

**Human rights and equality
considerations in the
development of a new
legislative and regulatory
framework on abortion**

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1. Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* ('2014 Act').

The Commission enjoys institutional accountability to the Houses of the Oireachtas. Section 9(2) of the 2014 Act provides that 'the Commission shall ... be independent in the performance of its functions'. The legislative framework establishing the Commission was drafted to ensure that it meets the requirements of the United Nations *Paris Principles*.¹

Section 10(1) of the 2014 Act stipulates that the overall general functions of the Commission shall be:

- '(a) to protect and promote human rights and equality,
- (b) to encourage the development of a culture of respect for human rights, equality, and intercultural understanding in the State,
- (c) to promote understanding and awareness of the importance of human rights and equality in the State,
- (d) to encourage good practice in intercultural relations, to promote tolerance and acceptance of diversity in the State and respect for the freedom and dignity of each person, and
- (e) to work towards the elimination of human rights abuses, discrimination and prohibited conduct.'

The Commission's more specific functions include the obligation to:

- 'keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality'.²

The Irish Human Rights and Equality Commission made a detailed submission³ to the Citizens' Assembly in December 2016 in the context of the Assembly's deliberations on the Eighth Amendment to the Constitution. The Commission's submission focussed on the applicable regional and international human rights and equality standards which apply to women's access to reproductive health services, including abortion, and outlined in detail the human rights and equality shortcomings in Ireland's legal and regulatory framework on abortion as articulated to date by international human rights bodies.

Since the publication of this submission, the Citizens' Assembly has completed its process of deliberation on the Eighth Amendment, and has voted on a number of recommendations to amend

¹ The Paris Principles are the UN governing standards for national human rights institutions. The Irish Human Rights and Equality Commission received 'A-Status' recognition before the UN International Coordinating Committee on National Human Rights in November 2015, which confirmed the Commission's full compliance with the Paris Principles. See: Irish Human Rights and Equality Commission (2015) 'The Irish Human and Equality Commission welcomes "A" status accreditation' [press release] <https://www.ihrec.ie/the-irish-human-and-equality-commission-welcomes-a-status-accreditation/>.

² Section 10(2)(b) of the Irish Human Rights and Equality Act 2014.

³ Irish Human Rights and Equality Commission (2016) *Submission to the Citizens' Assembly in its consideration of Article 40.3.3*. Available at <https://www.ihrec.ie/documents/ihrec-submission-citizens-assembly-consideration-article-40-3-3-irish-constitution/>. Hereafter cited as 'IHREC Citizens' Assembly Submission 2016'.

the Constitution, and for reform of the legal framework governing access to abortion in Ireland.⁴ These deliberations and recommendations will form the basis of a formal report to the Oireachtas by the Citizens' Assembly Chair, Ms Justice Laffoy. At the time of writing, a Joint Committee of the Houses of the Oireachtas is being constituted to consider this report and to make recommendations.⁵ The Taoiseach has also recently confirmed the Government's intention to hold 'a referendum on the eighth amendment in 2018'.⁶

In the context of these developments, the Commission is publishing this policy paper⁷ in order to outline some of the principles that may best inform a reformed legal and regulatory framework governing access to abortion in Ireland in order to ensure it meets the State's international human rights obligations, including the obligation to guarantee women's right to the highest attainable standard of physical and mental health. The paper also provides a brief outline of the legal and regulatory frameworks in place in a number of other jurisdictions.

⁴ Citizens' Assembly (23 April 2017) 'Citizens' Assembly Votes on Eighth Amendment - A Majority of Members Recommend That the Termination of Pregnancy Without Restriction Should Be Lawful', Press Release, available at <https://www.citizensassembly.ie/en/News/>. The fifth and final meeting of the Citizens' Assembly on this subject was held on 22-23 April 2017, and concluded with the balloting of Assembly members on a range of recommendations. Full details of the proceedings, accompanying support documents and ballots, and voting results, can be found at <https://www.citizensassembly.ie/en/Meetings/Fifth-Meeting-of-the-Citizens-Assembly-on-the-Eighth-Amendment-of-the-Constitution.html>.

⁵ See Notice of Motion in Dáil Éireann on the establishment of the Citizens' Assembly (available at <http://www.oireachtas.ie/documents/thisweek/motions-2016/m20160920.pdf>).

⁶ Taoiseach Leo Varadkar TD speaking in Dáil Éireann on 14 July 2017. Available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017061400030?opendocument>.

⁷ This paper has been adopted by the Irish Human Rights and Equality Commission. Two members of the Commission did not support the paper.

2. Overview of commentary by the Irish Human Rights and Equality Commission on access to abortion services

This section itemises where the Irish Human Rights and Equality Commission has to date raised human rights and equality concerns at both domestic and international level in relation to access to reproductive health services.

Observations on the Protection of Life During Pregnancy Bill 2013

In July 2013 the Irish Human Rights and Equality Commission (Designate) published a detailed analysis of the draft *Protection of Life During Pregnancy Bill 2013*.⁸ Recommendations and areas of concern outlined by the Designate Commission in relation to proposed new legislation included:⁹

- Recommendations for Constitutional amendments for instances of rape, and fatal foetal abnormality
- Concerns regarding the accessibility and effectiveness of the proposed procedures certifying a termination of pregnancy, particularly for women or girls from lower socio-economic backgrounds with limited access to healthcare, women or girls from ethnic minority backgrounds, or those with intellectual disabilities
- Concerns regarding the potential for the physical examination and certification procedures by multiple medical professionals to increase mental anguish or suffering
- Concerns regarding the potential ‘chilling effect’ that the Bill’s provisions for criminalization may have on the operation in practice of the legislation.

Some of the human rights and equality concerns outlined in these observations, and which remain relevant to the current legal and policy context, will be discussed later in this paper.

Reporting to United Nations human rights treaty bodies and under the UN Universal Periodic Review

The Irish Human Rights and Equality Commission has regularly raised human rights and equality concerns in the area of reproductive rights in the context of examinations of Ireland by the various United Nations human rights treaty bodies. Since 2014, the Commission has made recommendations on reproductive rights in the context of reports on Ireland’s compliance with its obligations under the International Covenant on Civil and Political Rights (ICCPR)¹⁰, the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹¹ the Convention on the Rights of the Child (CRC),¹²

⁸ Irish Human Rights and Equality Commission (Designate) (2013) *Observations on the Protection of Life During Pregnancy Bill 2013*, available at <https://www.ihrec.ie/documents/ihrc-observations-protection-of-life-during-pregna/>. Hereafter cited as ‘IHREC (Designate) PLDP Observations 2013’.

⁹ For a full summary of recommendations see IHREC (Designate) PLDP Observations 2013 pp. 51-54.

¹⁰ Irish Human Rights and Equality Commission (Designate) (2014) *IHREC Designate Report on Ireland’s 4th Periodic Review by the UN Human Rights Committee on the ICCPR*, June 2014, available at: <https://www.ihrec.ie/documents/ihrec-designate-report-on-ireland-and-the-iccpr-june-2014/ihrec-designate-report-on-iccpr-june-2014/>. Hereafter ‘IHREC (Designate) ICCPR Report 2014’.

¹¹ Irish Human Rights and Equality Commission (2015) *Ireland and the International Covenant on Economic, Social and Cultural Rights*, available at:

the Convention for the Elimination of all forms of Discrimination against Women (CEDAW),¹³ and the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (CAT).¹⁴ The Commission has also made recommendations on reproductive rights in the context of the UN Human Rights Council's Universal Periodic Review of Ireland.¹⁵

In these reports the Commission has 'endorsed the recommendations of the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights that the State take all the steps necessary, including a referendum on abortion, to revise its law to bring it into line with international human rights law'.¹⁶ The Commission has also recommended:

- 'that the parliamentary committee tasked with considering the Citizens' Assembly's forthcoming report on Article 40.3.3 of the Constitution ensures that the relevant aspects of the Committee's concluding observations, as well as the findings of other UN treaty monitoring bodies, are given due consideration.'¹⁷
- 'that the Protection of Life During Pregnancy Act 2013 be amended to require that age and situation appropriate clinical assessment and certification procedures be put in place for young women and girls availing of the Act's provisions.'¹⁸
- 'that the Department of Health update its Guidance Document for Health Professionals on the implementation of the Act to include detailed procedures and guidance on age-appropriate and situation-appropriate application of the Act's provisions to young women and girls in the areas of referral procedures, clinical assessments and certification.'¹⁹
- 'that the State ensure that clear, comprehensive and authoritative guidance as to what constitutes 'real and substantive risk' be provided to allow women and girls, particularly those from more vulnerable backgrounds, to access the medical services to which they are entitled.'²⁰

https://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf. Hereafter 'IHREC ICESCR Report 2015'.

¹² Irish Human Rights and Equality Commission (2015) *Ireland and the United Nations Convention on the Rights of the Child*, available at: <https://www.ihrec.ie/documents/ireland-and-the-united-nations-convention-on-the-rights-of-the-child-ihrec-submission-to-the-un-crc-december-2015/>. Hereafter 'IHREC CRC Report 2016'.

¹³ See Irish Human Rights and Equality Commission (2015) *List of Issues prior to reporting to CEDAW, 6th and 7th Combined reports*, October 2015, available at: <https://www.ihrec.ie/documents/ihrec-submission-to-the-un-cedaw-on-the-list-of-issues-prior-to-reporting-on-irelands-combined-6th-and-7th-report-under-cedaw-october-2015/> (hereafter 'IHREC CEDAW LOIPR Report 2015'), and Irish Human Rights and Equality Commission (2017), *Ireland and the Convention on the Elimination of all Forms of Discrimination against Women: Submission to the UN Committee on the Elimination of Discrimination against Women on Ireland's combined sixth and seventh periodic reports*, available at <https://www.ihrec.ie/documents/ireland-convention-elimination-forms-discrimination-women/> (Hereafter 'IHREC CEDAW Report 2017').

¹⁴ Irish Human Rights and Equality Commission (2017), *Submission to the United Nations Committee Against Torture on Ireland's Second Periodic Report*. Hereafter 'IHREC CAT Report 2017'.

¹⁵ Irish Human Rights and Equality Commission (2015) *Submission to UPR*, September 2015, available at: <https://www.ihrec.ie/documents/ihrec-submission-to-the-human-rights-commission-under-the-universal-periodic-review-for-ireland-september-2015/>. Hereafter 'IHREC UPR Submission 2015'.

¹⁶ See IHREC CEDAW LOIPR Report 2015. See also, IHREC CRC Report 2016, p.22; IHREC CEDAW Report 2017, p. 105; IHREC CAT Report 2017. This is the majority view of the Irish Human Rights and Equality Commission.

¹⁷ IHREC CEDAW Report 2017; IHREC CAT Report 2017.

¹⁸ IHREC CRC Report 2015 p.22.

¹⁹ IHREC CRC Report 2015 p.22.

²⁰ IHREC CRC Report 2015; IHREC CEDAW LOIPR Report 2015; IHREC ICESCR Report 2015, p.85; IHREC Designate ICCPR Report 2014.

- ‘dialogue between the State and the [UN Committee on Economic, Social and Cultural Rights] in relation to possible discrepancies between the [Protection of Life During Pregnancy Act 2013] and the provisions of the [International Covenant on Economic Social and Cultural Rights] in respect of situations where a pregnancy poses a risk to the health, as opposed to the life, of the pregnant woman, including where it may ‘unduly increase her risk of mental anguish or suffering’.²¹
- ‘that the State should consider the impact on the physical and mental health of a pregnant woman where a pregnancy is the result of a crime, such as rape or incest; where there is an established foetal fatal abnormality; or where it is established that the foetus will not survive outside the womb’.²²

The Commission has also expressed its concern that:

- ‘the current legal position in relation to abortion not only puts in place barriers which impede a woman’s right to bodily autonomy, but also that it has a disproportionate impact on women from lower socio-economic backgrounds and in particular, asylum seeking women and migrant women whose ability to travel may be circumscribed due to their immigration status.’²³
- ‘a woman who undergoes an unlawful abortion in Ireland could face a fine or up to 14 years’ imprisonment or both’.²⁴

The Commission’s submission to the Citizens’ Assembly in its consideration of Article 40.3.3° of the Irish Constitution

The Irish Human Rights and Equality Commission made a detailed submission²⁵ to the Citizens’ Assembly in December 2016 in the context of the Assembly’s deliberations on the Eighth Amendment to the Constitution. The Commission’s submission focussed on the applicable regional and international human rights and equality standards which apply to women’s access to reproductive health services, including abortion, and outlined in detail the human rights and equality shortcomings in Ireland’s legal and regulatory framework on abortion as articulated to date by international human rights bodies.

