a right to be heard, where practicable and desired by her, and the deciding body should be under obligation to issue written decisions, within a time limit.

Recourse to the Review Panel should be at the request of the woman only, i.e. to allow a woman to appeal when she has been refused access to a termination of pregnancy or to seek a final decision when the treating doctors are in dispute or unable to reach a diagnosis. Accordingly, it is envisaged that the Review Panel would be activated by the woman, or by a doctor or other person acting on her behalf, only.

Consideration was given to two possible models and these are outlined below.

Option 1 A medical model

A medical model would focus primarily on the woman's medical status, and would thus involve an independent clinical review, by medical experts operating within the normal doctor/patient relationship. This would involve two or more doctors reviewing the patient's notes (transmitted to them in a confidential manner), consulting with the original treating team, any other relevant health care professional, and with the patient if required, and coming to a decision based on an independent and expert clinical assessment of the case.

It was considered that a seriously ill pregnant woman should not be subjected to an adversarial legal process unless this was a legal requirement which is not the case. Having regard to the judgments in the *X* case, the inquiry to be made is not a balancing of the competing rights of woman and foetus. Rather, it is an inquiry as to whether the woman's life is threatened by a real and substantial risk that can only be averted by the termination of pregnancy. The inquiry to be made is medical, not legal.

In addition, under the Constitution, the State must by its laws as far as practicable defend and vindicate the right to life of the unborn (with due regard to the equal right to life of the mother) and accordingly, the measures establishing the review mechanism should explicitly require the Panel to consider whether it is practicable to preserve the life of the unborn (without compromising the right to life of the woman) and document their consideration of this matter.

Option 2 A legal model

A legal model would involve an inquiry by a tribunal-style body with quasi-judicial powers, with rights to legal representation to the various interests involved. That could involve cross-examination of the woman and her doctors which might be protracted, embarrassing and invasive of privacy.

Requiring the convening of a tribunal to conduct a quasi-judicial process for the purposes of determining whether a woman had a right to a lawful abortion was discordant with the principle that the core issue to be determined is a medical one. Furthermore such a system would be cumbersome, costly and

might interfere with the urgent delivery of life-saving medical treatment in situations of medical emergency.

6.7.4 Composition of the Review Panel

The Review Panel could be composed of specialists nominated by the relevant professional bodies (for example, the Royal College of Physicians in Ireland, the Royal College of Surgeons, the College of Psychiatry of Ireland), which may be called upon as the need arises. In terms of professional expertise, members of the Review Panel would mirror the requirements of the original multidisciplinary team, i.e. they would have the clinical expertise required to adjudicate on the clinical case under review.

Where the State establishes bodies to make complex decisions affecting people's rights, it is often the case that the body would be chaired by or include a lawyer so as to ensure that the hearing is properly and fairly conducted, to assist with the process of weighing the evidence and to apply the relevant legal rules correctly. However, this is not always the case and some decision-making bodies operate without standing arrangements for legal advice – such bodies obtain legal advice as and when the occasion requires it. It should also be pointed out that the presence of a lawyer does not provide any absolute protection against procedural challenges.

Option 1 Include a lawyer on the Panel

The decision that the Panel will be called on to make will require not only the evaluation of medical evidence and the review of a clinical decision, but also the making of a decision as to whether that evidence satisfies the legal requirements for a lawful abortion. As stated in the judgment, the framework required to review the initial clinical decision would need to establish as 'a point of law' whether a particular case qualified for a lawful abortion[50] and therefore one option to be considered is for the Review Panel to also include a lawyer.

The Panel will also have power to make a decision which may result in the termination of the life of the unborn. Thus the Panel will be deciding medical issues that have an impact on constitutional rights of a fundamental nature, the right to life of the woman, and the right to life of the unborn.

Advantages	**Disadvantages**
• Given the constitutional rights at issue, having a lawyer on the Panel may provide an additional safeguard. • This would ensure that expert legal input is available to the Panel, avoiding the need to seek external legal advice, which could be a cause of delay.	• In some cases the compulsory involvement of a lawyer at what is, in essence, a clinical decision-making process may be redundant, as no legal issue may arise.

[50] *A, B and C v Ireland* at paragraph 253.

Option 2 Give the Panel access to legal expertise on a formal basis

In this case, the Panel would have access to the advice and assistance of a lawyer who does not have any role in making the decision, but whose presence and availability will help to ensure procedural compliance and legal soundness in decision-making.

