

Irish Human Rights and Equality Commission
Submission to the Citizens' Assembly in its consideration of
Article 40.3.3° of the Irish Constitution

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**Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas**

Irish Human Rights and Equality Commission

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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 2014 Act provided for the merging of the former Irish Human Rights Commission and the former Equality Authority into an enhanced body. The new Commission enjoys increased 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 *UN 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

As part of its mandate as a national human rights institution and national equality body, the Commission has a role in reporting to international bodies on Ireland's compliance with its obligations under international agreements.

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.

Purpose and Outline of the Submission

The Irish Human Rights and Equality Commission welcomes the opportunity to make a submission to the Citizens' Assembly in relation to its discussions on the Eighth Amendment to the Irish Constitution.³

The purpose of this submission is to summarise Ireland's human rights and equality obligations where they are applicable to the Citizens' Assembly's current discussions on Article 40.3.3° of the Irish Constitution.

For the present purposes, the Commission largely confines this submission to a description of the applicable regional and international human rights and equality standards which apply.

In order to inform the discussions of the Citizens' Assembly in relation to Ireland's human rights and equality obligations, the Commission outlines areas where shortcomings in protection have been articulated by relevant bodies.

This submission is structured to cover the following:

- 1. Domestic Legal Framework:** The Commission understands that the Citizens' Assembly will receive briefings on the current state of Irish law and this section is therefore stated briefly.
- 2. Obligations under the European Convention on Human Rights and Revised European Social Charter:** This section outlines jurisprudence of the European Court of Human Rights in cases involving both Ireland and other Member States of the Council of Europe, and in so doing, highlights obligations under the European Convention on Human Rights that are relevant to the Citizens' Assembly's deliberations. It also outlines some relevant case law of the European Committee of Social Rights.
- 3. Obligations under UN Human Rights Treaties:** This section provides an overview of the observations of United Nations treaty monitoring bodies which point to areas where Irish law and practice have been deemed to not be in full conformity with international law.
- 4. Conclusion and recommendations:** This section reiterates previous Commission recommendations for the Citizens' Assembly's consideration.

The Irish Human Rights and Equality Commission is available to meet with the Citizens' Assembly to expand on any of the matters raised or to discuss the practical implications of the recommendations set out below.

³ This submission is the majority view of the Irish Human Rights and Equality Commission.

Domestic Legal Framework

Constitutional law

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.⁴ Pursuant to the Thirteenth and Fourteenth Amendments to the Constitution, the text of Article 40.3.3° further protects ‘freedom to travel’ to procure a termination of pregnancy,⁵ and ‘freedom to obtain or make available [...] information relating to services lawfully available in another state.’⁶ 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;⁷ the discontinuation of life support for a pregnant woman who had been declared clinically brain dead;⁸ and deportation decisions made in respect of the fathers of unborn children.⁹

The Commission notes the limited extent to which the Irish State can legislate for the termination of pregnancy as primary legislation must be compliant with the Constitution.

EU law

EU law, as determined by the Court of Justice of the European Union, provides that termination of pregnancy, where it is performed in accordance with the law of the State in which it is carried out, constitutes a service. Information on termination services available outside of the jurisdiction can be disseminated in Ireland.¹⁰

Following this EU law jurisprudence, the Irish State insulated its position on abortion under EU law through a Protocol to the Maastricht Treaty. This Protocol was transposed to the Treaty on the Functioning of the EU upon adoption of the Lisbon Treaty and reads as follows:

⁴ *X Case (Attorney General v X)* [1992] 1 IR 1.

⁵ 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’.

⁶ 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’.

⁷ 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.

⁸ 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.

⁹ 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).

¹⁰ *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan (No.2)* [1991] 3 CMLR 849.

‘Nothing in the Treaties, or in the Treaty establishing the European Atomic Energy Community, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.’¹¹

The Charter of Fundamental Rights of the EU protects the right to health care,¹² though this only applies to EU Member States when they are implementing Union law.¹³

European Court of Human Rights

In the case of *A, B and C v Ireland*,¹⁴ three women brought applications to the European Court of Human Rights alleging that restrictions on abortion in Ireland were in breach of their human rights. In December 2010, the European Court of Human Rights found that the rights of applicant C had been infringed but it did not find violations in relation to applicants A and B.¹⁵

Primary law responding to A, B and C v Ireland

The *Protection of Life During Pregnancy Act 2013* (the ‘**2013 Act**’) was enacted to respond to the findings of the European Court of Human Rights in the *A, B and C* case. The 2013 Act allows, following a detailed clinical assessment and certification process, for terminations in the limited circumstances where there is a ‘real and substantial risk of loss of the woman’s life’ and ‘that risk can only be averted by carrying out the medical procedure’.¹⁶ The risk of loss of the woman’s life includes circumstances where the mother is suicidal.¹⁷ The responsible supervising body of the European Court of Human Rights has determined that Ireland adopted the measures required for execution of the judgment in *A, B and C v Ireland*.¹⁸

In July 2013, the former Irish Human Rights Commission published detailed observations on the *Protection of Life During Pregnancy Bill 2013*.¹⁹ In those observations, the former Irish Human Rights Commission identified matters not addressed in that Bill, nor subsequently in the 2013 Act, which could raise additional human rights and equality concerns. Many of these recommendations are of continued relevance to the discussions of the Citizens’ Assembly. For example, the former Commission raised concerns regarding access to judicial reviews arising under the legislation,²⁰ as

¹¹ Protocol 35 to the Treaty on the Functioning of the European Union.

¹² Article 35 of the Charter of Fundamental Rights of the EU provides that: ‘Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.’

¹³ Article 51 of the Charter of Fundamental Rights of the European Union.

¹⁴ *A, B and C v Ireland* (App. 25579/05) 16 December 2010.

¹⁵ This decision is discussed in more detail below in the context of Ireland’s obligations under the European Convention on Human Rights.

¹⁶ Section 7(1)(a) of the *Protection of Life During Pregnancy Act 2013*.

¹⁷ Section 9 of the *Protection of Life During Pregnancy Act 2013*.

¹⁸ The Council of Europe Committee of Ministers supervises the execution of final judgments of the European Court of Human Rights and determined that measures had been adopted in order to give effect to the judgment noting the enactment of the *Protection of Life During Pregnancy Act 2013*. See Resolution CM/ResDH(2014)273, available at:

[https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/ResDH\(2014\)273](https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/ResDH(2014)273)

¹⁹ See Irish Human Rights Commission (2013) *Observations on the Protection of Life During Pregnancy*, July 2013, available at: <https://www.ihrec.ie/ihrc-publishes-observations-on-the-protection-of-life-during-pregnancy-bill-2013/>

²⁰ See Irish Human Rights Commission (2013) *Observations on the Protection of Life During Pregnancy*, July 2013, para 71. The Irish Human Rights Commission recommended that expedited judicial review procedures and related supports be provided for in the Bill, and that such procedures would be required under Article 8 of

well as regarding the potential impact of assessment and certification procedures on women and girls, particularly in the context of a risk of suicide.²¹

These concerns remain,²² and raise questions as to the degree to which the 2013 Act is in compliance with the European Convention on Human Rights. European Court of Human Rights case law relevant to this question will be dealt with later in this submission.