²¹ IHREC ICESCR Report 2015, p.85; IHREC Designate ICCPR Report 2014.

²² IHREC ICESCR Report 2015, p.85. See also IHREC (Designate) PLDP Observations 2013, para 118.

²³ IHREC CEDAW LOIPR Report 2015; IHREC UPR Report 2015; IHREC ICESCR Report 2015, p.85. See also the Oral Statement by IHREC Chief Commissioner Emily Logan to the United Nations Human Rights Council on Adoption of the Report of the Working Group on the Universal Periodic Review for Ireland, 23 September 2016, at <https://www.ihrec.ie/oral-statement-united-nations-human-rights-council-adoption-report-working-group-universal-periodic-review-ireland/>

²⁴ IHREC CEDAW LOIPR Report 2015.

²⁵ IHREC Citizens’ Assembly Submission 2016.

3. Principal human rights and equality issues that should be addressed in a revised legal framework

Article 40.3.3° of the Irish Constitution as inserted by the Eighth Amendment 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.’

The *X Case* interpreted the scope of Article 40.3.3° to include situations where a mother’s life is at risk of suicide.²⁶ Pursuant to the Thirteenth and Fourteenth Amendments to the Constitution, the text of Article 40.3.3° further protects ‘freedom to travel’,²⁷ and ‘freedom to obtain or make available [...] information relating to services lawfully available in another state.’²⁸ Subsequent case law has also interpreted the scope of Article 40.3.3° in cases falling outside the context of access to termination of pregnancy. These include cases involving: the protection afforded to embryos prior to implantation;²⁹ the discontinuation of life support for a pregnant woman who had been declared clinically brain dead;³⁰ and deportation decisions made in respect of the fathers of unborn children.³¹

The Commission also notes the recent conclusion of deliberations on this by the Citizens’ Assembly, the preparations underway for an Oireachtas Committee to examine the recommendations that stemmed from this process, and the Taoiseach’s recent confirmation of the Government’s intention to hold a referendum on the Eighth Amendment in 2018.

A range of human rights and equality concerns apply to the current framework governing access to abortion services in Ireland. In this section, the Commission outlines the principal concerns that should be addressed by the Oireachtas following an amendment to the Constitution permitting it to legislate for a revised framework.³²

²⁶ *X Case (Attorney General v X)* [1992] 1 IR 1. ‘If it can be 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 the termination of her pregnancy, such termination is permissible’ (*X Case* §§ 53,54, per Finlay C.J.).

²⁷ The Thirteenth Amendment to the Irish Constitution states that Article 40.3.3°: ‘shall not limit freedom to travel between the State and another state’.

²⁸ The Fourteenth Amendment to the Irish Constitution states that Article 40.3.3°: ‘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’.

²⁹ In 2009, the Supreme Court decided that the constitutional protection afforded to unborn life under Article 40.3.3° does not extend to embryos stored prior to implantation. See *Roche v Roche* [2010] 2 I.R. 321.

³⁰ In 2014, the High Court considered the case of a woman who was 15 weeks pregnant when she was declared clinically dead. There was no genuine prospect of the baby being born alive and the woman’s family did not wish to prolong life support measures. However, doctors were concerned that they were obliged to protect the life of the unborn under Article 40.3.3°. The order for discontinuing life support was granted on the basis that it was in the ‘best interests of the unborn child’. See *PP v HSE* [2014] IEHC 622.

³¹ See, for example, *IRM v Minister for Justice and Equality* [2016] IEHC 478 which found that the unborn child enjoys rights going beyond the right to life alone (at para 101(vi)), and that in cases of deportation, the future family rights of the unborn should be considered (at para 76). In this judgment, Humphreys J. makes reference (at para 56) to Irish jurisprudence on the rights of the unborn that predates the inclusion of Article 40.3.3° into the Constitution, including *G. v. An Bord Uchtála* [1980] I.R. 32 per Walsh J. (Henchy and Kenny JJ. concurring) at p. 69.

³² For a detailed summary of the instances where Ireland’s legal framework on abortion has been found not in keeping with international human rights obligations, see pp. 16-26 of the IHREC Citizens’ Assembly Submission 2016.

Access to abortion for reasons of health

The Protection of Life During Pregnancy Act 2013³³ allows for terminations of pregnancy in limited circumstances, subject to a detailed clinical assessment and certification process³⁴ where there is a real and substantial risk to the life of the mother, including in circumstances where the mother is suicidal. The Act does not provide for access to termination of pregnancy for health reasons, and such a provision would not be in compliance with Article 40.3.3° of the Constitution, as interpreted by the *X Case*.³⁵

Concerns about the barriers placed by this legal framework on women's access to appropriate health care have been raised in several international human rights fora. While the European Court of Human Rights has ruled³⁶ that this restriction falls within the State's margin of appreciation, in the context of developing jurisprudence at the European Court of Human Rights,³⁷ and the emergence of cases highlighting concerns about the operation of the Protection of Life During Pregnancy Act,³⁸ the continued blanket prohibition in Ireland on abortion for reasons of health is likely to be subject to further challenge at the Court in the years to come.

In international human rights law, a clear linkage has been made between access to abortion for reasons of health and the right to the highest attainable standard of physical and mental health, as guaranteed by Article 12 of the UN International Covenant on Economic, Social and Cultural Rights. In its 2000 General Comment on Article 12, the Committee on Economic, Social and Cultural Rights (CESCR) states that the right to health encompasses 'the right to control one's health and body, including sexual and reproductive freedom'.³⁹ With respect to the health needs of women, the Committee makes clear that:

³³ The Act was designed to respond to the judgment of the European Court of Human Rights in the case of *A, B and C v Ireland* (2010), No. 25579/05. The Judgment found that there was a "striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation", para 264.

³⁴ Sections 7–9 of the Protection of Life During Pregnancy Act 2013. Also see Department of Health, Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals, September 2014, sections 2–5.

³⁵ *X Case (Attorney General v X [1992] 1 IR 1)*. The Protection of Life During Pregnancy Act 2013 seeks to give legislative effect to the interpretation of Article 40.3.3° articulated in this judgment.

³⁶ In *A, B and C v Ireland*, the European Court of Human Rights found that given applicants A and B could lawfully travel abroad for an abortion, and had available to them relevant information and medical care in Ireland, the prohibition in Ireland of abortion for "health and well-being reasons" did not exceed the broad margin of appreciation accorded to the Irish State, but struck a "fair balance" between the right of A and B to respect for their private lives and the rights invoked on behalf of the unborn. The Court therefore found no violation of their rights under Article 8 of the European Convention on Human Rights. *A, B and C v Ireland* (2010), No. 25579/05, at paras 241-242.

³⁷ For examples of more recent jurisprudence at the Court, see IHREC Citizens' Assembly Submission at pages 10-11.

³⁸ See "Ms Y" court challenge to stop HSE inquiry into her care is struck out', Irish Times, 3 November 2015. Available: <http://www.irishtimes.com/news/crime-and-law/courts/highcourt/ms-y-courtchallenge-to-stop-hse-inquiry-into-her-care-is-struck-out-1.2415545>. The "Miss Y" case is discussed in more detail later in this section. On 12 June 2017 reports emerged of the case of a pregnant child who was detained under Section 25 of the Mental Health Act 2001. While believing the girl was at risk of self harm and suicide, and reporting that the girl 'had very strong views as to why she wanted to terminate the pregnancy', the consultant psychiatrist decided that 'this could be managed by treatment and that termination of the pregnancy was not the solution for all the child's problems at that stage'. See Dr. Carol Coulter, 'Order detaining pregnant girl seeking abortion discharged', *Child Care Law Reporting Project Case Histories 2017*, Volume 1, available at <https://www.childlawproject.ie/publications/>.

³⁹ UN Committee on Economic, Social and Cultural Rights (CESCR) (2000), *General Comment No. 14: The right to the highest attainable standard of health, (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4, para. 8. Available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzDjmcOy%2b9t%2bsAtGDNzdEqA6SuP2r0w%2f6sVBGtpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxl>. Hereafter cited as 'CESCR GC 14'.

‘The realization of women’s right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.’⁴⁰

In its more recent 2016 General Comment on the right to sexual and reproductive health, CESCR identified ‘criminalisation of abortion or restrictive abortion laws’ as amongst these barriers.⁴¹ In his 2016 report to the UN Human Rights Council, Dainius Pūras, the UN Special Rapporteur on the right to health stated that:

‘access to abortion services must be available, accessible and of good quality, without discrimination, at a minimum in the following circumstances: when the life or health of the mother is at risk, when the mother is the victim of rape or incest and if there is severe and fatal foetal impairment.’⁴²

The Commission recommends that the state approach legislation for and regulation of access to abortion services in Ireland primarily as a matter of healthcare policy, in line with its obligation under international human rights law to vindicate the right of both men and women to the highest attainable standard of physical and mental health.

Criminalisation of abortion

Section 22 of the Protection of Life During Pregnancy Act 2013 provides for a criminal offence of ‘destruction of unborn life’ subject to ‘a fine or imprisonment for a term not exceeding 14 years, or both’. Section 23 of the Act provides for an offence by a body corporate. The Irish Human Rights and Equality Commission (Designate), in its observations on the draft legislation, raised a number of human rights concerns regarding these provisions. These included concerns as to the proportionality of the indictable offence under the Constitution,⁴³ and as to the risk of a ‘chilling effect’ on women and girls seeking treatment or post-abortion care, and on medical practitioners providing such treatment.⁴⁴ These concerns about a potential ‘chilling effect’ remain relevant to the legislation as enacted. Recent cases suggest that it may be having an influence in clinical decision-making.⁴⁵

⁴⁰ CESCR GC 14, para. 21. s

⁴¹ UN Committee on Economic, Social and Cultural Rights (CESCR) (2016), *General Comment No. 22: the right to sexual and reproductive health, (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/22/, Available at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en.

See Para 34: ‘States parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual and reproductive health. This requires States to repeal or reform laws and policies that nullify or impair the ability of certain individuals and groups to realize their right to sexual and reproductive health. There exists a wide range of laws, policies and practices that undermine autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, for example criminalization of abortion or restrictive abortion laws.’ Hereafter ‘CESCR GC 22’.

⁴² UN Human Rights Council (2016), *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/32/32, para. 92. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/067/53/PDF/G1606753.pdf?OpenElement>.

⁴³ IHREC (Designate) PLDP Observations 2013, para. 101

⁴⁴ IHREC (Designate) PLDP Observations 2013, paras. 102-106.

⁴⁵ In 2014, the High Court considered the case of a woman who was 15 weeks pregnant when she was declared clinically dead. There was no genuine prospect of the baby being born alive and the woman’s family did not wish to prolong life support measures. However, doctors were concerned that they were obliged to protect the life of the unborn under Article 40.3.3°. The order for discontinuing life support was granted on the basis that it was in the ‘best interests of the unborn child’. See *PP v HSE* [2014] IEHC 622.