Advantages	Disadvantages
• Given the constitutional rights at issue, immediate access to a lawyer may provide an additional safeguard. • This model is consistent with the proposition that the key task of the Review Panel is to make a medical decision.	• It can be argued that providing access to a lawyer on a formal basis is unnecessary, since the decision to be made is a clinical one, and recourse can readily and speedily be had to external legal advice if any legal issue presents itself.

Option 3 Make no specific provision for access to legal advice

A third option is not to make any provision for access to legal advice, since it would be open to the Panel to access legal advice on an ordinary basis, just as it is to the doctors making the initial decision. Legal advice could be sourced through the Convenor of the review process.

Advantages	Disadvantages
• This would be consistent with the view that the key task of the Review Panel is to make a medical decision. • It may be that, in some cases, no legal advice will be needed; if legal advice is required there is no barrier to the Panel accessing it speedily.	• Bringing in legal expertise after concerns have arisen could give rise to delay in that a lawyer would have to be sourced and briefed; under options 1 and 2, the lawyer would be present from the start. • The Panel might not have sufficient legal expertise to know that they were running into legal difficulties, especially as regards procedural and constitutional issues.

6.7.5 Convenor

The Review Panel would be administered by a Convenor with the necessary authority to oversee its operation. If a decision is reached that the woman qualifies for treatment, it will then be the responsibility of the Convenor to make arrangements for the implementation of the decision.

Possible options to be considered in relation to the nature of the Convenor include the Department of Health, the Health Service Executive, or the announced Patient Safety Agency. As the health sector is currently undergoing a period of significant structural reform, this issue will need to be revisited by the Department of Health once the new health infrastructure has been established.

6.8 Access to the Courts

Following a negative decision of the Review Panel, where a woman still considers that there is a real and substantial risk to her life as defined in the *X* case, she has a constitutional right of access to the Courts and relevant rights under the European Convention on Human Rights.

The options that arise are (i) to provide for a specific right to appeal to the High Court or (ii) to allow the ordinary rules relating to the judicial review of administrative action to apply, without specifying any special procedures.

6.9 Conscientious Objection

An individual's right to conscientious objection is provided for in most ethical guidelines and has existed with good reason for many centuries. The Medical Council *Ethical Guidelines* state:

> *'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.*[51]

Similarly, the *Code of Conduct for each Nurse and Midwife* makes reference to an entitlement to conscientious objection that may be relevant to professional practice[52].

Most jurisdictions accept that an individual's right to conscientious objection is not absolute and often has limitations. This is because the right to conscientious objection must be balanced against someone else's competing rights, for example, the right to life in the case of a medical emergency. The balance is illustrated by the provisions of the European Convention on Human Rights which makes provisions both for freedom of conscience and for the appropriate limits on the exercise of that freedom in terms of others' rights[53].

A balance ought to be achieved between ensuring a patient's access to lawful medical treatment whilst also recognising an individual's conscientious objection, insofar as possible. Hence, an individual right to conscientious objection needs to be provided for with limitations to ensure that patients would not be kept from accessing lawful treatment from other practitioners. Limitations on objections would include:

- the duty to inform the patient of her right to ascertain whether she qualifies for treatment;

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[51] Medical Council: 2009, pg. 16.
[52] An Bord Altranais, 2000.
[53] Article 9(1) states: "Everyone has the right to freedom of thought, conscience and religion…'. However, it is qualified by Article 9(2), "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

- the duty to refer to another doctor who is not a conscientious objector,
- the duty to hand over any necessary medical files or information for the purpose; and
- the duty to treat in circumstances when the risk of death is inevitable and imminent.

From experience in other jurisdictions, an issue may also arise as to the application of conscientious objections and who may be entitled to it in practice. In this regard, the options include clearly prescribing who can avail of this prerogative, or leaving that up to the professional regulatory bodies and employers.

6.10 Monitoring System

Any proposed system should be duly monitored. There is a need to keep records on the number of women who seek and who are given terminations and the medical reasons that gave rise to the treatment for clinical purposes. Statistics are also required to inform policy, as well as to ensure that the principles and requirements of the system are being upheld. The Review Panel system and its effectiveness should also be monitored.