While Irish equality law protects individuals against discrimination and seeks to secure equal access to services, the Commission is concerned that the current legal framework on abortion raises not only gender equality considerations but also disproportionately impacts on women from lower socio-economic backgrounds, women who are seeking asylum, migrant women whose immigration status prevents them from travelling and women from ethnic minorities who may face greater obstacles in accessing health services.²³

the European Convention on Human Rights: 'In light of the sensitivity of the matters concerned, and the necessity for timeliness in dealing with issues arising under the draft legislation, the IHRC recommends that an expedited procedure before the High Court be provided for judicial reviews arising under the legislation, with provision for legal aid, and anonymity, thereby ensuring that judicial review is an "accessible and effective" procedure for vindicating the human rights engaged. It is arguable that such an expedited judicial review procedure would be required by Article 8 ECHR, in light of the ECtHR judgments in *Tysiac and P and S v Poland*'. No such procedures were included in the 2013 Act. The European Court of Human Rights case law referred to here will be discussed further later in this submission.

²¹ See Irish Human Rights Commission (2013) *Observations on the Protection of Life During Pregnancy*, July 2013, para 72. The draft legislation proposed examination by six doctors, four of whom would be carrying out a psychiatric assessment. In its observations, the Irish Human Rights Commission raised concerns that such an intrusive assessment procedure may not be compatible with Article 8 ECHR, stating that it 'by its nature will be intrusive, no matter how sensitively handled. [...] Concerns may thus arise that a woman who is suicidal and wishes to terminate her pregnancy will be reluctant to submit herself to such an extensive level of psychiatric assessment, and thereby the process under the legislation will be rendered inaccessible. In addition, in light of the potentially vulnerable position of the girl or woman, the number of examinations required may risk increasing her mental anguish and potential suffering with the potential to thereby breach Article 8.' The Irish Human Rights Commission went on to recommend that 'some discretion would be provided for [...] such that a girl or woman that presents as being suicidal is not subjected to additional psychiatric examinations if that would be detrimental to her mental health and wellbeing, and that one psychiatric opinion would be sufficient, for the purposes of review'. In the final legislation as enacted, provision is made for 3 medical practitioners to examine the woman, two of whom 'shall be a psychiatrist' (Section 9 of the *Protection of Life During Pregnancy Act 2013*).

²² Recent reports of the application of the 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. 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-court-challenge-to-stop-hse-inquiry-into-her-care-is-struck-out-1.2415545>.

²³ Irish Human Rights Commission (2013) *Observations on the Protection of Life During Pregnancy*, July 2013, Dublin: Irish Human Rights Commission, available at: <https://www.ihrec.ie/ihrc-publishes-observations-on-the-protection-of-life-during-pregnancy-bill-2013/>. In its observations the Irish Human Rights Commission also considered human rights risks related to: fatal foetal abnormality, rape, minors, minority groups and the accountability of medical practitioners. See paras 107-120.

Obligations under United Nations human rights treaties

Ireland has ratified a number of United Nations human rights treaties which impose minimum standards on the State to vindicate the rights of persons without discrimination as to gender or other characteristics.

In recent years UN treaty monitoring bodies have made a number of recommendations to Ireland regarding its legal regime on reproductive health services. For example, in 2015 the UN Committee on Economic, Social and Cultural Rights made the following recommendation, which the Commission endorsed:

‘Take all the steps necessary, including a referendum on abortion, to revise its legislation on abortion, including the Constitution and the *Protection of Life during Pregnancy Act 2013*, in line with international human rights standards’.²⁴

This, and other recommendations from UN treaty monitoring bodies which are relevant to the work of the Citizens’ Assembly will be dealt with in more detail later in this submission.

²⁴ See para. 30, UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland*, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement>

Obligations under the European Convention on Human Rights & Revised European Social Charter

The European Convention on Human Rights (ECHR)

Ireland is one of 47 member states of the Council of Europe, the regional human rights protection organisation established in 1949. Within the Council of Europe, the European Court of Human Rights has developed a comprehensive body of human rights jurisprudence which interprets and applies the rights set out in the European Convention on Human Rights (the '**ECHR**'). Ireland ratified the ECHR in 1953.

Individuals have challenged the regulation of abortion in member states primarily under Article 8 ECHR (the right to private and family life) and Article 3 ECHR (the right to be free from torture, inhuman and degrading treatment).

Margin of appreciation

Within the Council of Europe, there are diverging approaches to the question of when life begins.²⁵ The European Court of Human Rights affords a wide 'margin of appreciation' to member states when it interprets their obligations under the ECHR with regard to this question.

Ireland is thus afforded a certain amount of discretion by the European Court of Human Rights in its approach to protecting the right to life of the unborn and in how Ireland balances the conflicting rights of the mother. In the case of *A, B and C v. Ireland*,²⁶ while the European Court of Human Rights acknowledged the consensus amongst a substantial majority of states in the Council of Europe towards allowing abortion on wider grounds than that which is allowed under Irish law,²⁷ it also recognised that this is an area of 'acute sensitivity regarding the moral and ethical issues raised'.²⁸

A, B and C v Ireland

In this case, applicants A and B were not successful in arguing that the denial of access to an abortion in Ireland (on health and well-being grounds) violated Article 8 ECHR.²⁹ Applicant C however, did succeed in her claim that the Irish State had violated her right to private and family life under Article 8 ECHR.

The European Court of Human Rights considered the lack of consensus in the Council of Europe on the question of when life begins, and the protection to be afforded to the unborn, having regard to

²⁵ See *Vo v France* (App. 53924/00), 8 July 2004. The European Court of Human Rights held as follows: 'it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention'. Article 2 ECHR protects the right to life.

²⁶ *A, B and C v. Ireland* (App. 25579/05), 16 December 2010.

²⁷ See para. 235 of *A, B and C v. Ireland* (App. 25579/05), 16 December 2010.

²⁸ See para. 233 of *A, B and C v. Ireland* (App. 25579/05), 16 December 2010: 'There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.'

²⁹ Six judges of the European Court of Human Rights dissented in this regard concluding that it was clear that there had been a violation of Article 8 ECHR in relation to A and B.

the 'profound moral views of the Irish people as to the nature of life'.³⁰ The European Court of Human Rights decided that in Ireland, Article 8 ECHR allows for a domestic legal framework which prohibits abortion sought for health and well-being grounds, considering that a woman may lawfully travel abroad for an abortion.³¹ On the ability to travel, the Irish Human Rights and Equality Commission previously questioned whether the same finding would be made if a pregnant woman was not in a position to travel attendant on her immigration status within the State.³²

The third applicant (C) who was successful in her claim under Article 8 ECHR was in remission from cancer. The European Court of Human Rights found that Ireland had failed to secure an effective and accessible procedure which would allow C to establish her right to a lawful abortion, in a case where her right to life was at issue. In failing to legislate for where an exception to the prohibition on abortion arises, the Irish State violated its positive duty under Article 8 ECHR.³³ According to the Court, the legislative uncertainty: 'resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman's life and the reality of its practical implementation'.³⁴

The European Court of Human Rights also found that the threat of criminal prosecution was a significant 'chilling factor' both on the medical professionals in Ireland and the woman.³⁵ The *Protection of Life During Pregnancy Act 2013* was enacted to respond to the specific violation found by the European Court of Human Rights in relation to Applicant C.