The criminalisation of abortion has been identified in several international human rights fora as a barrier to the human rights and equal treatment of women. In *A, B and C v Ireland*, the European Court of Human Rights, in finding a violation of Article 8 of the European Convention on Human Rights, took into account that the criminal provisions then in force would “constitute a significant chilling factor” for both women and doctors in the medical consultation process.⁴⁶

As outlined above, the UN Committee on Economic, Social and Cultural Rights has clearly identified criminalisation of abortion as a barrier to the realization of women’s right to health under the International Covenant on Economic, Social and Cultural Rights.⁴⁷ In its 2015 Concluding Observations on Ireland it stated that it was ‘particularly concerned at the criminalization of abortion, including in the cases of rape and incest and of risk to the health of a pregnant woman’.⁴⁸ In his 2016 report to the UN Human Rights Council, Dainius Pūras, the UN Special Rapporteur on the right to health strongly encouraged states to decriminalize abortion, noting that:

‘Criminal laws with respect to abortion result in a high number of deaths, poor mental and physical health outcomes, infringement of dignity and amount to violations of the obligations of States to guarantee the right to health.’⁴⁹

In its General Recommendation on women and health the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) has stated that ‘barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women’.⁵⁰ It goes on to recommend that ‘legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion’.⁵¹

In its Concluding Observations on Ireland’s combined third and fourth periodic report under the Convention on the Rights of the Child in 2016, the Committee on the Rights of the Child (CRC) recommended that Ireland ‘decriminalize abortion in all circumstances and review its legislation with a view to ensuring access by children to safe abortion and post-abortion care services’.⁵²

The Commission recommends that notwithstanding limitations that may be placed on access to abortion by legislation and regulation, the state decriminalise abortion in all circumstances.

⁴⁶ *A, B and C v Ireland* (2010), No. 25579/05, para. 254.

⁴⁷ CESCR GC 22, para. 34.

⁴⁸ CESCR Concluding Observations 2015, para. 30.

⁴⁹ UN Human Rights Council (2016), *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/32/32, para. 92. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/067/53/PDF/G1606753.pdf?OpenElement>. See also the recent joint statement made by UN Special Rapporteurs identifying criminalisation of abortion services as a risk factor for the health and lives of women: Office of the High Commissioner for Human Rights, “Unsafe abortion is still killing tens of thousands women around the world” – UN rights experts warn’ [press release], 28 September 2016. Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20600&LangID=E>

⁵⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW) (1999), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, A/54/38/Rev.1, chap. I, para. 14. Hereafter ‘CEDAW GR 24’.

⁵¹ CEDAW GR 24, para. 31(c)

⁵² UN Committee on the Rights of the Child (2016) Concluding observations on the combined third and fourth periodic reports of Ireland CRC/C/IRL/CO/3-4, para. 58(a). Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/IRL/CO/3-4&Lang=En

Fatal foetal abnormality and other implications of the *Mellet* and *Whelan* decisions

Ireland's legislative framework does not permit access to abortion for women whose pregnancies have been diagnosed with a fatal foetal abnormality. In the Irish Human Rights and Equality Commission (Designate) observations on the Protection of Life During Pregnancy Bill in 2013, the Commission warned that the current legal position placed Ireland in potential breach of its international human rights obligations, and recommended that 'the question of further constitutional refinement be considered'.⁵³

Under the Option Protocol to the International Covenant on Civil and Political Rights (ICCPR)⁵⁴, in 2016 and 2017 the UN Human Rights Committee adopted two decisions on communications by Irish women alleging that their Covenant rights had been violated.⁵⁵

The Committee's 2016 decision was on foot of a Communication by Amanda Mellet in November 2013. Ms Mellet discovered in the 21st week of her pregnancy that her foetus had congenital heart defects and was subsequently informed that the foetus would die *in utero* or shortly after birth.⁵⁶ The UN Human Rights Committee was of the view that, in the context of the Irish legal framework on abortion, the options available to Ms Mellet were: 'carrying to term, knowing that the foetus would most likely die inside of her or having a voluntary termination of pregnancy in a foreign country'.⁵⁷

In finding a violation of article 7 ICCPR (prohibition on cruel, inhuman and degrading treatment) the UN Human Rights Committee was of the view that:

- 'By virtue of the existing legislative framework, the State party subjected the author to conditions of intense physical and mental suffering';⁵⁸
- Ms Mellet 'had her physical and mental anguish exacerbated' by the surrounding circumstances;⁵⁹

⁵³ IHREC (Designate) PLDP Observations 2013, para. 112.

⁵⁴ Ireland has ratified the Optional Protocol to the ICCPR and recognises the competence of the Human Rights Committee to determine whether there has been a violation of the ICCPR and that the State has undertaken to ensure to all individuals the rights recognised in the ICCPR and to provide an effective remedy when a violation has occurred. See para. 10. The Human Rights Committee has dealt with several communications on the subject of access to abortion services. See for example *V.D.A. v Argentina*, Communication No. 1608/2007. (Subject matter: medical and judicial authorities' refusal to authorize a termination of pregnancy for a victim of rape with a mental impairment), 28 April 2011, CCPR/C/101/D/1608/2007; *K.L. v Peru*, Communication No. 1153/2003. (Subject matter: Refusal to provide medical services to the author in connection with a therapeutic abortion which is not a punishable offence and for which express provision has been made in the law), 22 November 2005, CCPR/C/85/D/1153/2003.

⁵⁵ Human Rights Committee (November 2016) *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2324/2013*, CCPR/C/116/D/2324/2013 (hereafter 'Human Rights Committee (2016) *Mellet* decision'); Human Rights Committee (July 2017) *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2425/2014*, CCPR/C/119/D/2425/2014 (hereafter 'Human Rights Committee (2017) *Whelan* decision'). Both communications referred to Articles 2(1), 3, 7, 17, 19 and 26 of the ICCPR. Also see IHREC (10 June 2016), 'Statement on the views of the UN Human Rights Committee in *Mellet*', <https://www.ihrec.ie/statement-on-the-views-of-the-un-human-rights-committee/>.

⁵⁶ See para. 2.2, Human Rights Committee (2016) *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2324/2013*, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F116%2FD%2F2324%2F2013&Lang=en.

⁵⁷ Human Rights Committee (2016) *Mellet* decision, para. 7.2.

⁵⁸ Human Rights Committee (2016) *Mellet* decision, para. 7.4.

⁵⁹ The Human Rights Committee considered that: 'The author, as a pregnant woman in a highly vulnerable position after learning that her much-wanted pregnancy was not viable, and as documented, inter alia, in the psychological reports submitted to the Committee, had her physical and mental anguish exacerbated by: not being able to continue receiving medical care and health insurance coverage for her treatment from the Irish health care system; the need to choose

- ‘Many of the negative experiences [Ms Mellet] went through could have been avoided if [Ms Mellet] had not been prohibited from terminating her pregnancy in the familiar environment of her own country and under the care of the health professionals whom she knew and trusted’;⁶⁰ and
- ‘The fact that a particular conduct or action is legal under domestic law does not mean that it cannot infringe article 7 of the Covenant’.⁶¹

The Committee found a violation of article 17 ICCPR (protecting the right to privacy)⁶² considering that ‘the interference in [Ms Mellet’s] decision as to how best cope with her non-viable pregnancy was unreasonable and arbitrary’.⁶³ It also found a violation of Article 26 ICCPR (equality before the law) taking into account the financial cost of travelling to the UK:

‘The differential treatment to which the author was subjected in relation to other similarly situated women failed to adequately take into account her medical needs and socio-economic circumstances and did not meet the requirements of reasonableness, objectivity and legitimacy of purpose.’⁶⁴

In its decision, Committee stated that Ireland should:

- ‘take steps to prevent similar violations occurring in the future’;⁶⁵ and
- ‘amend its law on voluntary termination of pregnancy, including if necessary its Constitution, to ensure compliance with the Covenant, including ensuring effective, timely and accessible procedures for pregnancy termination in Ireland, and take measures to ensure that health-care providers are in a position to supply full information on safe abortion services without fearing being subjected to criminal sanctions’.⁶⁶

On 30 November 2016 Minister for Health, Simon Harris TD, outlined⁶⁷ the substance of the State’s formal response to the Committee:

between continuing her non-viable pregnancy or traveling to another country while carrying a dying foetus, at personal expense and separated from the support of her family, and to return while not fully recovered; the shame and stigma associated with the criminalization of abortion of a fatally ill foetus; the fact of having to leave the baby’s remains behind and later having them unexpectedly delivered to her by courier; and the State’s refusal to provide her with necessary and appropriate post-abortion and bereavement care’. See Human Rights Committee (2016) *Mellet* decision para. 7.4.

⁶⁰ Human Rights Committee (2016) *Mellet* decision, para. 7.4.

⁶¹ Human Rights Committee (2016) *Mellet* decision, para. 7.4.

⁶² Human Rights Committee (2016) *Mellet* decision, para. 7.7, referring to *K.L. v Peru* (Human Rights Commission (2005) *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 1153/2003*) and *L.M.R. v Argentina* (Human Rights Commission (2011) *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 1608/2007*).

⁶³ Human Rights Committee (2016) *Mellet* decision, para. 7.8.

⁶⁴ Human Rights Committee (2016) *Mellet* decision, para. 7.11. UN Human Rights Committee member Sarah Cleveland, in her individual concurring opinion, noted that Ms Mellet also argued that gender discrimination had taken place by virtue of stereotyping, arguing ‘that Ireland’s legal regime is based on traditional stereotypes regarding the reproductive role of women, by placing the woman’s reproductive function above her physical and mental health and autonomy.’ Ms Cleveland was of the view that ‘the Committee’s finding of a violation of article 26 in the author’s case [...] is fully justified on grounds of discrimination arising from gender stereotyping’. See Annex II at paras 14 and 16. Ms Cleveland re-iterated this opinion in the 2017 *Whelan* decision (see Human Rights Committee (2017) *Whelan* decision, Annex II).

⁶⁵ Human Rights Committee (2016) *Mellet* decision, para. 9.

⁶⁶ Human Rights Committee (2016) *Mellet* decision, para. 9.

⁶⁷ Department of Health, ‘Statement from Minister for Health, Simon Harris, TD, regarding the United Nations Human Rights Committee in the case of Ms Amanda Mellet’, 30 November 2016. Available at <http://health.gov.ie/blog/press-release/statement-from-minister-for-health-simon-harris-td-regarding-the-united-nations-human-rights-committee-in-the-case-of-ms-amanda-mellet/>.

- A reiteration of ‘the current legislative position in Ireland for termination of pregnancy where the unborn is protected by Article 40.3.3 of the Constitution’
- Information about the Citizens’ Assembly and its terms of reference, in particular where ‘they are directed to first consider the Eighth Amendment of the Constitution (Article 40.3.3) and their conclusions on the matter will be submitted to the Houses of the Oireachtas for further debate by Parliament’
- Information on the Regulation of Information (Services outside the State for Terminations of Pregnancy) Act 1995, and the request by the Minister for the ‘Department to review the 1995 Act to determine if the provisions need to be strengthened or clarified’
- Information on the Health Service Executive’s National Standards for Bereavement Care following Pregnancy Loss and Perinatal Death, published in August 2016
- Confirmation that ‘in acknowledgement of the Committee’s views, the State has offered Ms Mellet an ex gratia sum of €30,000’.

The UN Human Rights Committee’s 2017 decision was on foot of a Communication by Siobhán Whelan in April 2014. The facts of the case were similar to those in the *Mellet* Communication.⁶⁸ Relying on the reasoning outlined in that case⁶⁹ the Committee also found a violation of Articles 7, 17 and 26 ICCPR.⁷⁰

It is the view of the Commission that the *Mellet* and *Whelan* decisions are significant not only in the specific context of fatal foetal abnormality, but have a wider relevance to barriers for women to the highest attainable standard of health.

A revised legal framework for access to abortion services in Ireland should fully comply with Ireland’s obligations under Articles 7 (prohibition on cruel, inhuman and degrading treatment), 17 (right to privacy) and 26 (equality before the law) ICCPR, as elaborated in the *Mellet* and *Whelan* decisions.

