

THE CASE FOR REPEAL OF THE EIGHTH AMENDMENT

SUBMISSION TO THE CITIZENS' ASSEMBLY

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Links to Documents

Report of the Labour Women Commission on Repeal of the Eighth Amendment, 20th February 2015 – accessible at:

http://www.labour.ie/download/pdf/labour_women_8th_amendment_report_copy.pdf

Repeal the Eighth Amendment Bill 2015 – accessible at:

<http://www.labour.ie/news/blog/2015/11/25/labour-women-launch-heads-of-their-repeal-the-eighth/>

1. Summary

- Each year, thousands of women travel to England from Ireland to access terminations of pregnancy; 3,451 women made the journey in 2015 (63 per week; 9 per day).¹
- Over 160,000 women have travelled to England from Ireland since the Eighth Amendment was passed in 1983, inserting Article 40.3.3 into the Irish Constitution. Between January 1980 and December 2013 alone, over 150,000 women travelled from Ireland to access abortion services to another country.²
- For women who have difficulty in travelling abroad, due to legal status, youth, or poverty, termination of pregnancy is much more difficult to access, and likely to be carried out later in the term of the pregnancy.
- While the Eighth Amendment remains in place, it is not effectively possible to legislate for abortion on any grounds other than a risk to a woman's life.
- The current legal situation does not address the health needs of Irish women and has had the effect of putting lives at risk, as in the case of Savita Halappanavar in October 2012.³
- The language of the Eighth Amendment has given rise to many tragic human situations, and immense legal difficulties in a series of hard cases involving vulnerable women over the 33 years since its enactment.
- The Constitution is no place to regulate a complex and sensitive matter like abortion. The Eighth Amendment should be repealed in its entirety so that the Oireachtas may legislate to regulate the conditions under which abortion can legally be provided in Ireland.

2. Legal Background

Article 40.3.3 of the Constitution provides that:

“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.”⁴

¹ <https://www.gov.uk/government/statistics/report-on-abortion-statistics-in-england-and-wales-for-2015>

² <http://www.ifpa.ie/Hot-Topics/Abortion/Statistics>

³ See for example Irish Times, 14th November 2012, at <http://www.irishtimes.com/news/woman-denied-a-termination-dies-in-hospital-1.551412>

In 1992, the Supreme Court ruled in *Attorney General v X* that a 14 year old girl, pregnant as a result of rape, could obtain an abortion because she faced a real and substantial risk to her life due to the threat of suicide; and this risk could only be averted by the termination of her pregnancy.⁵ X was thus entitled to an abortion in Ireland under the provision in Article 40.3.3 requiring the State to have "due regard to the equal right to life of the mother".

Following referendums on travel and information rights in November 1992, the Regulation of Information (Services outside the State for the Termination of Pregnancies) Act 1995 was passed, providing that doctors and counsellors may give information on abortion services abroad; but may not "refer" women for abortion.

In the 1997 *C* case, a health board sought an abortion for a 13 year old girl in their care who had been raped and become pregnant. The High Court ruled that, as C was likely to take her own life if forced to continue with the pregnancy, she was entitled to an abortion in Ireland under the X Case test.

In 2006, the European Court of Human Rights ruled that a case taken by a woman identified as D was inadmissible because she had not exhausted domestic legal remedies by taking her case through the Irish courts. The Irish Government relied successfully on the argument that in her particular circumstances (involving fatal foetal abnormality), D could have been legally entitled to an abortion in Ireland had she applied through the Irish courts.

In 2010, in the case of *A, B and C v Ireland*, the Grand Chamber of the European Court of Human Rights unanimously ruled that Ireland's failure to implement the existing constitutional right to a lawful abortion when a woman's life is at risk had violated Applicant C's rights under Article 8 of the European Convention on Human Rights. C had cancer, and the continuation of her pregnancy had posed a potential risk to her life. The Court also ruled that the three women challenging Ireland's ban on abortion did not have an effective remedy available to them under the Irish legal system.

As a result of the *A, B and C* case, the Protection of Life During Pregnancy Act (PLDPA) was passed in 2013.⁶ The Act permits abortion only where there is a risk to the life of a pregnant woman, in accordance with the X case test. The Act provides that two doctors must confirm that there is a physical threat to the life of the pregnant woman. In medical emergencies, one doctor alone may make the decision. Where the threat arises because of risk of suicide, three doctors—a woman's obstetrician and two psychiatrists—must agree that her life is at risk. The Act states that "it shall be an offence to intentionally destroy unborn human life", replacing the pre-existing criminal prohibition on abortion in the 1861 Offences Against the Person Act. This offence carries a maximum 14-year prison sentence. The Act defines "unborn" as "commencing after implantation in the womb of a woman".