³⁰ See para. 241 of *A, B and C v. Ireland* (App. 25579/05), 16 December 2010. The Joint Partly Dissenting Opinions disagreed on this point noting at para. 2 that: 'regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus.' The dissenting opinions added at para. 9 that it was the first time that the European Court of Human Rights had 'disregarded the existence of a European consensus on the basis of profound moral views'.

³¹ The Joint Partly Dissenting Opinions strongly disagreed with this finding stating that the majority view did 'not truly address the real issue of unjustified interference in the applicants' private lives as a result of the prohibition of abortion in Ireland', see para. 8 of the Joint Partly Dissenting Opinions, *A, B and C v. Ireland* (App. 25579/05), 16 December 2010.

³² See para. 86, Irish Human Rights Commission (2013) *Observations on the Protection of Life During Pregnancy Bill 2013*, July 2013, available at; https://www.ihrec.ie/app/uploads/download/pdf/ihrc_observations_protection_of_life_in_pregnancy_bill_2013.pdf

³³ The European Court of Human Rights was heavily influenced by the fact that the *X Case* had identified a constitutional right to a termination of pregnancy under limited circumstances but that this right had remained without any legislative implementation. The facts of the *X Case* (*Attorney General v X* [1992] 1 IR 1) are well known. A young girl of 14 years of age became pregnant as a result of being raped. She travelled to the UK, with her parents, to obtain an abortion. Before going to the UK, her parents had enquired with the Garda Síochána if it would be possible to carry out tests on retrieved foetal tissue to confirm the identity of the rapist. The Garda Síochána consulted with the DPP who in turn consulted the Attorney General. The Attorney General brought an application to the High Court seeking an injunction restraining X from leaving the jurisdiction or from arranging or carrying out a termination of the pregnancy, and on 7 February 1992, Mr Justice Costello granted an interim injunction, ex parte, in the High Court. X and her parents returned from the UK and successfully appealed the injunction to the Supreme Court.

³⁴ See para. 264 of *A, B and C v. Ireland* (App. 25579/05), 16 December 2010.

³⁵ See para. 254 of *A, B AND C v. Ireland* (App. 25579/05), 16 December 2010. The Joint Partly Dissenting Opinions noted in para. 10 that: 'the severity of the (rather archaic) law is striking' and might be considered an element of testing the proportionality of the law.

*Additional European Court of Human Rights jurisprudence on reproductive rights*³⁶

As previously discussed, concerns remain as to the degree to which the *Protection of Life During Pregnancy Act 2013* is in compliance with the European Convention on Human Rights in light of recent case law. This case law may be instructive to the Citizens' Assembly in understanding how ECHR rights have been interpreted in their application to the regulation and provision of reproductive health services,³⁷ and is discussed below.

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.³⁸ 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.³⁹ 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'.⁴⁰ 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.⁴¹ 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.⁴²

In 2011, the European Court of Human Rights found a violation of Article 3 in *R.R. v Poland* where the applicant received a diagnosis of a severe genetic abnormality at a late stage, which precluded a decision to terminate the pregnancy.⁴³ The European Court of Human Rights found that: 'the applicant's suffering [...] could be said to have been aggravated by the fact that the diagnostic services which she had requested early on were at all times available and that she was entitled as a matter of domestic law to avail herself of them'.⁴⁴ The Court found that it was 'a matter of great

³⁶ A more comprehensive analysis of these cases and their potential application where similar facts might arise in Ireland is set out in paras 107-120 of Irish Human Rights Commission (2013) *Observations on the Protection of Life During Pregnancy Bill 2013*, July 2013.

³⁷ Section 4 of the *European Convention on Human Rights Act 2003* provides that 'judicial notice' must be taken of any judgment of the European Court of Human Rights. This has been interpreted as requiring courts in Ireland, subject to the Constitution, to take 'due account' of clear and consistent principles laid down in Strasbourg jurisprudence'. See para. 76 of *O'Donnell & Ors v South Dublin County Council & Ors* [2015] IESC 28.

³⁸ *P. and S. v Poland* (App.57375/08), 30 January 2013.

³⁹ See the parties' submissions at para. 156 of *P. and S. v Poland* (App.57375/08), 30 January 2013.

⁴⁰ See the Court's assessment at para 108 of *P. and S. v Poland* (App.57375/08), 30 January 2013.

⁴¹ See the Court's assessment at paras 167-168 of *P. and S. v Poland* (App.57375/08), 30 January 2013. Article 3 ECHR prohibits inhuman and degrading treatment and the finding of a violation under this provision will depend on the overall circumstances of the case and the relative severity of the treatment. Treatment is considered degrading where it causes fear, anguish and inferiority capable of humiliating and debasing an individual, see, for example, para. 51 of *Iwańczuk v. Poland*, (App. 25196/94).

⁴² See *P. and S. v Poland* (App. 57375/08), 30 January 2013. The ECtHR has pointed out that the fact that there is a heated debate in a member state on the right to a legal abortion does not absolve health care professionals from their professional obligations regarding medical secrecy, see para. 133.

⁴³ It was argued that the woman was denied timely access to the genetic tests to which she was entitled by medical professionals who were not sympathetic to her situation and procrastinated on her case, thus depriving her of decision-making opportunities. See paras 153-162 of *R.R. v Poland* (App. 27617/04), 28 November 2011.

⁴⁴ See para. 160, *R.R. v Poland* (App. 27617/04), 28 November 2011.

regret that the applicant was so shabbily treated by the doctors dealing with her case⁴⁵ and agreed that the woman ‘had been humiliated’⁴⁶ to a degree that triggered rights under Article 3 ECHR.⁴⁷ Echoing the European Court of Human Rights’ finding in *A, B and C v Ireland*, it reiterated that: ‘the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Poland on grounds referred to in this provision and the reality of its practical implementation’.⁴⁸

The inadequate procedure for allowing a mother to determine her right to a lawful abortion and to make an informed decision based on that information also lead to a violation of Article 8 ECHR.⁴⁹

In *Tysiacy v Poland* a violation was found where a woman was refused a therapeutic abortion and as a result of the pregnancy suffered a severe disability following the birth of her child.⁵⁰ The European Court of Human Rights found a violation of Article 8 due to the denial of access to an effective mechanism which was capable of determining whether the conditions for obtaining a legal abortion had been met.⁵¹

The Revised European Social Charter

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.⁵² 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.⁵³ While the European Committee of Social Rights has not found violations by Ireland relevant to reproductive health, relevant cases taken against Italy may be instructive to the Citizens’ Assembly in understanding how the relevant rights have been interpreted, and may potentially be interpreted.

Recent collective complaints against Italy concerned 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.⁵⁴ The European Committee of Social Rights (the

⁴⁵ See para. 160, *R.R. v Poland* (App. 27617/04), 28 November 2011.

⁴⁶ See para. 160, *R.R. v Poland* (App. 27617/04), 28 November 2011.

⁴⁷ See para. 161, *R.R. v Poland* (App. 27617/04), 28 November 2011.

⁴⁸ See para. 210 of *R.R. v Poland* (App. 27617/04), 28 November 2011.

⁴⁹ See paras 197-214 of *R.R. v Poland* (App. 27617/04), 28 November 2011.

⁵⁰ See *Tysiacy v Poland* (App. 5410/03), 24 September 2007.

⁵¹ See *Tysiacy v Poland* (App. 5410/03), 24 September 2007.