Young women and girls: accessible, age-appropriate health services, and consent to medical treatment

The Committee on the Rights of the Child (CRC) has outlined in its General Comment No. 15 the need for states to ‘ensure that health systems and services are able to meet the specific sexual and reproductive health needs of adolescents, including family planning and safe abortion services’, and that ‘girls can make autonomous and informed decisions on their reproductive health’.⁷¹ The Convention on the Rights of the Child also provides for increased decision making on the basis of a child’s maturity,⁷² and the CRC, in its General Comment No. 20 on the implementation of the right of the child during adolescence, elaborates that:

⁶⁸ In in the 20th week of her second pregnancy, the author was informed that her baby had a congenital brain malformation and would likely die in utero, in labour or very soon after birth. See Human Rights Committee (2017) *Whelan* decision, para. 2.1.

⁶⁹ Human Rights Committee (2017) *Whelan* decision, para. 7.9.

⁷⁰ Human Rights Committee (2017) *Whelan* decision, paras. 7.7, 7.9 and 7.12.

⁷¹ Committee on the Rights of the Child (2013), *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/C/GC/15, para. 56. Hereafter ‘CRC GC 15’. Article 24(1) of the UN Convention on the Rights of the Child echoes the language of the International Covenant on Economic, Social and Cultural Rights, stating: ‘States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services’.

⁷² Article 12(1) Convention on the Rights of the Child: ‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.’

‘There should be no barriers to commodities, information and counselling on sexual and reproductive health and rights, such as requirements for third-party consent or authorization.’⁷³

In 2015 the UN Committee on the Rights of the Child requested clarification from the State on the applicability of the Protection of Life During Pregnancy Act 2013 to pregnant girls.⁷⁴ In its 2013 observations on the Protection of Life During Pregnancy Bill, the Irish Human Rights and Equality Commission (Designate) had highlighted the absence from the Bill of provision for ‘accessible age-appropriate sexual and reproductive health services without discrimination ... and [age-appropriate] procedures which should apply concerning consent to treatment’.⁷⁵ No provisions were made to the legislation as enacted to address this recommendation.

The Commission also raised concerns that the Bill was silent as to how a minor’s consent to medical treatment will be accommodated under the legislation.⁷⁶ In the legislation as enacted, reference to consent is limited to a general provision at Section 16 that ‘nothing in this Act shall operate to affect any enactment or rule of law relating to consent to medical treatment.’⁷⁷

In its replies to the Committee’s List of Issues in 2015, the State indicated that the Department of Health *Guidance Document for Health Professionals* includes sections on confidentiality, consent and child protection issues “relevant to children”.⁷⁸ The guidance document does not, however, set out any specific guidelines for the appropriate adaptation of the clinical assessment and certification process to the needs and circumstances of pregnant girls who may find themselves in particularly vulnerable situations, and who may be the victims of sexual violence.

In its Concluding Observations on Ireland’s combined third and fourth periodic report under the Convention on the Rights of the Child in 2016, the CRC recommended that the state ensure that ‘the views of the pregnant girl are always heard and respected in abortion decisions.’⁷⁹

A new framework for access to abortion services in Ireland should ensure that the state meets its international human rights obligations to children and adolescents. It should ensure that the framework is implemented in an age-appropriate manner, in a way that meets the particular health needs of girls and adolescents, and that gives due weight to their views, in keeping with the Convention on the Rights of the Child.

Assessment and certification procedures

In its observations on the draft legislation in 2013, the Irish Human Rights and Equality Commission (Designate) raised concerns about the ‘number of examinations that a girl or woman is to be

⁷³ UN Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20*, para.60.

⁷⁴ UN Committee on the Rights of the Child (2015), *List of issues in relation to the combined third and fourth periodic reports of Ireland*, CRC/C/IRL/Q/3-4, 15 July 2015, at para 9.

⁷⁵ IHREC (Designate) PLDP Observations 2013, para. 118.

⁷⁶ IHREC (Designate) PLDP Observations 2013, para. 117.

⁷⁷ *Protection of Life During Pregnancy Act 2013*, Section 16. Available at <http://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/pdf>.

⁷⁸ Replies of Ireland to the list of issues, CRC/C/IRL/Q/3-4/Add.1 at para 69. See Department of Health, *Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals*, September 2014, section 9.3 and Appendix 10. This Guidance was published a year after the Act’s entry into force.

⁷⁹ CRC Concluding Observations on Ireland (2016) para. 58(a).

subjected to where she seeks treatment ... particularly girls and women in vulnerable situations', and the impact intrusive procedures under the draft legislation may have on a woman's right to respect for her private and family life under Article 8 of the European Convention on Human Rights.⁸⁰ The Commission also raised concerns about the barriers that assessment and certification requirements would place before women with restricted access to medical practitioners or health information, such as women from poorer socio-economic backgrounds, women from ethnic minority groups, or women with intellectual disabilities.⁸¹

Recent reports of the application of the Protection of Life During Pregnancy Act suggest that improvements to the legislation will be necessary to render procedures better-suited to the circumstances of pregnant girls and other potentially more vulnerable groups. In August 2014, media reports revealed that a young asylum seeking woman who has been called Ms. Y, a victim of an alleged rape in her country of origin, who despite asking for a termination of her unwanted pregnancy was told her only available option was to deliver the baby at 24 weeks by Caesarean section. She was reviewed by a panel of medical experts convened under the Act and although deemed suicidal, media reports suggest she was refused a termination as the pregnancy was too far progressed. It is not yet clear what information was provided to the young woman about her right to access a termination under the relevant legislation. The Health Service Executive began an enquiry into the matter, which was halted following legal action by lawyers acting on behalf of Ms. Y, who have also indicated they will be initiating personal injury proceedings.⁸²

The CEDAW committee has stressed the importance of women having access to timely and affordable health services, and has identified as a barrier 'conditions that prejudice women's access, such as high fees for health-care services, the requirement for preliminary authorization by spouse, parent or hospital authorities.'⁸³

Certification and assessment procedures in cases of rape and incest

Other international human rights commentary has clearly linked the imposition of onerous procedures as a prerequisite to accessing abortion services to stigma, distress and suffering, particularly in the cases of pregnancy due to rape or incest. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, has observed that 'for many rape survivors, access to a safe abortion procedure is made virtually impossible by a maze of administrative hurdles, and by official negligence and obstruction.'⁸⁴ The European Court of Human Rights, in the case of *P. and S. v Poland*⁸⁵ stated that:

⁸⁰ IHREC (Designate) PLDP Observations 2013, p4.

⁸¹ IHREC (Designate) PLDP Observations 2013, para. 39.

⁸² See "Ms Y" court challenge to stop HSE inquiry into her care is struck out', Irish Times, 3 November 2015. Available: <http://www.irishtimes.com/news/crime-and-law/courts/highcourt/ms-y-courtchallenge-to-stop-hse-inquiry-into-her-care-is-struck-out-1.2415545>.

⁸³ CEDAW GR 24, para. 21.

⁸⁴ UN Human Rights Council (2013), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/22/53*, para. 49.

⁸⁵ *P. and S. v Poland* (App.57375/08), 30 January 2013. The decision of the European Court of Human Rights in *P. and S. v Poland* in 2013 concerned a 14-year old girl who became pregnant as the result of rape. The applicant complained that she was driven in secret by authorities to a hospital 500 kilometres from her home, given no post-abortion care and was subjected to repeated and unnecessary questioning regarding the rape (para. 156). The European Court of Human Rights found that the 'events surrounding the determination of [...] access to legal abortion were marred by procrastination and confusion' and that 'the applicants were given misleading and contradictory information' (para. 108). The European Court of Human Rights concluded that the applicant was treated in a 'deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 ECHR' which prohibits inhuman and degrading treatment (paras 176-178). Article 8 ECHR was also found to have been violated as it imposes an obligation on states to secure the right to effective respect for physical and psychological integrity.

‘given the fact that the mental distress caused by unwanted pregnancy is likely to grow over time, substantial delay in the provision of voluntary abortion services after rape may cause severe suffering. It is not enough for the State to decriminalise abortion on paper; adequate procedures must be put in place to ensure the provision of legal medical services so that both law and practice are in conformity with the international legal obligations of the State under the UN Convention against Torture.’⁸⁶

The Court also underscored that ‘the general stigma attached to abortion and to sexual violence has been shown to deter women from seeking medical care, causing much distress and suffering, both physically and mentally.’⁸⁷

The Protection of Life During Pregnancy Act 2013 does not provide for access to termination of pregnancy for in cases of rape or incest, and such a provision would not be compliant with Article 40.3.3°. Recent academic commentary on models for reform to the law has stressed the importance that access to abortion for victims of rape or incest should not be subject to any requirement to prove that the rape occurred, or to participate in criminal proceedings.⁸⁸

In the event of an amendment to the constitution, and the implementation of a framework that widens the circumstances under which access to abortion services in Ireland are available, the state must avoid replicating the onerous certification and assessment procedures currently in place.⁸⁹

Inequality in reproductive health services

Socio-economic inequality

The UN Committee on Economic, Social and Cultural Rights and the World Health Organisation have highlighted clear links between barriers to accessing reproductive health services and social inequality.⁹⁰

Termination of pregnancy is only possible in Ireland where there is a real and substantial risk to the life, as distinct from the health, of the mother, including in circumstances where the mother is suicidal, and subject to a detailed clinical assessment and certification process. Women who wish to access abortion services abroad are entitled to do so, but this is subject to their ability to travel, which in turn may be affected by their immigration, legal, health, social, family, socio-economic or other circumstances.

While Irish equality law protects individuals against discrimination and seeks to secure equal access to services, Irish Human Rights and Equality Commission has repeatedly raised its concern that the current legal framework on abortion therefore disproportionately impacts on certain groups of

⁸⁶ *P. and S. v Poland* (App.57375/08), 30 January 2013, para.75.

⁸⁷ *P. and S. v Poland* (App.57375/08), 30 January 2013, para.76.

⁸⁸ See Máiréad Enright *et al.* ‘Abortion Law Reform in Ireland: A Model for Change’, *feminists@law*, Vol 4, No 1 (2015), p14.

⁸⁹ This will be discussed further in section 5 of this paper.

⁹⁰ CESCR GC 22, para. 8: ‘the right to sexual and reproductive health is also deeply affected by “social determinants of health”, as defined by WHO. In all countries, patterns of sexual and reproductive health generally reflect social inequalities in society and unequal distribution of power based on gender, ethnic origin, age, disability and other factors. Poverty, income inequality, systemic discrimination and marginalization based on grounds identified by the Committee are all social determinants of sexual and reproductive health, which also have an impact on the enjoyment of an array of other rights as well. The nature of these social determinants, which are often expressed in laws and policies, limits the choices that individuals can exercise with respect to their sexual and reproductive health. Therefore, to realize the right to sexual and reproductive health, States parties must address the social determinants as manifested in laws, institutional arrangements and social practices that prevent individuals from effectively enjoying in practice their sexual and reproductive health.’

women, and this concern has been echoed by multiple United Nations Human Rights treaty bodies, including in the recent UN Human Rights Committee decisions in *Mellet* and *Whelan*.⁹¹

Gender inequality

The current legal framework also raises the more specific consideration of gender equality and gender discrimination.

As discussed earlier in this section, international human rights law has consistently linked reproductive health services with the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The Convention on the Elimination of all forms of Discrimination against Women requires that states eliminate discrimination in to ensure access to healthcare 'on a basis of equality of men and women'.⁹² A recent Joint Statement by UN and regional human rights experts made a more explicit linkage between gender discrimination and restrictions on reproductive health services, stating:

'Sexual and reproductive health and rights are based on universally accepted human rights standards, as codified in international and regional treaties [...] the criminalization of or other failure to provide services that only women require, such as abortion and emergency contraception, constitute discrimination based on sex, and is impermissible.'⁹³

In her concurring opinion on the *Mellet* decision, UN Human Rights Committee member Sarah Cleveland stated that 'the Committee's finding of a violation of article 26 in the author's case [...] is fully justified on grounds of discrimination arising from gender stereotyping'.⁹⁴

It is the view of the Commission that there is a clear socio-economic and gender equality case for a revised and expanded framework for access to abortion services in Ireland.