⁴ Inserted by referendum as the Eighth Amendment to the Constitution in 1983, with the last two sentences added by way of referendum in 1992.

⁵ [1992] 1 IR 1.

⁶ The 2013 Act was brought into force on 1st January 2014.

Since the 2013 Act came into force, a total of 52 terminations of pregnancy have been carried out to save women's lives under its provisions; 26 terminations of pregnancy in Ireland to save women's lives in 2014; and another 26 in 2015. This proves that a significant number of women have needed abortions in order to save their lives, but it hardly represents the 'floodgate' that the opponents of the Act suggested would follow from its enactment.⁷

The 2013 Act is highly restrictive. It could provide for abortion only where a woman's life was at risk – but legislators could not include any other ground. Because of the Eighth Amendment, the Oireachtas could not legislate to allow abortion in cases where a pregnancy poses a serious risk to a woman's health; nor in rape cases; nor even in cases where a baby is incapable of being born alive.

"Risk to life" remains the only ground on which abortion can be legally carried out in Ireland, because of the terms of the Eighth Amendment.

The Eighth Amendment has also had an adverse impact on women's choices in maternity care. For example, the current (May 2016) edition of the HSE's National Consent Policy makes specific reference to Article 40.3.3 in this context, stating under the section dealing with "Refusal of treatment in pregnancy" that:

"The consent of a pregnant woman is required for all health and social care interventions. However, because of the constitutional provisions on the right to life of the "unborn",⁸ there is significant legal uncertainty regarding the extent of a pregnant woman's right to refuse treatment in circumstances in which the refusal would put the life of a viable fetus at serious risk. In such circumstances, legal advice should be sought as to whether an application to the High Court is necessary. Relevant factors to be considered in this context may include whether the risk to life of the unborn is established with a reasonable degree of medical certainty, and whether the imposition of treatment would place a disproportionate burden or risk of harm on the pregnant woman."⁹

The Eighth Amendment thus creates many further restrictions on the exercise of choices of women in pregnancy and childbirth. Indeed, in December 2014 a pregnant woman who was brain-dead and whose family wished to allow her to die naturally had to be kept on life-support in order to preserve the life of "the unborn" while the courts debated the situation. Ultimately the High Court ruled that the woman could be taken off life-support because there was no prospect of a live birth.¹⁰

⁷ Department of Health, Notifications in Accordance with Section 20 of the Protection of Life During Pregnancy Act 2013, *Annual Report 2014*, published June 2015; and *Annual Report 2015*; published June 2016.

⁸ Article 40.3.3 of the Irish Constitution 1937.

⁹HSE, *National Consent Policy* (2016), at paragraph 7.7.1. Accessible at: http://www.hse.ie/eng/services/list/3/nas/news/National_Consent_Policy.pdf

¹⁰ *PP v. HSE* [2014] IEHC 622.

This tragic case demonstrates that where a foetus has a prospect of being born alive, the constitutional provision may even override the choices of the family of a deceased woman— an appalling vista indeed.¹¹

We know that the Eighth Amendment has created immense legal uncertainty – and it continues to do so, in areas well beyond abortion law, the law on maternity care or women’s reproductive health. As recently as 29th July 2016, in *I.R.M. v. Minister for Justice and Equality and Others*, Mr Justice Humphreys ruled in a deportation case that Article 42A of the Constitution, which provides for children’s rights, should “be given a wide interpretation and should include the child before birth.”¹² The State has announced its intention to appeal this judgment to the Supreme Court.

However, in a series of other cases concerning the definition of the “unborn” in situations involving deportations; frozen embryos, and custody rights in family law disputes, the Eighth Amendment has generated a web of legal uncertainty around a range of different complex areas of human life.¹³

3. The Need for Repeal of the Eighth Amendment

This brief historical overview of legal cases clearly shows the need for repeal of the Eighth Amendment. These cases tell us that the Constitution is no place to regulate abortion. Trying to legislate for abortion through the blunt instrument of the constitutional text is a mistake – no other European country regulates abortion through its Constitution. Constitutions are legal documents which are intended to reflect values that society at large subscribes to. They outline broad, deliberately vague principles; principles which allow the text to remain relevant for generations to come. They are not documents in which to prescribe detailed regulation of complex areas of human life, like women’s reproductive health.