⁵² 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.

⁵³ Article D of the Revised Charter. The complaint is 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.

⁵⁴ 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>

Committee) found violations of the right to protection of health (Article 11)⁵⁵ and in conjunction with that right, found that the treatment involved multiple discrimination (Article E).⁵⁶

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’⁵⁷ and that the availability of healthcare ‘applies with particular force to time-sensitive procedures such as abortion’.⁵⁸ The unavailability of non-objecting practitioners, particularly in certain areas, resulted in a violation of Article 11. In a subsequent case the difficulties identified were found not to have been remedied.⁵⁹

The claims grounded in discrimination alleged that certain categories of Italian women were subject to less favourable treatment in effectively accessing lawful abortion facilities ‘as a result of the combined effect of their gender, health status, territorial location and socio-economic status’.⁶⁰ In this way, certain vulnerable categories of women were found to have been treated differently, without objective justification, resulting in a violation of Article E which protects against discrimination.⁶¹ Additionally, the Committee found discriminatory treatment in relation to the

⁵⁵ 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.’

⁵⁶ 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.’

⁵⁷ 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>.

⁵⁸ 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>.

⁵⁹ At para. 191 the Committee noted that: ‘given the urgent character of the procedures needed, women wishing to seek an abortion may be forced to move to other health facilities, in Italy or abroad, or to terminate their pregnancy without the support or control of the competent health authorities, or may be deterred from accessing abortion services which they have a legal entitlement to receive’. It further noted at para. 192 that ‘these situations involve considerable risks for the health and well-being of the women concerned, which is contrary to the right to the protection of health’ *Confederazione Generale Italiana del Lavoro (CGIL) v Italy* (Complaint No. 91/2013), available at:

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

⁶⁰ Paras 189-190 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>.

⁶¹ The Committee found that: ‘Pregnant women seeking to access abortion services are therefore treated differently depending on the area in which they live; in addition the differential treatment on this basis may by extension have an adverse impact on women in lower income groups who may be less able to travel to other parts of Italy or abroad in order to access abortion services,’ para. 209 of *Confederazione Generale Italiana del Lavoro (CGIL) v Italy* (Complaint No. 91/2013), available at:

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

treatment of the non-objecting medical practitioners who were found to have suffered cumulative disadvantages at work⁶² resulting also in a violation of the right to dignity at work.⁶³

⁶² 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>

⁶³ The Committee decided that there had been a violation of Article 26 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>

Obligations under United Nations Human Rights Treaties

Introduction

Ireland has ratified a number of United Nations human rights treaties which impose minimum standards on the State to vindicate the rights of persons without discrimination as to gender or other characteristics.⁶⁴

Many of these international conventions protect the woman's right to accessible sexual and reproductive health services without discrimination, and have informed the consistent linkage by the United Nations of access to reproductive health services with the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.⁶⁵ Ireland's obligations under United Nations human rights treaties are therefore relevant to the deliberations of the Citizens' Assembly.

The State's compliance with its UN treaty obligations is assessed through formal examinations by UN treaty monitoring bodies comprising independent experts on the specific rights at issue. The resulting observations evaluate the extent to which Ireland complies with its international human rights obligations under those conventions to which the State is a party and which bind the State under international law.

⁶⁴ For example, the objective of the UN Convention for the Elimination of Discrimination against Women (CEDAW) is to eliminate all forms of discrimination against women on the basis of sex, and 'guarantees women the equal recognition, enjoyment and exercise of all human rights and fundamental freedoms.' In particular, the UN CEDAW Committee draws attention to the varying ways in which women can experience discrimination: 'Biological differences between women and men may lead to differences in health status, there are societal factors which are determinative of the health status of women and men and which can vary among women themselves. For that reason, special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and women with physical or mental disabilities.' See para. 6, UN Committee on the Elimination of Discrimination against Women (1999) *General Recommendation No. 24: Article 12 of the Convention (women and health)*, available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

⁶⁵ For example, in 2011 the then Special Rapporteur to the Human Rights Council on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, examined the 'impact of criminal and other legal restrictions on abortion', concluding that some restrictions 'violate the right to health by restricting access to quality goods, services and information. They infringe human dignity by restricting the freedoms to which individuals are entitled under the right to health, particularly in respect of decision-making and bodily integrity.' See 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, at Summary. Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/66/254. See also the 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>. 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>

Certain UN treaties incorporate an individual complaints mechanism under which persons can appeal directly to the UN treaty monitoring body in order to vindicate their rights.⁶⁶

The summary below highlights the principal human rights protections of relevance. It further notes instances where Ireland's legal framework and practice have been deemed not to offer full protection, as determined by the relevant treaty monitoring bodies.

The Commission notes that in the absence of a constitutional amendment, the Irish State is limited in its capacity to address recommendations from United Nations treaty monitoring bodies on access to abortion services.⁶⁷

UN International Covenant on Civil and Political Rights

Ireland ratified the UN International Covenant on Civil and Political Rights (ICCPR) in 1989 and has been examined by the UN Human Rights Committee⁶⁸ on four occasions in relation to how it complies with the rights set out under this convention, most recently in 2014.⁶⁹ The UN Human Rights Committee takes the approach that it is up to the State to legislate for and regulate abortion services, but that when it does so, it must not violate a woman's privacy rights.⁷⁰ Restrictions on how a lawful abortion can be obtained must be capable of being justified and such restrictions must not impair the woman's human rights.⁷¹

In examining Ireland's compliance with the ICCPR, the UN Human Rights Committee raised concerns in 2008 as to the 'highly restrictive circumstances under which women can lawfully have an abortion'.⁷² It recommended that Ireland bring its abortion laws into line with the ICCPR, adding that Ireland:

⁶⁶ For example, the Optional Protocol to the International Covenant on Civil and Political Rights ('ICCPR') enables the UN Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights under the Covenant where the individual has exhausted all domestic remedies available to them. A state which becomes party to the Optional Protocol recognises the competence of the UN Human Rights Committee to consider and provide its views in relation to the communication. The recent views of the UN Human Rights Committee responding to a complaint made by Amanda Mellet in 2013 (discussed in more detail below) illustrate this avenue of recourse.

⁶⁷ See Irish Human Rights and Equality Commission (2015) *Submission to the Second Universal Periodic Review Cycle for Ireland*, para. 12, available at: <https://www.ihrec.ie/documents/ihrec-submission-to-the-human-rights-commission-under-the-universal-periodic-review-for-ireland-september-2015/>

⁶⁸ The UN Human Rights Committee is the supervisory body for the ICCPR. It issues general comments, concluding observations and views on individual cases which cumulatively give guidance and interpret provisions of the ICCPR. For present purposes the most relevant rights protected include: the right to life (Article 6), the right to freedom from cruel, inhuman or degrading treatment or punishment (Article 7), the right to private life (Article 17) and equality before the law (Article 26).

⁶⁹ See 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/app/uploads/download/pdf/20140616113130.pdf>

⁷⁰ See, for example, the views of the UN Human Rights Committee in *K.L. v Peru* (Human Rights Committee (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 Committee (2011) *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 1608/2007*).

⁷¹ Restrictions must not impair a woman's right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, the right to health (which includes the removal of barriers that inhibit women's effective access to reproductive and health services including on a non-discriminatory basis). See para. 21, Irish Human Rights Commission (2013) *Observations on the Protection of Life During Pregnancy Bill 2013*, July 2013.