⁹¹ Human Rights Committee (2016) *Mellet* decision, para. 7.11. 'The differential treatment to which the author was subjected in relation to other similarly situated women failed to adequately take into account her medical needs and socio-economic circumstances and did not meet the requirements of reasonableness, objectivity and legitimacy of purpose'. See also Human Rights Committee (2017) *Whelan* decision, para. 7.12.

⁹² CEDAW article 12.

⁹³ Joint Statement by UN human rights experts, the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples' Rights (September 2015): 'Sexual and reproductive health and rights are based on universally accepted human rights standards, as codified in international and regional treaties [...] the criminalization of or other failure to provide services that only women require, such as abortion and emergency contraception, constitute discrimination based on sex, and is impermissible.' Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16490&LangID=E>.

⁹⁴ Human Rights Committee (2016) *Mellet* decision, Annex II at paras 14 and 16. Concerns about the gender equality considerations raised by the current framework were also raised during parliamentary debates in advance of the passage of the Protection of Life During Pregnancy Act 2013, including by a former Minister for Justice Alan Shatter TD, who stated 'the right of pregnant women to have their health protected is, under our constitutional framework, a qualified right, as is their right to bodily integrity.' See speech delivered by Alan Shatter TD, Minister for Justice, Equality and Defence in Dáil Éireann during Private Members Time on Tuesday, 27th November 2012. Available at <http://www.justice.ie/en/JELR/Pages/SP12000333>.

4. A review of legal and regulatory frameworks in other jurisdictions

In this section, the legal and regulatory frameworks for access to abortion services in a number of other jurisdictions are briefly outlined. The jurisdictions outlined in this section do not necessarily form the basis of an endorsement or recommendation by the Commission, but may be useful when considering the design of a revised framework for access to abortion services in the Irish context.

Spain

Abortion in Spain is regulated by criminal law under *Organic Law 2/2010 on Sexual and Reproductive Health and the Voluntary Interruption of Pregnancy* [*Ley 2/2010 Orgánica de Salud Sexual y Reproductiva y de la Interrupción Voluntaria del Embarazo*].⁹⁵ Abortions can legally be performed upon a women's request up to the 14th week of pregnancy, subject to the women having been fully informed of her rights to maternal support, and three days having elapsed between the provision of this information and the abortion procedure.⁹⁶ After the 14th week, an abortion can be legally performed up to 22 weeks pregnancy upon two physicians agreeing that continuation of the pregnancy risks the life or health of the women or there to be a serious risk of foetal abnormalities.⁹⁷

Abortions may only be performed in a public or certified private hospital, by or under the supervision of a specialist physician with the express written consent of the women or her legal representative.⁹⁸ The legislation guarantees that public health services provide universal access to abortion in all cases complying with the above requirements.⁹⁹ Health care professionals can object to performing an abortion on the grounds of conscience provided that the women's access to care is not affected.¹⁰⁰

Sweden

Abortion in Sweden is regulated by criminal law under the *Abortion Act 1974*.¹⁰¹ Abortion is legally available upon a women's request up until the end of the 18th week of pregnancy, provided the procedure will not seriously risk the life or health of the women.¹⁰² Beyond the 18th week of pregnancy, an abortion can be performed only if the National Board of Health and Welfare has granted the women special permission to undergo the procedure. Grounds for such permission include the physical and psychological impacts on the woman of continuing the pregnancy, or the risk of foetal abnormalities. Generally such applications are not granted if the foetus is held to be viable.¹⁰³ Where the continuance of a pregnancy entails serious danger to the life or health of a women, however, an abortion may be performed at any stage of the pregnancy subject to the

⁹⁵ Available at <https://www.boe.es/buscar/act.php?id=BOE-A-2010-3514>.

⁹⁶ *Ley 2/2010 Orgánica de Salud Sexual y Reproductiva y de la Interrupción Voluntaria del Embarazo* (Spain) section 14.

⁹⁷ *Ley 2/2010* section 15.

⁹⁸ *Ley 2/2010* section 13.

⁹⁹ *Ley 2/2010* section 18.

¹⁰⁰ *Ley 2/2010* section 19(2).

¹⁰¹ *Lag Om Abort [Abortlagen]* (*Svensk Författningssamling 1974*) Abortion Act 1974 (Sweden), available at https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/abortlag-1974595_sfs-1974-595

¹⁰² Abortion Act 1974 (Sweden) section 1.

¹⁰³ Abortion Act 1974 (Sweden) section 3.

approval of the National Board of Health and Welfare.¹⁰⁴ The requirement to seek approval from the Board can be waived in emergency medical circumstances.

Abortion is provided as a public health service and must be performed in a public hospital or other state-approved medical institution.¹⁰⁵ Every women who has requested or undergone an abortion must be offered counselling.¹⁰⁶ As of a 2008 amendment to the Abortion Act, women need not be Swedish or resident in Sweden to receive an abortion.¹⁰⁷ Swedish legislation makes no provision for healthcare professionals to object to performing an abortion on the grounds of conscience.¹⁰⁸

New Zealand

Abortion in New Zealand is regulated by criminal law under both the *Crimes Act 1961*,¹⁰⁹ which outlines the grounds for legal abortion, and the *Contraception, Sterilisation and Abortion Act 1977*,¹¹⁰ which sets out the procedures medical practitioners must follow in order to legally authorise an abortion.

Abortions can be performed up to 20 weeks gestation subject to two medical practitioners agreeing that the continuance of a pregnancy would result in serious risk to the life or to the physical or mental health of a woman, or that that there is a substantial risk that the child, if born, would be ‘so physically or mentally abnormal as to be seriously handicapped’.¹¹¹ An abortion may also be legally performed where the pregnancy is the result of incest or sex with a guardian, or if the woman or girl is considered ‘severely subnormal within the meaning of section 138(2)’.¹¹² In determining the risk to the health of the women, practitioners can consider the age of the women and whether there are reasonable grounds for believing that the pregnancy is the result of sexual violation.¹¹³

In the case of a pregnancy of more than 20 weeks gestation, two medical practitioners must agree that the abortion is necessary to save the life of the women or to prevent serious permanent injury to her physical or mental health.¹¹⁴ Where the above criteria are met, each state-funded District Health Board must provide women access to abortion as a matter of public health care.¹¹⁵ Certifying medical practitioners are physicians certified by the Abortion Supervisory Committee, the statutory

¹⁰⁴ Abortion Act 1974 (Sweden) section 6.

¹⁰⁵ Abortion Act 1974 (Sweden) section 5.

¹⁰⁶ Abortion Act 1974 (Sweden) section 2.

¹⁰⁷ Elin Hofverberg ‘Sweden’ in *Abortion Legislation in Europe*, the Law Library of Congress Global, Legal Research Center, 2015.

¹⁰⁸ Anna Heino, Mika Gissler, Dan Apter & Christian Fiala. 2013. ‘Conscientious objection and induced abortion in Europe’ *The European Journal of Contraception & Reproductive Health Care*, Vol.18 (4).

¹⁰⁹ Crimes Act 1961 (New Zealand), available at <http://legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

¹¹⁰ *Contraception, Sterilisation and Abortion Act 1977*, available at <http://www.legislation.govt.nz/act/public/1977/0112/latest/DLM17680.html>.

¹¹¹ Crimes Act 1961 (New Zealand) section 187A (2).

¹¹² Section 138(2) of the Crimes Act 1961 regulates sexual exploitation of persons with ‘significant impairment’, defined at section 138(6) as “an intellectual, mental, or physical condition or impairment (or a combination of 2 or more intellectual, mental, or physical conditions or impairments) that affects a person to such an extent that it significantly impairs the person’s capacity—(a) to understand the nature of sexual conduct; or (b) to understand the nature of decisions about sexual conduct; or (c) to foresee the consequences of decisions about sexual conduct; or (d) to communicate decisions about sexual conduct.

¹¹³ Crimes Act 1961 (New Zealand) section 187A (2).

¹¹⁴ Crimes Act (New Zealand) section 187A (3).

¹¹⁵ See ‘DHB Responsibilities’, Abortion Services New Zealand, <http://abortionsservices.org.nz/ministry.html>.

committee which regulates the practice of abortion in New Zealand.¹¹⁶ One of the two certifying physicians authorising an abortion must be a practising obstetrician or gynaecologist.¹¹⁷ Doctors can refuse to perform an abortion on the grounds of conscience,¹¹⁸ but are obliged to inform the women where they can obtain the service from another practitioner they believe to hold no objection to performing the procedure.¹¹⁹

The *Care of Children Act 2004* protects the right of the child to consent to an abortion.¹²⁰

Australia

The regulation of abortion in Australia stems from criminal law, originating in the English *Offences Against the Person Act 1861*.¹²¹ Upon Federation of the states and territories in 1901, the legislative powers of the Australian Parliament were not made to include a mandate over criminal law, and as a result abortion is today regulated at state level. Abortion law therefore differs across the 9 states and territories of the country. Two of the states to have most recently reformed abortion law are Tasmania (2013) and Victoria (2008).

Tasmania

The *Reproductive Health (Access to Terminations) Act 2013*¹²² decriminalised abortion in Tasmania, explicitly exempting a women who consents to, assists in or performs a termination on herself from any criminal liability.¹²³ Under the legislation, abortion is available upon a women's request up to the end of the 16th week of pregnancy.¹²⁴ After 16 weeks, a women may access an abortion if two medical practitioners agree that continuation of the pregnancy entails a greater risk of injury to the women's physical or mental health than if the pregnancy were terminated.¹²⁵ At least one of the medical practitioners must specialise in obstetrics or gynaecology, and in their assessing the risk of injury to the women the medical practitioners must have regard to the women's current and future physical, psychological, economic and social circumstances.¹²⁶

There is at present no publicly funded abortion service in Tasmania.¹²⁷ Medical practitioners and counsellors have the right to refuse to perform an abortion on the grounds of conscience, except in case of emergency circumstances where the procedure is necessary to save the life of the women or to prevent her serious physical injury.¹²⁸ Practitioners who invoke a conscientious objection are

¹¹⁶ As established under section 10 of the Contraception, Sterilisation and Abortion Act 1977 (New Zealand).

¹¹⁷ Contraception, Sterilisation and Abortion Act 1977 (New Zealand) section 32(2)(b)(i).

¹¹⁸ Contraception, Sterilisation and Abortion Act 1977 (New Zealand) section 46(1).

¹¹⁹ Health Practitioners Competence Assurance Act 2003 (New Zealand) section 174.

¹²⁰ Care of Children Act 2004 (New Zealand) section 38. Available at <http://legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html>.

¹²¹ Offences Against the Person Act 1961 (UK), available at http://www.legislation.gov.uk/ukpga/1861/100/pdfs/ukpga_18610100_en.pdf.

¹²² Reproductive Health (Access to Terminations) Act 2013 (Tasmania), available at http://www.parliament.tas.gov.au/bills/Bills2013/pdf/24_of_2013.pdf.

¹²³ Reproductive Health (Access to Terminations) Act 2013 (Tasmania) section 8.

¹²⁴ Reproductive Health (Access to Terminations) Act 2013 (Tasmania) section 4.

¹²⁵ Reproductive Health (Access to Terminations) Act 2013 (Tasmania) section 5(1).

¹²⁶ Reproductive Health (Access to Terminations) Act 2013 (Tasmania) section 5(2)-(3).