Finally, it is important to protect and suitably anonymise all records, to safeguard the privacy and identity of both patients and doctors.

Chapter 7

OPTIONS FOR IMPLEMENTATION

7.1 Introduction

The terms of reference of the Expert Group required it to recommend a series of options on how to implement the judgment in *A, B and C v Ireland* of the European Court of Human Rights. The previous Chapter examined the practical arrangements that are necessary to comply with the judgment. This Chapter considers methods for implementing the required procedures. Again, during its deliberations, the Expert Group weighed advantages and disadvantages of each option, with a view to achieve legal clarity within a practicable system and the over-riding need for speedy action.

Implementation Options	
Non-Statutory	• Guidelines
Statutory	• Regulations – Regulate the provision of lawful termination of pregnancy by way of primary legislation to empower the Minister for Health to regulate the area by statutory instrument. • Legislation Alone – Regulate the provision of lawful termination of pregnancy by way of primary legislation. • Legislation plus Regulations – Regulate the provision of lawful termination of pregnancy by way of primary legislation, with certain matters left to the Minister for Health to regulate by way of secondary legislation.

7.2 Guidelines

Consideration was given to the possibility of implementing the judgment without recourse to legislation, by the publication of guidelines or some other form of non-statutory protocol. If that were possible, it would meet the need for speedy action emphasised in the terms of reference in contrast to the legislative options, as the drafting and passing of legislation is often a lengthy process.

Guidelines are often necessary in a healthcare setting where it is important to ensure consistency in the delivery of medical treatment. It is thus likely that a guidance document will be required in any scheme to facilitate understanding of the law by medical personnel, other health care professionals and lay people and to illustrate how to access treatment.

However, an argument can be made that guidelines in isolation do not fulfil all the requirements set by the European Court of Human Rights judgment for a number of reasons. Guidelines are, by their nature, non binding and do not have force of law. The Courts, both domestic and international, have made it clear that in a democracy, measures which affect rights must have a secure legal basis. In *A, B and C v Ireland*, the Court considered that neither the medical consultation nor litigation options constituted effective and accessible procedures which allowed a woman to establish her right to a lawful abortion in Ireland[54].

7.2.1 Legal Protection

The Court emphasised the legal uncertainty caused by current provisions arising from the fact that the 1861 Act had not been amended or clarified, following the adoption of Article 40.3.3° of the Constitution and the interpretation of that Article by the Supreme Court in the *X* case. The judgment stated that the criminal provisions still in force would have a significant chilling effect on both women and doctors during the medical consultation process because of the risk for both parties of criminal conviction and imprisonment[55]. In this regard, only the implementation of a statutory framework, compliance with which would provide a defence from criminal prosecution, would provide legal protection to medical practitioners. It would also counteract the effect of the 1861 Act, were this to remain in force.

In relation to professional disciplinary proceedings, the threat of which the Court also raised, a situation could potentially arise where the Medical Council might deem unethical some of the provisions contained in any proposed protocol, leaving a doctor exposed to the risk of sanctions by the Council.

It is possible that a doctor might have to appeal a successful complaint to the High Court, as per current practice, but this situation cannot be prevented under the provisions of the *Medical Practitioners Act, 2007*[56]. Legal protection for medical practitioners could be attained through the implementation of a statutory framework.

Advantages	**Disadvantages**
• Guidance documents can be used in an effective way to communicate, to implement and to explain existing law and the delivery of a service. • A guidance document/non-	• Guidance would not have force of law and could be subject to legal challenge. • The legal uncertainty arising from the 1861 Act would not be resolved and its 'chilling effect' on

[54] *A, B and C v Ireland* at paragraph 263.
[55] *A, B and C v Ireland* at paragraph 254.
[56] The Medical Practitioners Act 2007 stipulates in Section 7(2)(i) that the Council shall "specify standards of practice for registered medical practitioners, including the establishment, publication, maintenance and review of appropriate guidance on all matters related to professionals conduct and ethics for registered medical practitioners". Section 9(1) of the Act provides that "The Minister may give general policy directions in writing to the Council in relation to the performance by the Council of its functions except any such functions – (a) relating to professional conduct and ethics of registered medical practitioners."