⁷² See para. 13, UN Human Rights Committee (2008) *Concluding Observations on Ireland*, CCPR/C/IRL/CO/3

‘should take measures to help women avoid unwanted pregnancies so that they do not have to resort to illegal or unsafe abortions that could put their lives at risk (article 6) or to abortions abroad (articles 26 and 6)’.⁷³

In 2014, the UN Human Rights Committee issued Concluding Observations which recommended that Ireland:

‘(a) Revise its legislation on abortion, including its Constitution, to provide for additional exceptions in cases of rape, incest, serious risks to the health of the mother, or fatal foetal abnormality;

(b) Swiftly adopt a guidance document to clarify what constitutes a “real and substantive risk” to the life of the pregnant woman;

(c) Consider making more information on crisis pregnancy options available through a variety of channels, and ensure that health-care providers who supply information on safe abortion services abroad are not subject to criminal sanctions.’⁷⁴

In July 2014, the Irish Human Rights and Equality Commission (Designate) welcomed these Concluding Observations.⁷⁵

Communication of Amanda Mellet to the UN Human Rights Committee

The UN Human Rights Committee adopted a view in June 2016 responding to a Communication by Amanda Mellet in November 2013 alleging that her rights under the International Covenant on Civil and Political Rights (ICCPR) had been violated.⁷⁶

30 July 2008, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2fIRL%2fCO%2f3&Lang=en

⁷³ See para. 13, UN Human Rights Committee (2008) *Concluding Observations on Ireland*, CCPR/C/IRL/CO/3

30 July 2008, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2fIRL%2fCO%2f3&Lang=en

⁷⁴ See para. 9, UN Human Rights Committee (2014) *Concluding observations on the fourth periodic report of Ireland*, CCPR/C/IRL/CO/4 19 August 2014, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2fIRL%2fCO%2f4&Lang=en

⁷⁵ Irish Human Rights and Equality Commission (Designate) (2014) ‘IHREC Designate welcomes UN Human Rights Committee’s Concluding Observations on Ireland’s human rights record’ [press release] 24th July 2014, available at: <https://www.ihrec.ie/ihrec-designate-welcomes-un-human-rights-committees-concluding-observations-on-irelands-human-rights-record/>

⁷⁶ The communication referred to Articles 2(1), 3, 7, 17, 19 and 26 of the ICCPR. 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, 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. The Human Rights Committee has dealt with a number of 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, UN Document No. 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

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.⁷⁷ 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’.⁷⁸

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’⁷⁹
- Ms Mellet ‘had her physical and mental anguish exacerbated’ by the surrounding circumstances⁸⁰
- ‘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’⁸¹ 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’.⁸²

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.

⁷⁷ 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.

⁷⁸ See para. 7.2, 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.

⁷⁹ See para. 7.4, 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.

⁸⁰ 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 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 para. 7.4, 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.

⁸¹ See para. 7.4, 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.

⁸² See para. 7.4, 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.

The UN Human Rights Committee found a violation of article 17 ICCPR (protecting the right to privacy)⁸³ considering that ‘the interference in [Ms Mellet’s] decision as to how best cope with her non-viable pregnancy was unreasonable and arbitrary’.⁸⁴

The UN Human Rights Committee 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’⁸⁵

The UN Human Rights Committee stated that Ireland should:

- ‘take steps to prevent similar violations occurring in the future’⁸⁶ 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’.⁸⁷

On 30 November 2016 Minister for Health, Simon Harris TD, outlined⁸⁸ the substance of the State’s forthcoming formal response to the Committee, which is to include:

⁸³ See para. 7.7, Human Rights Committee (2016) *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2324/2013*, 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*).

⁸⁴ See para. 7.8 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.

⁸⁵ See para. 7.11, 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. 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.

⁸⁶ See para. 9, 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.

⁸⁷ See para. 9, 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.

⁸⁸ 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’.

Upon the publication of the views of the UN Human Rights Committee in this case, the Irish Human Rights and Equality Commission stated that the Citizens’ Assembly should fully consider the views of the UN Human Rights Committee to ensure that Ireland’s legal framework complies with its international obligations under the ICCPR.⁸⁹

UN International Covenant on Economic, Social and Cultural Rights

Ireland ratified the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1989. This Covenant protects the right to health which, according to the UN Committee on Economic, Social and Cultural Rights includes: ‘the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference’.⁹⁰

The UN Committee on Economic, Social and Cultural Rights is of the view that 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’.⁹¹ The Committee has identified ‘criminalization of abortion or restrictive abortion laws’ as amongst these barriers.⁹²

⁸⁹ See Irish Human Rights and Equality Commission (2016) ‘IHREC statement on the views of the UN Human Rights Committee’ [press release] available at: <https://www.ihrec.ie/statement-on-the-views-of-the-un-human-rights-committee/>

⁹⁰ See para. 8, UN Committee on Economic Social and Culture Rights (2000) *General Comment No. 14 (2000) 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, 11 August 2000, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11

⁹¹ See para. 21, UN Committee on Economic Social and Culture Rights (2000) *General Comment No. 14 (2000) 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, 11 August 2000, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11

⁹² UN Committee on Economic Social and Cultural Rights *General Comment No. 22 (2016) on 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.’

Ireland's compliance with the ICESCR has been reviewed on three occasions, most recently in July 2015, when the UN Committee on Economic, Social and Cultural Rights recommended that Ireland:

'take all the steps necessary, including a referendum on abortion, to revise its legislation on abortion, including the Constitution and the Protection of Life During Pregnancy Act 2013, in line with international human rights standards; adopt guidelines to clarify what constitutes a real substantive risk to the life of a pregnant woman; publicize information on crisis pregnancy options through effective channels of communication; and ensure the accessibility and availability of information on sexual and reproductive health.'⁹³

The Irish Human Rights and Equality Commission has endorsed these recommendations.⁹⁴

UN Convention on the Elimination of All forms of Discrimination against Women

Ireland acceded to the UN Convention on the Elimination of All forms of Discrimination against Women (CEDAW) in December 1985, which under Article 12 addresses women and health. The UN Committee on the Elimination of All forms of Discrimination against Women has stressed in its general recommendations, and in decisions on individual communications, that a woman's right to health includes the removal of barriers that inhibit women's effective access to reproductive and health services.⁹⁵

The UN Committee on the Elimination of All forms of Discrimination against Women will examine Ireland on its implementation of the Convention early in 2017.⁹⁶ Previously, in 2005, the UN Committee on the Elimination of All forms of Discrimination against Women recommended that

⁹³ See para. 30 UN Committee on Economic Social and Culture Rights (2015) *Concluding observations on the third periodic report of Ireland* E/C.12/IRL/CO/3, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement>

⁹⁴ Irish Human Rights and Equality Commission (2015) 'IHREC endorses UN Committee recommendations to protect and promote economic, social and cultural rights in Ireland' [press release], 22nd June 2015, available at <https://www.ihrec.ie/ihrec-endorses-un-committee-recommendations-to-protect-and-promote-economic-social-and-cultural-rights-in-ireland/>. See also Irish Human Rights and Equality Commission (2015) *Submission to CEDAW in respect of the List of Issues Prior to Reporting in relation to Ireland's 6th and 7th periodic report*, 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/>