¹²⁷ See the Department of Health and Human Services (Tasmanian Government), available at http://www.dhhs.tas.gov.au/publichealth/healthy_communities/termination_of_pregnancy.

¹²⁸ Reproductive Health (Access to Terminations) Act 2013 (Tasmania) section 6.

obliged to refer the women to another medical practitioner who they reasonably believe will not object to performing the procedure.¹²⁹

Victoria

The *Abortion Law Reform Act 2008*¹³⁰ provides access to both medical and surgical abortion upon request for women no more than 24 weeks pregnant.¹³¹ After 24 weeks, an abortion can be performed where two medical practitioners believe the procedure to be appropriate in 'all of the circumstances', having regard to relevant medical circumstance and the women's current and future physical, psychological and social circumstances.¹³² A registered pharmacist or nurse may administer a drug to cause an abortion after 24 weeks pregnancy upon receiving written direction to do so by a registered medical practitioner.¹³³

Abortion services are offered by both private and public health service providers at a cost. However those in receipt of Medicare welfare assistance may be able to access abortion without incurring a cost.¹³⁴ Medical practitioners have a rights to conscientious objection, bar in an emergency circumstance where the procedure is necessary to preserve the life of the pregnant women. Practitioners invoking this right are obliged to refer the women to another practitioner known not to have a conscientious objection.¹³⁵

United Kingdom

Abortion in the United Kingdom is regulated under criminal law through the *Abortion Act 1967*,¹³⁶ the *Offences Against the Person Act 1861*.¹³⁷

Abortion can be lawfully performed where a pregnancy has not exceeded 24 weeks and two registered medical practitioners agree that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant women or any existing children of her family. Beyond 24 weeks gestation, a pregnancy can be terminated where two registered medical practitioners agree that the termination is necessary to prevent grave permanent injury to the physical or mental health of the women, that the continuance of the pregnancy would involve risk to the life of the pregnant women, greater than if the pregnancy were terminated, or that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.¹³⁸ In determining

¹²⁹ Reproductive Health (Access to Terminations) Act 2013 (Tasmania) section 7(2).

¹³⁰ Abortion Law Reform Act 2008 (Victoria), available at [http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTOject_Store/LTOjectSt1.nsf/DDE300B846EED9C7CA257616000A3571/69D6C3A5305F935BCA2577610017C10D/\\$FILE/08-58a003.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTOject_Store/LTOjectSt1.nsf/DDE300B846EED9C7CA257616000A3571/69D6C3A5305F935BCA2577610017C10D/$FILE/08-58a003.pdf).

¹³¹ Abortion Law Reform Act 2008 (Victoria) section 4.

¹³² Abortion Law Reform Act 2008 (Victoria) section 5.

¹³³ Abortion Law Reform Act 2008 (Victoria) section 7.

¹³⁴ See 'Abortion Services in Australia', Victoria State Government, available at <https://www.betterhealth.vic.gov.au/health/healthyliving/abortion-services-in-victoria>.

¹³⁵ Abortion Law Reform Act 2008 (Victoria) section 8.

¹³⁶ Abortion Act 1967 (UK), available at http://www.legislation.gov.uk/ukpga/1967/87/pdfs/ukpga_19670087_en.pdf.

¹³⁷ Offences Against the Person Act 1861 (UK), available at http://www.legislation.gov.uk/ukpga/1861/100/pdfs/ukpga_18610100_en.pdf.

¹³⁸ Abortion Act 1967 (UK) section 1, as amended by the Human Fertilisation and Embryology Act 1990 (UK) section 37 (1).

the risk to a pregnant women's health, practitioners may take account of the women's actual or reasonably foreseeable environment.¹³⁹

In cases where these circumstances are met, abortion is universally available through publicly funded health services.¹⁴⁰ The service must be performed in a hospital or other place approved under the National Health Service Acts, except where termination is deemed immediately necessary to save the life or prevent grave permanent injury to the physical or mental health of the pregnant women. In such cases it is also permissible for an abortion to be performed upon the basis of a single registered medical practitioner's assessment.¹⁴¹

Medical practitioners can refuse to participate in an abortion treatment on the grounds of conscientious objection, except in circumstances where the treatment is necessary to save the life or prevent grave permanent injury to the physical or mental health of the pregnant women.¹⁴²

Canada

There are no criminal laws restricting access to abortion in Canada. In 1988 the Canadian Supreme Court ruled that provisions in the Criminal Code which had criminalised abortion to be in contravention of Article 7 of the *Canadian Charter of Rights and Freedoms*, which enshrines the right to 'life, liberty and security of the person'.¹⁴³ Since this Supreme Court ruling, abortion in Canada has been regulated by the *Canada Health Act 1984*,¹⁴⁴ the standard legislation regulating all other medical procedures, and there are no legally defined term limits for an abortion.

In accordance with the *Canada Health Act 1984*, public health providers offer universal access to abortion as a health service.¹⁴⁵

While there is no legislative provision for conscientious objection, the Canadian Medical Association advocate that no physician should be compelled to participate in an abortion, and that those who do object on the grounds of moral or religious belief should inform their patient of this so they can consult another physician.¹⁴⁶

¹³⁹ Abortion Act 1967 (UK) section 1(2).

¹⁴⁰ See 'Abortion', National Health Service (UK), available at <http://www.nhs.uk/conditions/Abortion/Pages/Introduction.aspx>.

¹⁴¹ Abortion Act 1967 (UK) section 1(3)-(4).

¹⁴² Abortion Act 1967 (UK) section 4.

¹⁴³ R v Morgentaler 1988 (Canadian Supreme Court).

¹⁴⁴ Canada Health Act 1984, available at <http://laws-lois.justice.gc.ca/eng/acts/C-6/>.

¹⁴⁵ See Action Canada's *Submission For Canada's Review Before the U.N. Committee on the Elimination of All Forms of Discrimination Against Women*, 65th Session, paragraph 21, available at http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/INT_CEDAW_NGO_CAN_25402_E.pdf.

¹⁴⁶ Canadian Medical Association, 1988. *CMA Policy: Induced Abortion*. Available at <http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD88-06.pdf>.

5. Recommendations on a new legal and regulatory framework for access to abortion in Ireland

This section outlines a number of further considerations that the state should bring to bear on constructing a revised legal and regulatory framework for access to abortion services.

Constitutional reform

Article 40.3.3° of the Constitution of Ireland currently limits the extent to which Ireland can revise its legal and regulatory framework governing access to abortion.

Flowing from the human rights and equality concerns raised in Section 3, the Commission is of the view that the current Constitutional arrangement:

- puts in place barriers to women’s right to bodily autonomy and the highest attainable standard of health;
- disproportionately impacts on particular groups of women in the state, contributing to their unequal treatment depending on their socio-economic, health, immigration, disability or other status; and
- restricts the state’s ability to reform the legal and policy framework governing women’s reproductive health, including access to abortion services, in a way that meets international human rights standards

Constitutional reform is therefore fundamental to ensuring that a human rights compliant framework for access to abortion services can be achieved.¹⁴⁷

There has been a particular focus in recent discussions around reform in this area on the suitability of provisions governing access to abortion services being placed in a constitutional text, rather than in primary legislation. Concerns have been raised that the continued placement of provisions for access to abortion services within the Constitution – even in the context of a wider set of circumstances and on wider grounds – risks creating a new framework that is unduly complex and inflexible.¹⁴⁸ The placement of such provisions in the Constitution also risks restricting the ability of the Oireachtas to act to address further challenges that may arise without entering into the complex political and legal process of further constitutional change.¹⁴⁹

The Commission shares these concerns, and stresses the importance of ensuring that any Constitutional reform undertaken avoids creating new barriers that serve to repeat or replicate the barriers to human rights and equality, including the right to health and bodily autonomy, that are currently in place. Legislation and regulation, rather than Constitutional provisions, are a more appropriate means of creating a framework for access to reproductive health services, including abortion. A legislative and regulatory approach enables the state to design a framework for access to

¹⁴⁷ The Commission has regularly endorsed the recommendations of UN treaty monitoring bodies that Ireland take all necessary measures, including constitutional reform, to revise its legal framework on abortion. See IHREC Citizens’ Assembly Submission for a detailed summary of these recommendations.

¹⁴⁸ See, for example, Fiona de Londras (2015), ‘Constitutionalizing Fetal Rights: A Salutary Tale from Ireland’, *Michigan Journal of Gender and Law*, Vol 22, Issue 2, p. 243. See also De Londras (2016), *Submission to the Citizens’ Assembly on the 8th Amendment to the Irish Constitution (Article 40.3.3) and Associated Matters*, section 5. Available at the Assembly’s submissions page: <https://www.citizensassembly.ie/en/Submissions/Eighth-Amendment-of-the-Constitution/>. See also, Máiréad Enright *et al.* ‘Abortion Law Reform in Ireland: A Model for Change’, *feminists@law*, Vol 4, No 1 (2015), pp. 8-16.

¹⁴⁹ Articles 46 and 47 of the Constitution of Ireland require that an amendment to the Constitution be approved by decision of the people in a referendum.

abortion services that meets the needs of women. It also equips the Oireachtas to legislate further, and as appropriate, in response to changes in public need, developments in international law, changes in medical best practice or other developments.¹⁵⁰

The Commission recommends that the state carry out a referendum to put to the People the deletion of Article 40.3.3° of the Constitution of Ireland in order to permit the development of a framework governing access to abortion in Ireland that has a basis in primary legislation and regulation.

Grounds that may apply in a reformed framework

Flowing from the issues identified in section 3, a reformed framework for access to abortion services in Ireland should seek to meet the needs of women in a wider set of circumstances than is possible under the current framework.

These wider circumstances should include access to abortion due to:

- Risk to life, health and wellbeing
- Socio economic or family circumstances
- Pregnancy as a result of rape or incest
- Fatal foetal abnormality

As stated in section 3, onerous certification and assessment procedures may have a potentially harmful effect on women seeking abortion services, particularly on women who are more vulnerable or who may have been victim of sexual assault. The Commission further recalls the findings of the Human Rights Committee in the *Mellet* and *Whelan* decisions, including the violation of Article 7 ICCPR (prohibition on cruel, inhuman and degrading treatment). A reformed framework for access to abortion services in Ireland should avoid replicating the conditions that led to these violations, and avoid the creation of new processes where vulnerable women and girls may be subject to trauma, re-victimization, delays in treatment, or other harms.

A reformed framework for access to abortion services in Ireland should avoid to the greatest extent possible the creation of a complex system of certification and approval for access to abortion on multiple grounds. A framework that approaches access to abortion primarily as a private matter between a woman and her physician may achieve this. Numerous jurisdictions in Europe and around the world have adopted this approach, permitting access to abortion on request subject to various term limits, after which certification procedures may apply.¹⁵¹

The Commission recommends that a reformed framework for access to abortion services in Ireland should encompass circumstances that reflect the wider reproductive health needs of women in Ireland. These should include access to abortion services for reasons of:

- **Risk to life, health or wellbeing**
- **Socio-economic or family circumstances**

¹⁵⁰ The Commission notes the recommendation made by the Citizens' Assembly on this point. At the Fifth Meeting of the Citizens' Assembly on the Eighth Amendment of the Constitution on 22 April 2017, the Citizens' Assembly voted to recommend that 'Article 40.3.3 should be replaced with a constitutional provision that explicitly authorises the Oireachtas to legislate to address termination of pregnancy, any rights of the unborn, and any rights of the woman.' See Ballot 3, available at <https://www.citizensassembly.ie/en/Meetings/Fifth-Meeting-of-the-Citizens-Assembly-on-the-Eighth-Amendment-of-the-Constitution.html>.

¹⁵¹ See the examples of Spain, Sweden, Canada, Tasmania and Victoria outlined in section 4.

- **Pregnancy due to rape or incest**
- **Fatal foetal abnormality.**

The Commission recommends that these circumstances are incorporated into a framework for access to abortion services in Ireland that places the decision-making process primarily in the hands of the pregnant women in consultation with her physician, and that avoids to the greatest extent possible onerous grounds-based certification procedures.