statutory scheme can be flexible, detailed and can be more easily reviewed and amended, if and when necessary. • The time frame for this option might be relatively more expeditious than the statutory options, assuming agreement can be reached with medical professionals, professional regulatory bodies and hospitals/clinics. • Administrative guidance is likely to be required even if it is decided to proceed by way of legislation; thus there are advantages to proceeding to consider the contents of guidance as soon as possible.	women and medical practitioners would not be removed. • As compliance with the protocol would be voluntary, it would be vulnerable to inadequate or non implementation. • Sanctions for lack of implementation would not be governed by the State but would come under the remit of professional bodies. • There could be difficulties ensuring timely decision-making and review processes, and there would be no statutory method of enforcing the scheme. • As compliance with the guidance would be voluntary, agreement would have to be secured as to its terms. The process of seeking agreement could be just as time-consuming as the legislative process. • The fact that the measures would not have binding force is likely to mean that this option would not satisfy the Committee of Ministers of the Council of Europe.

7.3 Regulations

A second approach would be for the Minister for Health to issue regulations. However, the Minister could not issue regulations without being given the power to do so by enabling legislation. The Oireachtas would provide the principles and policies, and the enacting primary legislation would give the Minister the powers required to issue such regulations.

This option would allow for the specific details of the scheme to be amended over time as needed; however, the enabling legislation would still require full scrutiny of the Oireachtas, and, for that reason, it is not likely to prove a speedier or superior solution than the other legislative options.

Advantages	**Disadvantages**
• The Oireachtas would have the opportunity to discuss and vote	• Primary legislation would still need to be enacted by the

on the principles and policies provided for in the primary legislation. • These regulations could be amended relatively easily in order to address any concerns arising from their implementation, changes in clinical practice and scientific advances. • Access to lawful termination of pregnancy in Ireland would be put on a statutory, and therefore, more secure footing. • Provided the legislation contained adequate principles and policies to support the regulations, the 'chilling effect' of the 1861 Act could be removed, and legal protection from prosecution could be attained by compliance with the proposed regulations.. • This approach is likely to satisfy the requirements of the implementation process of the judgment in *A, B and C v Ireland*.	Oireachtas.

7.4 Legislative Options

The issue of how to provide for the *X* case has been considered by other bodies, who have all concluded that legislation, in some form, is the most appropriate way in which to regulate access to lawful abortion in Ireland.

7.4.1 Previous Analyses

A) Constitution Review Group 1996

The Constitution Review Group recommended legislation 'as the only practical possibility'[57] to clarify the state of the law. The Group stated that the legislation should cover matters including definitions, protection for appropriate medical intervention, certification of 'real and substantial risk to the life of the mother' and a time-limit on the lawful termination of pregnancy.

B) Green Paper on Abortion 1999

This Paper on Abortion considered seven options to resolve the issues around abortion. Of these seven, only two are applicable to the remit of the Expert

[57] All Party Oireachtas Committee on the Constitution: 2000, pg. A592.

Group as they did not require any change to the constitutional *status quo* in relation to abortion.

Option (iv) involved the introduction of new primary legislation to re-enact the criminal prohibition on abortion in Ireland to replace the relevant sections of the *Offences Against the Person Act 1861*. Such legislation would provide for a general criminal prohibition on abortion, but would also provide a defence that a doctor had carried out an abortion in line with the *X* case criteria.

Option (v) involved introducing legislation to regulate abortion in circumstances defined by the *X* case without repealing the relevant section of the 1861 Act which would continue to provide the general criminal prohibition on abortion.

C) All Party Oireachtas Committee on the Constitution – Abortion 2000

The All Party Oireachtas Committee on the Constitution looked at three options in relation to this issue, one of which is applicable to the work of the Expert Group as it did not require constitutional amendment but called for greater legal clarity. This option advocated supporting the plan to reduce the number of crisis pregnancies, accompanied by legislation to protect medical intervention which safeguards the life of the woman within the existing constitutional framework. This legislation would re-state the prohibition on intentional termination of pregnancy, and would provide a defence along the lines of the *X* case test.

7.4.2 Legislation Alone

Having examined the proposals put forward in previous documents, one of the options considered is original primary legislation or amendment of an existing Act to regulate access to lawful termination of pregnancy in Ireland in accordance with the *X* Case, the requirements of the European Convention on Human Rights and the judgment in *A, B and C v Ireland.* In this option, all the details on the assessment of entitlement to a lawful termination of pregnancy would be enacted in legislation, giving the Oireachtas the power to scrutinise all its provisions, and leaving no significant matters to be dealt with by regulations.