Repealing the Eighth Amendment would allow the Oireachtas to create new laws which could provide necessary detailed regulation of abortion, and which could broaden the circumstances of when a woman could access abortion services. Repeal would not create a legal vacuum. Following repeal of the Eighth Amendment, the Protection of Life During Pregnancy Act 2013 - limiting abortion to cases where the woman’s life is at risk - would still remain in force. It would only stop being law if the Oireachtas took steps to amend it or replace it with new legislation.¹⁴

¹¹ For further discussion of the legal impediments to women’s choices in the context of maternity care, see Bacik, Ivana, ‘Maternity Care, Midwifery Practice and Women’s Choices – Recent Legal Developments’ (2015) 21 *MLJI* 4-10

¹² [2016] IEHC 478, at para 78 of the judgment.

¹³ For further background to the legal implications of the Eighth Amendment, see for example Bacik, Ivana, ‘History of Abortion Law in Ireland: Prospects for Change’ (2014) 20(2) *M.L.J.I.* 75-81; and Bacik, Ivana, ‘Legislating for Article 40.3.3’ (2013) 3 (3) *Irish Journal of Legal Studies* 18-35, at http://ijls.ie/wp-content/uploads/2013/07/IJLS_Vol_3_Issue_3_Article_2_Bacik.pdf

¹⁴ Daly, Eoin, ‘There is no reason why we can’t simply repeal the Eighth Amendment’ *The Irish Times* 2nd November, 2016.

4. The Labour Women Commission on Repeal of the Eighth Amendment

Repeal of the Eighth Amendment has been Labour Party policy for many years, a policy driven by Labour Women, the women's section within the party. In December 2014, Labour Women established a commission, chaired by former Senator, Dr Mary Henry, to put forward a practical strategy to achieve repeal. I was Rapporteur to this Commission. We consulted with independent doctors and lawyers, including Dr. Peter Boylan and psychiatrist Professor Veronica O'Keeffe.

We then developed a policy document, adopted unanimously at our party conference in February 2015 (http://www.labour.ie/download/pdf/labour_women_8th_amendment_report_copy.pdf). This made repeal of the amendment a Labour manifesto commitment in the 2016 General Election.

In November 2015, Labour Women published the scheme of the Bill that Labour would introduce if the Amendment was repealed (see <https://www.labour.ie/news/blog/2015/11/25/labour-women-launch-heads-of-their-repeal-the-eighth/>).

This legislation, the Repeal the Eighth Amendment Bill 2015, would allow abortion on four medically certified grounds: risk to life; risk to health; rape; and fatal foetal abnormality. The test for assessing risk to health would be that of "real and substantial risk", a test with which doctors are familiar from existing law. A stricter test would apply for risk to health where abortion is sought beyond the first trimester. The Bill would repeal existing laws that criminalise women and their doctors; and it would provide protection for those offering and accessing legal abortion services.

This is sensible and moderate legislation, relatively conservative by European standards. Indeed, personally I would prefer to see a more radical abortion law in place, as would many others. But Labour Women recognised that this Bill more closely reflects the current views of Irish people on abortion, as measured in successive opinion polls.¹⁵

A key reason for publication of this Bill, was to show that we are serious about achieving repeal. Labour is the party of social change: we have long taken liberal stances on social issues such as contraception and divorce.

In line with this tradition, it was Labour that pushed successfully for a referendum on divorce in 1995; the 2012 gender quota legislation was Labour policy; and it was Labour that ensured marriage equality was included in the programme for the 2011-16 Government. In all these cases we achieved change – notably with the successful 2015 Marriage Equality Referendum. By publishing this Bill, we make clear our intent to achieve a referendum on repeal of the Eighth Amendment.

¹⁵ For an overview of public opinion polls showing support for liberalisation of abortion laws, see <http://www.ifpa.ie/Hot-Topics/Abortion/Public-Opinion>.

5. Conclusion

We need to repeal the Eighth Amendment. Passed in 1983, it has cast a blight over an entire generation – my generation, too young to have voted 33 years ago, but whose daughters are now growing up under its chill. Its effect has been utterly negative and in some cases, devastating.

The Eighth Amendment has not prevented one crisis pregnancy. But it has compounded the crisis of pregnancy, particularly for those women for whom the journey to seek abortion abroad is particularly difficult: young women, women in poverty, asylum seekers.

It has symbolically portrayed women as vessels, equating our lives to those of the unborn. And, above all, it has endangered women's lives by having a chilling effect on the practice of obstetrics in Ireland, making doctors afraid to intervene to save a pregnant woman's life until she is close to death.

There is a groundswell of public support for a referendum on the Eighth Amendment. Let's achieve repeal and end the chill – for the sake of our daughters and their generation.

ENDS.