Gestational term limits

As outlined in section 4, the imposition of gestational term limits is a standard feature of the frameworks for access to abortion services in many jurisdictions, while some jurisdictions, such as Canada, do not include gestational term limits in legislation.

Gestational term limits differ from jurisdiction to jurisdiction, and can be put in place for a variety of reasons. Bases for choosing a gestational limit include, for example, consideration of the method of abortion being regulated, or consideration of the point at which a foetus is thought to become viable.¹⁵² There exist a range of arguments both in favour of, and against, incorporating gestational term limits into the legislative framework governing access to abortion services. See, for example, the various concerns communicated to the Government of Victoria, Australia in its public consultation on abortion law reform.¹⁵³ The Citizens' Assembly, in its deliberations in April 2017, considered the question of gestational term limits, and options for this were included in their ballots.¹⁵⁴

As gestational term limits constitute a potential barrier to access, their inclusion in a framework for access to abortion services in Ireland should be informed by the principles of necessity and proportionality, and with regard to the human rights and equality issues already identified in this paper. These include:

- The right of the pregnant woman to bodily autonomy and to the highest attainable standard of physical and mental health
- The need to avoid to the greatest extent possible onerous certification procedures
- The need to reduce to the greatest extent possible the risk that imposition of limits may contribute to or exacerbate trauma or stigma.

The Commission recommends that any gestational term limits included in a reformed framework for access to abortion services in Ireland should be:

- **Devised in keeping with best medical practice, and with the health of the pregnant woman as the primary focus**
- **Necessary, proportionate, and should have due regard to a woman's right to bodily autonomy, and her right to the highest attainable standard of physical and mental health**

¹⁵² See Victorian Law Reform Commission (2008), *Law of Abortion: Final Report*, p. 40.

¹⁵³ See Victorian Law Reform Commission (2008), *Law of Abortion: Final Report*, Chapters 3 and 6. For a discussion on the human rights and equality dimension of legislating for and regulating abortion by gestational age, see Joanna N Erdman, 'Theorizing Time in Abortion Law and Human Rights'. *Health and Human Rights Journal*, Volume 19, No. 1, June 2017, p.29.

¹⁵⁴ See <https://www.citizensassembly.ie/en/Meetings/Fifth-Meeting-of-the-Citizens-Assembly-on-the-Eighth-Amendment-of-the-Constitution.html>.

- **Subject to regular review and assessment.**

Conscientious objection

The state has an obligation under international human rights law to vindicate the right of everyone to freedom of thought, conscience and religion,¹⁵⁵ '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'.¹⁵⁶

Provision for conscientious objection is a regular feature of the legal frameworks for access to abortion services in many jurisdictions.¹⁵⁷

Section 17 of the Protection of Life During Pregnancy Act 2013 permits conscientious objection by medical practitioners in the context of procedures provided for in the Act.¹⁵⁸ Medical procedures undertaken due to the risk of loss of life in an emergency are explicitly excluded from the purview of this section.¹⁵⁹ The section further obliges the objecting medical practitioner to transfer the care of the patient to enable the procedure to be carried out.¹⁶⁰ The Irish Human Rights and Equality Commission (Designate), in its observations on the draft legislation in 2013, recommended that the legislation provide for a specified offence in the event that 'a person claiming to have a conscientious objection and refusing to carry out or assist in carrying out a lawful procedure knowingly contributes to the death of or significant harm to the woman', however this recommendation was not reflected in the legislation as enacted.¹⁶¹

A revised framework for access to abortion services in Ireland would require provisions for conscientious objection adapted to the wider circumstances in which access may be permitted. For example, the 'emergency' exception in the current legislation deals only with risk of loss of life, given the current Constitutional limitations of the framework. A revised framework permitting access to abortion for reasons of health would arguably require an exception to conscientious objection that also encompasses the risk of immediate danger to health or significant harm.¹⁶²

The Commission also notes the risk that conscientious objection can become the norm, rather than the exception, placing undue barriers in the path of women seeking abortion services.¹⁶³

¹⁵⁵ See, for example, Article 9, European Convention on Human Rights (ECHR); Article 18(2) International Covenant on Civil and Political Rights (ICCPR).

¹⁵⁶ ECHR Article 9(2). Article 18(3) of the ICCPR reads 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'

¹⁵⁷ See section 4. Also, for a comparative analysis of the regulation of conscientious objection to abortion in the UK, Norway, Portugal and Italy, see Wendy Chavkin *et al*, 'Regulation of Conscientious Objection to Abortion: AN International Comparative Multiple-Case Study', *Health and Human Rights Journal*, Volume 19, No 1, June 2017, p. 55 (Hereafter 'Chavkin *et al* 2017').

¹⁵⁸ Section 17(1): 'Subject to subsections (2) and (3), nothing in this Act shall be construed as obliging any medical practitioner, nurse or midwife to carry out, or to assist in carrying out, any medical procedure referred to in section 7(1) or 9(1) to which he or she has a conscientious objection.'

¹⁵⁹ Section 17(2): 'Subsection (1) shall not be construed to affect any duty to participate in any medical procedure referred to in section 8(1).'

¹⁶⁰ Section 17(3): 'A person who has a conscientious objection referred to in subsection (1) shall make such arrangements for the transfer of care of the pregnant woman concerned as may be necessary to enable the woman to avail of the medical procedure concerned.'

¹⁶¹ IHREC (Designate) PLDP Observations 2013, p.4.

¹⁶² Máiréad Enright *et al*. suggest a provision permitting a good faith conscientious objection unless an abortion is 'immediately necessary to save the pregnant woman's life or to prevent severe or disabling damage to her health'. See Máiréad Enright *et al.*, 'Abortion Law Reform in Ireland: A Model for Change', *feminists@law*, Vol 4, No 1 (2015), p 15.

¹⁶³ Chavkin *et al*. 2017, p.60.

The European Committee of Social Rights has heard a number of recent collective complaints against Italy under the Revised European Social Charter¹⁶⁴ concerning the accessing of reproductive services where a high number of medical health practitioners were exercising the right to conscientiously object to carrying out the termination of pregnancies.¹⁶⁵ It decided that: ‘the provision of abortion services must be organised so as to ensure that the needs of patients wishing to access services are met’¹⁶⁶ and that the availability of healthcare ‘applies with particular force to time-sensitive procedures such as abortion’.¹⁶⁷ The unavailability of non-objecting practitioners, particularly in certain areas, resulted in a violation of the right to protection of health (Article 11)¹⁶⁸ and in conjunction with that right, found that the treatment involved multiple discrimination (Article E).¹⁶⁹ Additionally, the Committee found discriminatory treatment in relation to the treatment of the non-objecting medical practitioners who were found to have suffered cumulative disadvantages at work.¹⁷⁰

These cases demonstrate the necessity to ensure that provisions for conscientious objection operate within a legislative and regulatory framework that ensures the necessary systems and resources to guarantee that women are provided safe and timely access to medical procedures.

The Commission recommends that a reformed framework for access to abortion services in Ireland should put appropriate provisions in place to safeguard the right of medical practitioners to conscientious objection where there is no immediate danger to the patient’s life or health. These provisions should

- **Ensure that, notwithstanding the conscientious objection, women have safe and timely access to the care that they require.**

¹⁶⁴ The Revised European Social Charter (the Revised Charter) was adopted by the Council of Europe in 1996 and sets out those human rights which are described as ‘economic and social’ rights. The Revised European Social Charter comprises the European Social Charter (adopted by the Council of Europe in 1961) together with its additional Protocol and other amendments. Ireland ratified the Revised Charter in 2000. Social partners and non-governmental organisations can lodge collective complaints regarding violations by states who are party to the Revised Charter. Complaints are examined by the European Committee of Social Rights, following which it adopts a decision on the merits of the complaint. The Committee of Ministers subsequently adopts a resolution and may recommend that the State concerned take specific measures to bring the situation into line with the Charter.

¹⁶⁵ In this way, lawful abortion services were not available in practice, particularly in certain regions of Italy. See *International Planned Parenthood Federation – European Network (IPPR EN) v Italy* (Complaint No. 87/2012), available at: <http://hudoc.esc.coe.int/eng/?i=cc-87-2012-dmerits-en> and *Confederazione Generale Italiana del Lavoro (CGIL) v Italy* (Complaint No. 91/2013), available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168063ecd7>.

¹⁶⁶ Para. 163 of *International Planned Parenthood Federation – European Network (IPPR EN) v Italy* (Complaint No. 87/2012), available at: <http://hudoc.esc.coe.int/eng/?i=cc-87-2012-dmerits-en>.

¹⁶⁷ Para. 164 of *International Planned Parenthood Federation – European Network (IPPR EN) v Italy* (Complaint No. 87/2012), available at: <http://hudoc.esc.coe.int/eng/?i=cc-87-2012-dmerits-en>.

¹⁶⁸ Article 11 of the Revised European Social Charter provides as follows:

‘With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.’

¹⁶⁹ Article E of the Revised Charter provides as follows: ‘The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.’

¹⁷⁰ The Committee decided that there had been a violation of Article 1(2) of the Revised Charter in *Confederazione Generale Italiana del Lavoro (CGIL) v Italy* (Complaint No. 91/2013), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168063ecd7>

- **Require medical institutions to ensure that they have the means to accommodate conscientious objection in a way that does not adversely affect women’s access to services.**
- **Establish in law that where a person claiming to have a conscientious objection and refusing to carry out or assist in carrying out a lawful procedure knowingly contributes to the death of or significant harm to the woman, that person and/or the institution shall be guilty of a specified offence.**

Mental capacity and assisted decision-making

The State is currently undertaking a series of legal reforms in preparation for the ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD) which are of significance in relation to access to abortion.¹⁷¹

Article 23 CRPD prohibits discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others.¹⁷² Article 25 CRPD obliges States to ‘provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health’.

Presumption of legal capacity of persons with a disability and equal recognition before the law are protected under Article 12 of the CRPD. This right implies that legal capacity is a universal attribute, which must be upheld for all persons with disabilities on an equal basis with others. Under Article 12 CRPD, persons with disabilities must be supported in exercising their legal capacity, recognising that mental capacity may fluctuate depending on a person’s disability.¹⁷³ This right is crucial for persons with disabilities when it comes to making fundamental decisions about their health,¹⁷⁴ including their reproductive health.

The Commission has called for a move away from archaic and discriminatory approaches to capacity towards an approach based on supporting a person’s will and preference in decision making, as set out in international human rights law.¹⁷⁵ The Commission has raised concerns about the degree to which the *Assisted Decision-Making (Capacity) Act 2015* meets these standards.¹⁷⁶

¹⁷¹ This includes preparations for the establishment of the Decision Support Services provided for under the *Assisted Decision-Making (Capacity) Act* in 2015. This legislation awaits commencement for the main part pending the operationalisation of the Decision Support Services. In addition, the *Disability Miscellaneous Provisions Bill 2016* is progressing through the legislative process. Draft proposals to address the deprivation of liberty in certain care settings are outstanding at the time of writing.

¹⁷² The Commission notes recent reforms under the *Criminal Law (Sexual Offences) Act 2017*. The Commission welcomed the repeal of paternalistic protections under s 5 *Criminal Law (Sexual Offences) Act 1993* but stated that all persons should be presumed to have capacity to consent to a sexual act and recommended the provision of information and supports to assist persons in exercising their autonomy to consent to sexual relations.

¹⁷³ See also Irish Human Rights and Equality Commission (Designate) (2015) *Section 5 Criminal Law (Sexual Offences) Act 1993 Discussion Paper Submission on behalf of the Irish Human Rights and Equality Commission (Designate)* available at: http://www.ihrec.ie/download/pdf/ihrec_submission_amendment_s5_sexual_offences_act_1993_9sept14.pdf.