Advantages	**Disadvantages**
• This option would clearly provide for the general prohibition of abortion while at the same time enacting in legislation the exceptions that might arise in lawful circumstances, i.e. when there is a risk to the life of the pregnant woman that can only be averted by a termination of pregnancy. • The Oireachtas would have the opportunity to discuss and vote on all the relevant details of the	• Due to the nature of this legislation, the process of drafting and democratic scrutiny is likely to take a considerable period of time. • Postulating all the details of the assessment and review process in primary legislation might be too rigid an approach. In this case, even minor changes that might arise following implementation or in light of scientific advances would require

proposed legislation. • Access to lawful termination of pregnancy in Ireland would be put on a statutory, and therefore more secure, footing. • Such legislation would update the 1861 Act and arguably provide better protection for the unborn than is currently provided by that Act. • The 'chilling effect' of the 1861 Act would be removed and legal protection from prosecution could be attained by compliance with the proposed legislation. • The role of the Minister would not come under scrutiny in relation to procedural matters which would be in the legislation. • This approach is likely to satisfy the requirements of the implementation process of the judgment in *A, B and C v Ireland*.	full scrutiny and further passage through the Houses of the Oireachtas.

7.4.3 Legislation plus Regulations

Finally, an implementation option that would be constitutionally, legally, and procedurally sound is primary or amending legislation to regulate access to lawful termination of pregnancy in Ireland in accordance with the *X* Case, the requirements of the European Convention on Human Rights and the judgment in *A, B and C v Ireland.* This legislation would provide for the drafting of regulations to deal with detailed and practical matters relevant to the issue, such as changing medical practices and scientific advances, as well as addressing emerging challenges to implementation. Most aspects of the provision of lawful termination of pregnancy would be set out in primary legislation, with certain operational matters delegated to the Minister to govern by way of regulations.

The advantages of this option are that it fulfils the requirements of the judgment, it provides for appropriate checks and balances between the powers of the legislature and the executive, and would be amenable to changes that might arise out of clinical practice and scientific advances.

Advantages	**Disadvantages**
• The Oireachtas would have the opportunity to discuss and vote on all the relevant details of the	• Due to the nature of this legislation, the process of drafting and democratic scrutiny

proposed legislation. • Access to lawful termination of pregnancy in Ireland would be put on a statutory, and therefore more secure, footing. • Such legislation would update the 1861 Act and arguably provide better protection for the unborn than is currently provided by that Act. • The 'chilling effect' of the 1861 Act would be removed and legal protection from prosecution could be attained by compliance with the proposed legislation. • The role of the Minister would come under less scrutiny in relation to procedural matters as these would be in the legislation. • The regulations could be amended relatively easily in order to address changes in clinical practice, scientific advances, and any challenges arising from their implementation. • This approach is likely to satisfy the requirements of the implementation process of the judgment in *A, B and C v Ireland*.	is likely to take a considerable period of time.

7.4.4 New Legislation or Amendment of the 1861 Act?

The choices are:

1 to repeal the 1861 Act, and replace it with a full restatement of the law on abortion.

2 retain the Act of 1861, and amend it by legislation providing for the judgment in the *X* case.

In considering these options, it is helpful to look at the 1861 Act. Section 58 and 59 are as follows:

'*58. 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 not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a*

felony, and being convicted thereof shall be liable to be kept in penal servitude for life.

59. Whoever 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.'

The provisions are arguably unclear as to their scope and content. It is not clear, from reading the section, what sort of conduct would be liable to criminal prosecution, and what would not. Nor is it clear whether the scope and content of the prohibition on abortion is co-extensive with the constitutional prohibition on abortion. It should be borne in mind that the 1861 Act pre-dates the Constitution and its provisions are only in force insofar as they are not inconsistent with the Constitution.

The provisions fail to provide specific protection for the right to life of a woman whose life is at risk due to her pregnancy. This has been the subject of sustained criticism by the Irish Courts and was impugned in the judgment in *A, B and C v Ireland*.

It can also be argued that the section does not effectively protect the right to life of the unborn. For instance, under Irish law, currently, the life of a baby who is in the process of being delivered is not clearly protected either under the offence of murder or the offence of abortion. This lacuna could be addressed by changing the 1861 Act.