⁹⁵ Such barriers include: 'laws that criminalise medical procedures only needed by women and that punish women who undergo those procedures'. See Committee on the Elimination of Discrimination against Women (1999) *General recommendation No. 24: Article 12 of the Convention (women and health)* available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4738_E.pdf In *L.C. v Peru* Communication No. 22/2009, CEDAW/C/50/D/22/2009 Views 4 November 2011, the CEDAW Committee found that the complainant (a minor) did not have "access to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required"; at para 8.15. In *da Silva Pimentel v. Brazil*, Communication 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 (CEDAW, July 25, 2011), the CEDAW Committee found that in addition to the complaint's deceased daughter suffering sex discrimination and discrimination on the basis of her socio-economic background (being of African descent) in being refused access to an abortion, the State had failed to exercise its "due diligence" obligation to take measures to control the activities of non-State actors (the health service facilities: "the duty to regulate and monitor private health-care institutions") to ensure the victim's rights. Further, it held that there was a lack of "effective judicial action and protection" to secure her rights under Articles 12 and 12(c) of CEDAW.

⁹⁶ The 2017 examination will represent Ireland's combined 6th and 7th periodic report, and Ireland's first examination under this Convention since 2005.

Ireland: 'continue to facilitate a national dialogue on women's right to reproductive health, including on the very restrictive abortion laws'.⁹⁷

In advance of Ireland's examination in 2017, the UN Committee on the Elimination of All forms of Discrimination against Women has requested that Ireland provide information on:

- 'the framework that regulates the determination of risk to the life of the pregnant woman for her to procure an abortion'
- 'the specific steps that a woman has to follow in order to legally procure an abortion on those grounds'
- 'the legislative measures envisaged to revise the law in order to provide for abortion on other grounds including threat to the health of the pregnant woman, rape, incest and severe foetal impairment, and to remove punitive measures for women who undergo abortions'
- 'the demand for abortion services by women and girls in the State party, including those who procure abortion services abroad, and the cost to women for travel and abortion service and care in those countries'.⁹⁸

The UN Committee on the Elimination of All forms of Discrimination against Women also asked for clarification on:

- 'the extent of the problem of clandestine abortions in the State party, and whether medical personnel can provide post-abortion care in those circumstances without being prosecuted' and
- 'measures to revise the Regulation of Information Act 1995, which criminalizes the provision of information by health-care providers and pregnancy counsellors that advocates or promotes the option of abortion'.⁹⁹

The Irish Human Rights and Equality Commission is preparing a detailed report which will be published in January 2017 on Ireland's record under the CEDAW to inform the UN Committee's assessment, and to highlight gaps in the protection of women's rights in Ireland.¹⁰⁰

UN Convention against Torture

Ireland ratified the UN Convention against Torture (CAT) in April 2002 and is due to be examined in 2017 on its implementation of the rights protected under the CAT.

⁹⁷ See para. 397, UN Committee on the Elimination of Discrimination against Women (2005) *Concluding Observations on Ireland A/60/38*, available at: [http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f60%2f38\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f60%2f38(SUPP)&Lang=en)

⁹⁸ See para. 21, Committee on the Elimination of Discrimination against Women (2016) *List of Issues Prior to Reporting*, 4 March 2016, CEDAW/C/IRL/QPR/6-7, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgA84bcFRy75ulvS2cmS%2f%2biPnISDjulye%2btudNIsQyWBeeyCzNlo1naSox3kNlvhGsSCXPI9QqG4KMvNijgCffBIO6I791hzc8f264qvblGREgOH2JTIrO0DVvXVwCtn%2fw%3d%3d>

⁹⁹ See para. 22, Committee on the Elimination of Discrimination against Women (2016) *List of Issues Prior to Reporting*, 4 March 2016, CEDAW/C/IRL/QPR/6-7, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgA84bcFRy75ulvS2cmS%2f%2biPnISDjulye%2btudNIsQyWBeeyCzNlo1naSox3kNlvhGsSCXPI9QqG4KMvNijgCffBIO6I791hzc8f264qvblGREgOH2JTIrO0DVvXVwCtn%2fw%3d%3d>

¹⁰⁰ This report draws on an extensive consultation process carried out by the Commission in 2016. Information on this consultation and the Commission's forthcoming report is available at: <https://www.ihrec.ie/our-work/cedaw-2016/>

In 2011, under the previous examination, the UN Committee against Torture recommended that Ireland:

‘Clarify the scope of legal abortion through statutory law and provide for adequate procedures to challenge differing medical opinions as well as adequate services for carrying out abortions in the State party, so that its law and practice is in conformity with the Convention’.¹⁰¹

The Irish Human Rights and Equality Commission will prepare a report in advance of Ireland’s examination before the UN Committee against Torture in 2017.

UN Convention on the Rights of the Child

Ireland ratified the UN Convention on the Rights of the Child (CRC) in September 1992 and was examined by the UN Committee on the Rights of the Child early in 2016.¹⁰² In its report, the Committee on the Rights of the Child 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; and ensure that the views of the pregnant girl are always heard and respected in abortion decisions.’¹⁰³

The UN Committee on the Rights of the Child further recommended that Ireland:

‘Develop and implement a policy to protect the rights of pregnant teenagers, adolescent mothers and their children and combat discrimination against them’, and

‘Adopt a comprehensive sexual and reproductive health policy for adolescents and ensure that sexual and reproductive health education is part of the mandatory school curriculum and targeted at adolescent girls and boys, with special attention to the prevention of early pregnancy and sexually transmitted infections’¹⁰⁴

The Irish Human Rights and Equality Commission stated that it would advocate for the full adoption by the State of the Committee’s recommendations with a view to bringing Ireland fully in compliance with its international obligations.¹⁰⁵

Universal Periodic Review

¹⁰¹ See para. 26, UN Committee against Torture (2011) *Consideration of reports submitted by States parties under article 19 of the Convention*, 17 June 2011, CAT/C/IRL/CO/1, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CAT/C/IRL/CO/1&Lang=En

¹⁰² This represented Ireland’s combined third and fourth periodic reporting before the UN Committee on the Rights of the Child.

¹⁰³ See para. 58(a), 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, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRC/C/IRL/CO/3-4&Lang=En

¹⁰⁴ See para. 58(a), 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, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRC/C/IRL/CO/3-4&Lang=En

¹⁰⁵ Irish Human Rights and Equality Commission (2016) ‘UN Committee publishes “detailed and wide-ranging” report on Ireland’s child rights record’ [press release] 4 February 2016, available at: <https://www.ihrec.ie/un-committee-publishes-detailed-and-wide-ranging-report-on-irelands-child-rights-record/>

The Universal Periodic Review (UPR) is a comprehensive human rights review mechanism overseen by the UN Human Rights Council.¹⁰⁶ Ireland was first examined under this review in 2012 and was examined again in 2016.¹⁰⁷ In the second round evaluation, UN Member States raised questions as to the progress made by Ireland on the advancement of human rights since the first round evaluation, as well as raising new, emerging concerns.