¹⁷⁴ UN Committee on the Rights of Persons with Disabilities (2014), *General Comment No. 1: Article 12: Equal recognition before the law*, 19 May 2014, CRPD/C/GC/1, at para. 8. Available at:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

¹⁷⁵ Irish Human Rights and Equality Commission (Designate) (2014) *Observations on the Assisted Decision-Making (Capacity) Bill 2013*, available at: <http://www.ihrec.ie/news/2014/03/24/ihrc-publishes-observations-on-the-assisted-decisi/>.

¹⁷⁶ Irish Human Rights and Equality Commission (2016) *Observations on the General Scheme of the Equality / Disability (Miscellaneous Provisions) Bill*, pp.25-30. Available at <https://www.ihrec.ie/app/uploads/2016/11/Observations-on-the-General-Scheme-Equality-Disability-Miscellaneous-Provisions-Bill.pdf>. A recent media report revealed that the Health

A revised framework for access to abortion services in Ireland should meet the state's obligations under the UN Convention on the Rights of Persons with Disabilities, in particular under Articles 12 (equal recognition before the law), 23 (respect for home and the family) and 25 (health). As with other areas of health care provision, a revised framework should include CRPD-compliant procedures for assisted decision-making in accessing abortion or other reproductive health services where required. In cases where a person's will and preference cannot be discerned, an approach which integrates the best interpretation of a person's will and preferences should replace the paternalistic 'best interests' model.

The Commission recommends that in devising a revised framework for access to abortion services in Ireland, the State have regard to its obligations under the UN Convention on the Rights of Persons with Disabilities, in particular Articles 12, 23 and 25, ensuring that, as with all areas of health care provision, CRPD-compliant procedures for assisted decision-making are applied.

Sexual and reproductive health education

The Commission notes the emphasis that international human rights bodies and experts in reproductive healthcare place on the importance of sexual and reproductive health education.

Article 11(2) of the Revised European Social Charter obliges States Parties to take appropriate measures to 'provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health'.

In its General Recommendation No. 24 on women's right to health, the UN CEDAW Committee recommends that 'States parties should ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls.'¹⁷⁷ It goes on to say that 'particular attention should be paid to the health education of adolescents, including information and counselling on all methods of family planning'.¹⁷⁸ The Committee on the Rights of the Child has also emphasised the importance of sexual and reproductive health education for both girls and boys.¹⁷⁹

In its General Comment No. 22 on the right to sexual and reproductive health, the UN Committee for Economic, Social and Cultural Rights draws attention to the important intersectional dimension of sexual and reproductive health education:

'the right to sexual and reproductive health, combined with the right to education (articles 13 and 14) and the right to non-discrimination and equality between men and women (articles 2 (2) and 3), entails a right to education on sexuality and reproduction that is comprehensive, non-discriminatory, evidence-based, scientifically accurate and age appropriate.'¹⁸⁰

Service Executive recently sought and was granted High Court orders permitting the inducement of a pregnant woman who is intellectually impaired, where concerns arose regarding the woman's mental capacity to understand the implications of the pregnancy, and to give her consent to treatment. The court orders also permit an emergency caesarean section if deemed to be required by the treating obstetrician. It is further reported that an assessment for considering whether the woman should be made a ward of court will follow. See Mary Carolan (2017) 'Doctors may induce birth of intellectually impaired woman's baby' The Irish Times 14 June 2017, available at: <http://www.irishtimes.com/news/crime-and-law/courts/high-court/doctors-may-induce-birth-of-intellectually-impaired-woman-s-baby-1.3119598>.

¹⁷⁷ CEDAW GR 24, para. 18.

¹⁷⁸ CEDAW GR 24, para. 23.

¹⁷⁹ CRC GC 15, paras. 54-57.

¹⁸⁰ CESCR GC 22, para.

The World Health Organisation has also stressed the importance of sexual health programmes for:

‘governments to promote healthy sexuality throughout the individual’s lifespan and to offer sexual health services that are appropriate, affordable, accessible and of good quality, to all persons and without stigma or discrimination on the basis of sex, race, ethnicity, age, lifestyle, income, sexual orientation or gender expression.’¹⁸¹

Gaps in Ireland’s sexual and reproductive health education system have been identified by the Commission and others in recent years,¹⁸² and both the UN Committee on the Rights of the Child¹⁸³ in 2016 and the UN CEDAW Committee in 2017¹⁸⁴ have made recommendations to Ireland to improve sexual and reproductive health education. In particular, the CEDAW Committee in 2017 recommended that Ireland:

‘Integrate compulsory and standardized age-appropriate education on sexual and reproductive health and rights into school curricula, including comprehensive sex education for adolescent girls and boys covering responsible sexual behaviours and focused on preventing early pregnancies, and ensure that sex education is scientifically objective and its delivery by schools is closely monitored and evaluated.’¹⁸⁵

The Commission fully endorses the views of the UN CEDAW Committee and the UN Committee on the Rights of the Child.

The Commission recommends that in parallel to a reformed framework for access to abortion services in Ireland, the state should develop a comprehensive, scientifically objective, sexual and reproductive health education policy to inform children, adolescents and adults in an age-appropriate manner about contraception, responsible sexual behaviour, family planning, and the availability of reproductive health services.

Access to abortion services in the Irish public health system

As set out in section 3, the Commission:

- recommends that the state approach legislation for and regulation of access to abortion services in Ireland primarily as a matter of healthcare policy, in line with its obligation under international human rights law to vindicate the right of both men and women to the highest attainable standard of physical and mental health; and
- is of the view that there is a clear socio-economic and gender equality case for a revised and expanded framework for access to abortion services in Ireland.

¹⁸¹ World Health Organisation (2010), *Developing sexual health programmes: a framework for action*, WHO/RHR/HRP/10.22. Available at http://apps.who.int/iris/bitstream/10665/70501/1/WHO_RHR_HRP_10.22_eng.pdf.

¹⁸² Irish Human Rights and Equality Commission (2017), *Ireland and the Convention on the Elimination of all Forms of Discrimination against Women: Submission to the UN Committee on the Elimination of Discrimination against Women on Ireland’s combined sixth and seventh periodic reports*, p. 84. See also Children’s Rights Alliance and UNICEF Ireland (2015), *Picture Your Rights, A report to the UN Committee on the Rights of the Child from children living in Ireland*.

¹⁸³ UN Committee on the Rights of the Child (2016), *Concluding observations on the combined third and fourth periodic reports of Ireland*, CRC/C/IRL/CO/3-4, para. 58 (c).

¹⁸⁴ UN Committee on the Elimination of Discrimination against Women (2017), *Concluding observations on the combined sixth and seventh periodic reports of Ireland*, CEDAW/C/IRL/CO/6-7. Para 39 (c).

¹⁸⁵ Para 39 (c).

The Commission also notes General Comment 22 of the Committee on Economic, Social and Cultural rights, which underlines the importance of states providing reproductive health services that are affordable for all,¹⁸⁶ and to

‘ensure universal access without discrimination for all individuals, including those from disadvantaged and marginalized groups, to a full range of quality sexual and reproductive health care, including maternal health care; contraceptive information and services; safe abortion care’¹⁸⁷

The Commission recommends that services available under the new framework should be incorporated into the existing public health and social welfare system, and made available to all, according to need, and without discrimination.

¹⁸⁶ CESCR GC 22, para. 17.

¹⁸⁷ CESCR GC 22, para. 45. See also United Nations General Assembly (2011), *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/66/254: ‘laws prohibiting public funding of abortion care ... make safe abortions and post-abortion care unavailable, especially to poor, displaced and young women’. Para. 24

6. Recommendations

The Constitutional position

The Taoiseach has confirmed the Government's intention to hold a referendum on the Eighth Amendment in 2018.

Legislation and regulation, rather than Constitutional provisions, are a more appropriate means of creating a framework for access to reproductive health services, including abortion. A legislative and regulatory approach enables the state to meet the needs of women, and allows the Oireachtas to make law in the future in response to changes in public attitudes, and to developments in international law and medical best practice.

The Commission recommends that the state carry out a referendum to put to the People the deletion of Article 40.3.3° of the Constitution of Ireland in order to permit the development of a framework governing access to abortion in Ireland that has a basis in primary legislation and regulation.

Recommendations on a framework for access to abortion services in Ireland

There is a clear human rights, socio-economic equality and gender equality case for a revised and expanded framework for access to abortion services in Ireland.

In order for a reformed framework for access to abortion services in Ireland to be human rights and equality compliant, it will need to address a far wider set of circumstances than is the case under the current framework, in keeping with the reproductive health needs of women.

A reformed framework for access to abortion services in Ireland should not replicate the barriers to women's bodily autonomy that are currently in place, barriers which may disproportionately affect more marginalised women within the state. Such barriers would include grounds that are inadequate to meet the needs of women, or unduly onerous administrative or certification procedures. The Commission recommends, therefore, that:

- **The state approach legislation for and regulation of access to abortion services in Ireland primarily as a matter of healthcare policy, in line with its obligation under international human rights law to vindicate the right of both men and women to the highest attainable standard of physical and mental health.**
- **Notwithstanding limitations that may be placed on access to abortion by legislation and regulation, the state decriminalise abortion in all circumstances.**
- **A revised legal framework for access to abortion services in Ireland should fully comply with Ireland's obligations under Articles 7 (prohibition on cruel, inhuman and degrading treatment), 17 (right to privacy) and 26 (equality before the law) ICCPR, as elaborated in the *Mellet* and *Whelan* decisions.**
- **A new framework for access to abortion services in Ireland should ensure that the state meets its international human rights obligations to children and adolescents. It should ensure that the framework is implemented in an age-appropriate manner, in a way that**

meets the particular health needs of girls and adolescents, and that gives due weight to their views, in keeping with the Convention on the Rights of the Child.

- A reformed framework for access to abortion services in Ireland should encompass circumstances that reflect the wider reproductive health needs of women in Ireland. These should include access to abortion services for reasons of:
 - Risk to life, health or wellbeing
 - Socio-economic or family circumstances
 - Pregnancy due to rape or incest
 - Fatal foetal abnormality
- These circumstances are incorporated into a framework for access to abortion services in Ireland that places the decision-making process primarily in the hands of the pregnant women in consultation with her physician, and that avoids where possible onerous grounds-based certification procedures.
- Any gestational term limits included in a reformed framework for access to abortion services in Ireland should be:
 - Devised in keeping with best medical practice, and with the health of the pregnant woman as the primary focus
 - Necessary, proportionate, and should have due regard to a woman's right to bodily autonomy, and her right to the highest attainable standard of physical and mental health
 - Subject to regular review and assessment.
- A reformed framework for access to abortion services in Ireland should put appropriate provisions in place to safeguard the right of medical practitioners to conscientious objection where there is no immediate danger to patient's life or health. These provisions should:
 - Ensure that, notwithstanding the conscientious objection, women have safe and timely access to the care that they require.
 - Require medical institutions to ensure that they have the means to accommodate conscientious objection in a way that does not adversely affect women's access to services.
 - Establish in law that where a person claiming to have a conscientious objection and refusing to carry out or assist in carrying out a lawful procedure knowingly contributes to the death of or significant harm to the woman, that person and/or the institution shall be guilty of a specified offence.
- In devising a revised framework for access to abortion services in Ireland, the State must have regard to its obligations under the UN Convention on the Rights of Persons with Disabilities, in particular Articles 12, 23 and 25, ensuring that, as with all areas of health care provision, CRPD-compliant procedures for assisted decision-making are applied.
- In parallel to a reformed framework for access to abortion services in Ireland, the state should develop a comprehensive, scientifically objective, sexual and reproductive health education policy to inform children, adolescents and adults in an age-appropriate manner about contraception, responsible sexual behaviour, family planning, and the availability of reproductive health services.

- **Services available under the new framework should be incorporated into the existing public health and social welfare system, and made available to all, according to need, and without discrimination.**



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