Sub-option 1 - Repeal and Replace the 1861 Act

Advantages	Disadvantages
• This option would provide clarity and certainty as to the law. • It would comply with Ireland's obligations under the judgment in A*, B and C v Ireland*. • It would provide compliance with Article 40.3.3° by providing a clear modern statement of the law on abortion, including measures consistent with the respect to be accorded to the unborn.	• Due to the nature of this legislation, the process of drafting and democratic scrutiny is likely to take a considerable period of time.

Sub-option 2 - Amend Existing Law

Advantages	Disadvantages
• Enactment of legislation along the lines of the *Infant Life (Preservation) Act, 1929*, which amended the 1861 Act to provide	• This solution would not address the lack of clarity in the 1861 Act.

	for protection of the unborn until birth, while also providing protection for the right to life of the mother, could potentially comply with our obligations in *A, B and C v Ireland,* while leaving the existing criminal prohibition intact.	

Chapter 8

CONCLUSION

The Expert Group was established by Government to recommend a series of options on how to implement the judgment in *A, B and C v Ireland* of the European Court of Human Rights. The judgment found that there had been a violation of C's right to private and family life contrary to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms because of the State's failure to implement the existing constitutional right to lawful abortion in Ireland.

Under the Expert Group's terms of reference, it was not its function to specify how the judgment should be implemented but rather to provide options. The Group has endeavoured to put forward options that are practical and consistent with the Constitution and the law of the State. Inevitably some options commend themselves more than others.

The Expert Group trusts that this report will be of assistance to the Government in making decisions concerning the implementation of the judgment in *A, B and C v Ireland*.

APPENDIX I

MEMBERSHIP OF THE EXPERT GROUP

No	Expertise	Organisation
1	Chair	Hon. Justice Mr. Sean Ryan
2	Obstetrics	Dr Peter Boylan, Consultant Obstetrician/Gynaecologist
3		Dr Mary Holohan, Consultant Obstetrician/Gynaecologist
4	Psychiatry	Dr Imelda Ryan, Consultant Psychiatrist
5	General Practice	Dr Ailís Ní Riain, General Practitioner – *resigned May 2012*
6		Dr Mark Walsh, General Practitioner
7	Law	Ms Christine O'Rourke, Office of the Attorney General
8		Ms Mary O Toole, Senior Counsel
9		Ms Joanelle O'Cleirigh, Solicitor
10		Ms Denise Kirwan, Solicitor
11	Policy	Mr Bernard Carey, Assistant Secretary, Department of Health
12		Dr Tony Holohan, Chief Medical Officer, Department of Health
13	Professional Standards – Doctors	Dr Deirdre Madden, Medical Council
14	Professional Standards – Nurses and Midwives	Dr Maura Pidgeon, An Bord Altranais (Nursing Board)

Secretariat provided by the Social Inclusion Unit of the Department of Health

APPENDIX II

TERMS OF REFERENCE

The terms of reference of the Group, as approved by Government on 29th November 2011, are as follows:

- To examine the judgment in A*, B and C v Ireland* of the European Court of Human Rights;
- To elucidate its implications for the provision of health care services to pregnant women in Ireland;
- 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 over-riding need for speedy action.

The Group will meet on a periodic basis (at least monthly) and may consult with interested parties and additional relevant experts and professionals.

The Expert Group is to report back to the Government within six months of establishment by means of a written report.

APPENDIX III

INTERNATIONAL ABORTION LAW

Internationally, laws on abortion are diverse, with differences arising according to the influence of religious, moral and cultural norms. A survey of abortion law in 197 countries and territories, published in 2009[58], found a range of legal regimes, with highly restrictive law on one end of the spectrum and abortion on demand at the other end.

In the 32 countries with the most stringent legislation, including Malta, Andorra and San Marino, abortion is not legally permitted on any grounds. In the next category, 36 countries permit abortion when the woman's life is threatened – Ireland is the only country in this category in a developed region; all the others are from the developing world. A few countries in the category, for example, Panama, Bhutan and Mali, make exceptions in cases of rape, incest or foetal abnormalities.

Thirty-six countries allow abortion to save a woman's life and to preserve her physical health, and 23 allow abortion to save a woman's life and to preserve her physical and protect her mental health (both of the latter categories also make exceptions for cases of foetal impairment, rape or incest). The latter categories include countries such as Israel, New Zealand, Spain and South Korea.