The UN Human Rights Council adopted the report on Ireland in September 2016. Amongst the recommendations made to Ireland by other UN Member States in May 2016,¹⁰⁸ Ireland was urged to:

- ‘Conduct consultations involving all stakeholders, including civil society organisations, in order to examine whether article 40.3.3 of the Constitution could be revised and the legal framework related to abortion broadened.’ (Switzerland);
- ‘Ensure availability of safe abortions, at a minimum in cases where the pregnancy is the result of rape or incest and in cases of severe and fatal foetal impairment.’ (Iceland);
- ‘Take all necessary steps to revise the Protection of Life During Pregnancy Act 2013 in line with International Human Rights standards.’ (India);
- ‘Amend the Protection of Life During Pregnancy Act 2013 so that women’s interests and health are better protected, especially in instances where the pregnancy resulted from rape or incest, or in cases of severe foetal impairment.’ (Lithuania);
- ‘Consider revising its relevant legislation on abortion in line with international human rights standards on sexual and reproductive health and rights.’ (Republic of Korea);
- ‘Broaden through an inclusive public debate the access to abortion for pregnant women, in particular in cases of threat to health, rape and incest.’ (Czech Republic);
- ‘Take the necessary steps aimed at revising the relevant legislation with a view to decriminalize abortion within reasonable gestational limits.’ (the former Yugoslav Republic of Macedonia);
- ‘Ensure the full right for women to abortion and implement the decisions of the European Court of Human Rights regarding this right.’ (Slovakia);
- ‘Take necessary steps to revise its legislation on abortion and provide for clear exceptions, in line with international human rights law and standards, so as to ensure the right to abortion in cases of rape and incest, as well as cases entailing serious risks to the health of the mother or fatal foetal abnormality.’ (Sweden);
- ‘Decriminalize abortion in all circumstances and, as a minimum, ensure access to safe abortion also in cases of rape, incest, serious risks to the health of the mother and fatal foetal abnormality.’ (Slovenia);

¹⁰⁶ The UN Human Rights Council has a 47-state membership. Three-year membership is open to all UN Member States through election by absolute majority of the UN General Assembly with voting by secret ballot. Efforts towards geographical representation are made through the allocation of seats by region.

¹⁰⁷ See Irish Human Rights Commission (2011) *Submission for the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland*, March 2011, in respect of the first round review. See Irish Human Rights and Equality Commission (2015) *Irish Human Rights and Equality Commission Submission to the Second Universal Periodic Review Cycle for Ireland*, September 2015, in respect of the second round evaluation, available at: https://www.ihrec.ie/download/pdf/irish_human_rights_and_equality_commission_upr_submission__ireland_2016.pdf

¹⁰⁸ Of the 262 recommendations made to Ireland under this process, 176 were accepted, 45 were partially accepted and 41 were not accepted. Ireland has committed to publishing an interim report in 2018 on progress made in implementing the accepted and partially accepted recommendations. See the website of the Department of Justice and Equality at: <http://www.upr.ie/>

- ‘Review the law on abortion to expand the circumstances in which it can be carried out (Uruguay).’¹⁰⁹

As an A-status national human rights institution, the Irish Human Rights and Equality Commission was granted speaking rights to address the UN Human Rights Council upon adoption of the UPR Report in September 2016. In this address, the Chief Commissioner stated that:

‘The Commission remains concerned that the current legal position in relation to abortion puts in place barriers which impede a woman’s right to bodily autonomy and has a disproportionate negative impact on certain groups of women’.¹¹⁰

¹⁰⁹ See the website of the UN Office of the High Commissioner for Human Rights: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/157/18/PDF/G1615718.pdf?OpenElement>

¹¹⁰ Irish Human Rights and Equality Commission (2016) *Oral Statement 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, available at: <https://www.ihrec.ie/oral-statement-united-nations-human-rights-council-adoption-report-working-group-universal-periodic-review-ireland/>

Summary of Gaps in Protection as identified by International Bodies

Drawing upon the analysis above, the Irish Human Rights and Equality Commission notes a number of relevant themes which have been raised by treaty monitoring bodies and other assessments of Ireland's international human rights obligations. These are broadly summarised below.

Clarifying the scope of legal abortion services

The theme of clarifying the scope of legal abortion in Ireland through legislation has recurred both prior to and following the publication of the *Protection of Life during Pregnancy Act 2013* (the '**2013 Act**').

In 2011, Ireland was urged by the UN Committee Against Torture to put in place adequate procedures in order to challenge differing medical opinions and to provide adequate services for carrying out abortions in Ireland.¹¹¹

Following the 2013 Act, clarification is required as to what constitutes a 'real and substantive risk' to the life of a pregnant woman, according to the UN Human Rights Committee in its 2014 assessment.¹¹²

In July 2015, Ireland was again recommended by the UN Committee on Economic, Social and Cultural Rights to adopt guidelines to clarify what constitutes a 'real substantive risk' to the life of a pregnant woman.¹¹³

In 2016, the UN Committee on the Rights of the Child also raised the concern that the term 'real and substantial risk' prevents doctors from being able to provide services in accordance with objective medical practice.¹¹⁴

¹¹¹ See para. 26, UN Committee Against Torture (2011) *Concluding Observations on Ireland* CAT/C/IRL/CO/1 17 June 2011, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/IRL/CO/1&Lang=E

¹¹² See para. 9, UN Human Rights Committee (2008) *Concluding Observations on Ireland*, CCPR/C/IRL/CO/3 30 July 2008, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fCO%2f3&Lang=en

¹¹³ See para. 30, UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland*, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement>

¹¹⁴ See 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, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/IRL/CO/3-4&Lang=En

Amending national law (including by Constitutional referendum)

The UN Human Rights Committee¹¹⁵ stated in 2014 that Ireland should revise its laws (including the Constitution) to provide additional exceptions allowing for lawful abortion in cases of rape, incest, serious risks to the health of the mother, or fatal foetal abnormality.¹¹⁶

This recommendation was echoed by the UN Committee on Economic, Social and Cultural Rights in 2015 when it recommended that Ireland:

‘Take all the steps necessary, including a referendum on abortion, to revise its legislation on abortion, including the Constitution and the *Protection of Life during Pregnancy Act 2013*, in line with international human rights standards’.¹¹⁷

The UN Committee on the Rights of the Child in 2016 raised concerns that the Irish legal framework criminalises abortion ‘even in instances where the pregnancy results from rape or incest, or in cases of severe foetal impairment’. It recommended that Ireland: ‘Decriminalise abortion in all circumstances’.¹¹⁸

Information provision and guidance

In 2014, the UN Human Rights Committee recommended that Ireland consider making more information on crisis pregnancy options available through various channels, and to ensure that health care providers who supply information on safe abortion services abroad are not subject to criminal sanctions.¹¹⁹ It also urged the State to take measures to help women to avoid unwanted pregnancies so that they do not have to resort to illegal or unsafe abortions that could put their lives at risk.¹²⁰

¹¹⁵ The UN Human Rights Committee is a body of independent experts that monitors states’ implementation of the International Covenant on Civil and Political Rights (ICCPR).

¹¹⁶ See para. 9, UN Human Rights Committee (2014) *Concluding observations on the fourth periodic report of Ireland*, CCPR/C/IRL/CO/4 19 August 2014, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fCO%2f4&Lang=en

¹¹⁷ See para. 30, UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland*, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement>

¹¹⁸ See para. 58, 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, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/IRL/CO/3-4&Lang=en

¹¹⁹ See para. 9, UN Human Rights Committee (2014) *Concluding observations on the fourth periodic report of Ireland*, CCPR/C/IRL/CO/4 19 August 2014, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fCO%2f4&Lang=en

¹²⁰ See para. 13, UN Human Rights Committee (2014) *Concluding observations on the fourth periodic report of Ireland*, CCPR/C/IRL/CO/4 19 August 2014, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fCO%2f4&Lang=en

In 2015, Ireland was again urged to: ‘publicize information on crisis pregnancy options through effective channels of communication; and ensure the accessibility and availability of information on sexual and reproductive health’.¹²¹

Disproportionate effect of the current law on certain groups

In 2016, the UN Committee on the Elimination of all forms of Discrimination against Women requested the Irish State to provide information on ‘the cost to women for travel and abortion service and care’ when persons procure abortion services abroad.¹²²

As described above, the UN Human Rights Committee in examining the treatment of Ms Mellet found that there was a failure to take into account her ‘medical needs and socio-economic circumstances’, which, in the circumstances, resulted in a violation of the ICCPR.¹²³

Minors

The UN Committee on the Rights of the Child in 2016 recommended that Ireland review its legislation with a view to ensuring access to safe abortion and post-abortion care services; and ‘ensure that the views of the pregnant girl are always heard and respected in abortion decisions’.¹²⁴ It further stated its concern at the: ‘severe lack of access to sexual and reproductive health education and emergency contraception for adolescents’.¹²⁵ It recommended that Ireland:

‘Adopt a comprehensive sexual and reproductive health policy for adolescents and ensure that sexual and reproductive health education is part of the mandatory school curriculum and targeted at adolescent girls and boys, with special attention to the prevention of early pregnancy and sexually transmitted infections.’

¹²¹ See para. 30, UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland*, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement>

¹²² See para 21, UN Committee on the Elimination of Discrimination Against Women (2016) *List of issues and questions prior to the submission of the combined sixth and seventh periodic reports of Ireland*, 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/>

¹²³ See para. 7.11, UN 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.

¹²⁴ See para. 58, 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, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRC/C/IRL/CO/3-4&Lang=En

¹²⁵ See para. 58, 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, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRC/C/IRL/CO/3-4&Lang=En

Recommendations of the Commission

The Irish State reports periodically to the United Nations and regional bodies on how it is vindicating the rights protected under different international conventions. As part of this process, the Irish Human Rights and Equality Commission submits its own analysis of Ireland's progress on human rights and equality matters and makes recommendations to the State for improvements.

The Irish Human Rights and Equality Commission has submitted a number of reports which (amongst the matters covered) have a bearing on the work of the Citizens' Assembly in relation to reproductive health.¹²⁶ For ease of reference, the main recommendations of the Commission on reproductive health can be condensed and summarised as follows:

Summary of recommendations/concerns:

'The [Irish Human Rights and Equality 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'.¹²⁷

'The Irish Human Rights and Equality Commission considers that the UN Human Rights Committee's views [in response to the Communication by Amanda Mellet] should be considered in full by the Citizens' Assembly to ensure that Ireland's legal framework complies with our international obligations.'¹²⁸

'The [Irish Human Rights and Equality Commission] has 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.'¹²⁹

¹²⁶ The recommendations include those made by the former Irish Human Rights Commission which was dissolved in 2014.

¹²⁷ 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/>.

See also Irish Human Rights and Equality Commission (2015) *Ireland and the United Nations Convention on the Rights of the Child*, p. 22, 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/>

¹²⁸ Irish Human Rights and Equality Commission (2016) 'IHREC statement on the views of the UN Human Rights Committee' [press release] available at: <https://www.ihrec.ie/statement-on-the-views-of-the-un-human-rights-committee/>

¹²⁹ 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/>

See also 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/>

See also Irish Human Rights and Equality Commission (2015) *Ireland and the International Covenant on Economic, Social and Cultural Rights*, p 85, available at: https://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf

‘The [Irish Human Rights and Equality Commission] reiterates its concern that [...] a woman who undergoes an unlawful abortion in Ireland could face a fine or up to 14 years’ imprisonment or both’.¹³⁰

‘The [Irish Human Rights and Equality Commission] reiterates its earlier recommendations 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.’¹³¹

‘[National law] should address the situation of young women and girls in a crisis pregnancy (including following rape) by setting out the procedures which should apply to take into account their age and vulnerability, potential exposure to criminal sanction, and their consent to treatment, including where the child is in HSE care. [Irish law] should further provide that young women and girls in a crisis pregnancy have a right to accessible age-appropriate sexual and reproductive health services without discrimination.’¹³²

‘The [Irish Human Rights and Equality Commission] recommends that the Department of Health update its Guidance Document for Health Professionals on the implementation of the [Protection of Life During Pregnancy] 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’.¹³³

‘The [Irish Human Rights and Equality Commission] further recommends 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

¹³⁰ 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/>

¹³¹ 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/>

See also 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/>

See also Irish Human Rights and Equality Commission (2015) *Ireland and the International Covenant on Economic, Social and Cultural Rights*, p 85, available at: https://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf

See also 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/>

¹³² Irish Human Rights Commission (2013) *Observations on Protection of Life During Pregnancy Act 2013*, para 118, available at: <https://www.ihrec.ie/ihrc-publishes-observations-on-the-protection-of-life-during-pregnancy-bill-2013/>

¹³³ Irish Human Rights and Equality Commission (2015) *Ireland and the United Nations Convention on the Rights of the Child*, p 22, 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/>

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'.¹³⁴

'The [Irish Human Rights and Equality Commission] recommends 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'.¹³⁵

The *Protection of Life During Pregnancy Act 2013* should be amended to provide:

'an expedited procedure before the High Court ... for judicial reviews arising under the legislation, with provision for legal aid, and anonymity, thereby ensuring that judicial review is an "accessible and effective" procedure for vindicating the human rights engaged. It is arguable that such an expedited judicial review procedure would be required by Article 8 ECHR, in light of the ECtHR judgments in *Tysiac and P and S v Poland*',¹³⁶ and;

'some discretion [...] such that a girl or woman that presents as being suicidal is not subjected to additional psychiatric examinations if that would be detrimental to her mental health and wellbeing'.¹³⁷

¹³⁴ Irish Human Rights and Equality Commission (2015) *Ireland and the International Covenant on Economic, Social and Cultural Rights*, p 85, available at https://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf

See also 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/>

¹³⁵ Irish Human Rights and Equality Commission (2015) *Ireland and the International Covenant on Economic, Social and Cultural Rights*, p 85, available at: https://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf

See also Irish Human Rights Commission (2013) *Observations on Protection of Life During Pregnancy Act 2013*, para 118, available at: <https://www.ihrec.ie/ihrc-publishes-observations-on-the-protection-of-life-during-pregnancy-bill-2013/>

¹³⁶ Irish Human Rights Commission (2013) *Observations on the Protection of Life During Pregnancy*, July 2013, at para. 71. Available at: <https://www.ihrec.ie/ihrc-publishes-observations-on-the-protection-of-life-during-pregnancy-bill-2013/>

¹³⁷ Irish Human Rights Commission (2013) *Observations on the Protection of Life During Pregnancy*, July 2013, at para. 72. Available at: <https://www.ihrec.ie/ihrc-publishes-observations-on-the-protection-of-life-during-pregnancy-bill-2013/>