Less restricted again are the 14 countries, including India, Britain, Australia, Finland, Iceland and Zambia, which permit abortion on the three previously mentioned grounds and also for socioeconomic reasons, with exceptions again made variously in cases of foetal impairment, rape or incest.

The remaining 56 countries and territories allow abortion without restriction as to reason, although in many certain conditions must be met for abortion to be carried out. For example, many impose gestational limits, most commonly that abortion must be carried out during the first 12 weeks of gestation. Other limitations placed on access to abortion include parental consent where a minor is concerned (in countries including Bosnia-Herzegovina, Czech Republic, Denmark, Greece, Italy, Norway, Portugal, Serbia, Slovenia, Turkey and some parts of the United States), and spousal consent where the woman is married (Turkey). Abortion for the purposes of sex selection is banned in China and Nepal.

According to the WHO[59], between 1997 and 2008, the grounds on which abortion may be legally performed were broadened in 17 countries: Benin, Bhutan, Cambodia, Chad, Colombia, Ethiopia, Guinea, Iran, Mali, Nepal, Niger, Portugal, Saint Lucia, Swaziland, Switzerland, Thailand and Togo. Three countries tightened their laws to further restrict access - El Salvador and Nicaragua amended already restrictive laws to prohibit abortion entirely, and Poland withdrew socioeconomic reasons as a legal ground for abortion.

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[58] Guttmacher Institute (2009). *Abortion worldwide: A decade of uneven progress*. http://www.guttmacher.org/pubs/Abortion-Worldwide.pdf

[59] World Health Organisation and Guttmacher Institute (2012). *Facts on induced abortion worldwide.* http://www.guttmacher.org/pubs/fb_IAW.html

In terms of international incidence, the rate of abortion in Africa is 29 per 1000 women of childbearing age and in Latin America is 32 per 1000. The rate of abortion in Europe is 28 per 1000, and in Western Europe the rate is 12 per 1000[60].

The table below summarises abortion law in 27 countries in the Council of Europe, information on which was received through the Department of Foreign Affairs and from the United Nations' global review of abortion policies[61].

Country	To save woman's life	To protect physical health	To protect mental health	Foetal abnormality	Rape / incest	Economic / social reasons	On request
Andorra	Yes						
Bosnia & Herzegovina	Yes	Yes	Yes	Until 20 weeks	Until 20 weeks		Until 10 weeks
Croatia	Yes	Yes		Yes	Yes		Until 10 weeks
Czech Republic	Yes	Yes		Yes	Yes		Until 12 weeks
Denmark	Yes	Yes	Yes	Yes	Yes	Yes	Until 12 weeks
Estonia	Yes	Yes		Yes			Until 11 weeks
France	Yes	Yes	Yes	Yes			Until 12 weeks
Georgia	Yes	Yes	Yes	Yes	Yes	Yes	Until 12 weeks
Germany	Yes	Yes	Yes		Yes		Until 12 weeks
Greece	Yes	Yes	Yes	Yes	Yes		Until 12 weeks
Iceland	Yes	Yes	Yes	Yes	Yes	Yes	
Ireland	Yes						
Italy	Yes	Yes	Yes	Yes	Yes	Yes	
Netherlands	Yes	Yes	Yes	Yes	Yes	Yes	Until 24 weeks (in practice 21 weeks & few days)
Norway	Yes	Yes	Yes	Yes	Yes	Yes	Until 12 weeks
Romania	Yes						Until 14 weeks
Russia	Yes	Yes	Yes	Yes	Yes	Until 22 weeks	Until 12 weeks
Serbia	Yes	Yes		Yes	Yes		

[60] Guttmacher Institute and World Health Organisation (2012). *Facts on induced abortion worldwide*. http://www.guttmacher.org/pubs/fb_IAW.html
[61] United Nations Population Division (2002). *Abortion Policies; A Global Review*. http://www.un.org/esa/population/publications/abortion/

Spain	Yes	Yes		Until 22 weeks	Until 14 weeks		Until 14 weeks
Sweden	Yes	Yes					Until 18 weeks
Switzerland	Yes	Yes	Yes				Until 12 weeks
United Kingdom	Yes	Yes	Yes	Yes			