

**Opening Statement of Professor Fiona de Londras**  
**Joint Committee on the 8<sup>th</sup> Amendment to the Constitution**  
**27 September 2017**

0.1 I have been asked specifically to address the question of legal (un)certainty. My written remarks and opening statement are supplemented by more detailed written evidence already circulated to the members of the Committee.

0.2 While it is quite appropriate for this Committee to be concerned with legal certainty, we must accept that **absolute legal certainty is not achievable**. Indeed, Ms Justice Laffoy made that point here last week. Thus, **rather than try to achieve absolute legal certainty, the aim should be to create a reasonable level of legal certainty**. This is one that makes clear the scope of the Oireachtas' legislative power, although it may still require the exercise of judgement in determining whether a proposed legal enactment is within that power. It may also be subject to a finding by a Court that this judgement was inaccurate, resulting in some or all of a piece of law being struck down. **In my view, both simple repeal and repeal and replace allow for a reasonable level of legal certainty, although in the case of replace much depends on the wording that is proposed.**

0.3 Furthermore, legal certainty is only one interest to be pursued in respect of the reform of Article 40.3.3. Any change proposed to the Constitution should be such as to ensure that it does not tie the Oireachtas' hands completely. **Constitutions should enable the organs of the state to govern effectively**, i.e. to respond to the real governance needs in society, which shift and change over time, within constitutionally articulated limitations about rights and the separation of powers. They should also enable the state to meet its international human rights law obligations, which we are currently in breach of. In other words, constitutions should stand the test of time. **Constitutions should also enable the government to meet the needs of those it governs**. Article 40.3.3 does not allow for a legislative structure that meets the needs of the thousands of women<sup>1</sup> in Ireland who every year access abortion outside of the healthcare structures in this state. Ensuring that this is redressed is also an important objective of constitutional reform.

## **1. The power to legislate**

1.1 Article 15.2.1 provides that the Oireachtas has the power to legislate for all matters, and Article 15.4 requires the Oireachtas to legislate in a manner consistent with the Constitution. Thus there is no uncertainty about the power to legislate for abortion as a general matter.

1.2 At present the scope of the Oireachtas' power to legislate is also effectively clear as it is outlined in Article 40.3.3. This limits the power to the extent that the

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<sup>1</sup> Throughout this submission the words pregnant women, women, and pregnant persons are used interchangeably. The pronouns 'she' and 'her' are also used. In all cases, these should be

Oireachtas cannot legislate for reforms as proposed by the Citizens Assembly; that requires constitutional change.

**1.3 The Assembly's proposal as to constitutional law reform should thus be read in its context and as per its clear intended effect: as a proposal designed to make explicit the power to legislate for abortion to the extent recommended in the legislative proposals made by the Assembly.**

1.4 The question of legal uncertainty really relates to how to ensure that the Oireachtas has the power to legislate to the extent recommended by the Assembly, although whether it would pass a law of the kind recommended by the Assembly would be a matter for the Oireachtas itself. In this respect the constitutional and legislative questions that arise should be considered separately. The constitutional question relates to how to ensure the Oireachtas has sufficient power. The legislative question relates to the form, extent, and nature of the legislation. I am dealing exclusively with the former, although both are relevant to the questions of legal certainty as a general matter.

## **2. Legal (Un)certainty: The Concerns**

2.1 In its session last week, this Committee expressed concern about how to ensure the constitutionality of legislation that might follow a referendum. I take this as being related to uncertainty about what rights either the foetus or the pregnant woman would have following a 'simple' repeal of Article 40.3.3. The three potential outcomes are:

- (i) Repeal would remove the express right to life of the foetus. Women's right to access abortion care would most likely be constructed as part of already protected rights to, for example, bodily integrity and privacy. These rights are qualified, and may be limited provided the limitation is proportionate. *This would mean the Oireachtas could legislate for abortion according to the same rules and principles as it does in all other areas of governance that have implications for rights.*
- (ii) Repeal would remove the express right to life of the foetus but other unenumerated or implicit constitutional rights of the foetus would be unaffected. The extent of those rights is currently unknown. *This might substantially constrain the scope for the Oireachtas to legislate to make abortion care available to the same or a greater extent than is currently the case.*
- (iii) Repeal would remove the express right to life of the foetus and mean that women had a right to access abortion care in Ireland, which might be unlimited. *This might substantially constrain the scope for the Oireachtas to legislate for limitations to abortion care.*

2.2 While all three options are possible, my view is that option (i) is the most likely. Under that approach, the constitutional rights of pregnant persons which are

undisturbed by repeal of Article 40.3.3 (i.e. all ‘ordinary’ constitutional rights) would continue to apply, as would the obligation only to legislate in conformity with the Constitution. Repeal would most likely be interpreted as empowering the Oireachtas to legislate for abortion unconstrained by foetal constitutional rights. Notwithstanding that, it would be open to the Oireachtas to pursue the legitimate aim of preserving foetal life by imposing time limits or limiting access to certain grounds, but in doing so it could only impose *proportionate limitations* on pregnant persons’ rights. While the Courts would ultimately determine the meaning of the Constitution, in the first instance the Oireachtas would be advised as to the likely meaning of the Constitution by the Attorney General and would legislate accordingly. In other words, **the Oireachtas would need to approach making law about abortion in the same way as it approaches the rest of its law-making functions.**

### 3. Options for Constitutional Reform

#### 3.1.1 Repeal Article 40.3.3 without replacement

3.1.1 The first option is ‘simple’ repeal of Article 40.3.3. The power of the Oireachtas to legislate would be guaranteed under Article 15.2.1 but the scope of the power to legislate might not be fully clear. This is because the foetus may have some continuing constitutional rights, and of course the pregnant person would have their full constitutional rights. She may also have a constitutional right to choose. The exact scope of these rights may need to be determined by the court. It is reasonable to expect that courts would take into account the assumed intentions of the electorate in voting to repeal Article 40.3.3 in any such case. Legislation for abortion introduced after repeal would need to ensure that any limitations on the rights of pregnant people are proportionate. A Court could strike the legislation down if it were an unconstitutional interference with rights. A simple repeal would thus produce a reasonable level of certainty similar to that within which the Oireachtas operates in other contexts.

#### 3.1.2 Repeal Article 40.3.3 and replace it with a provision explicitly outlining the situations in which abortion is constitutionally permitted

3.2.1 A second option is to remove Article 40.3.3 and replace it with a provision that permits abortion in limited circumstances (e.g. rape, incest, risk to life, fatal foetal abnormality). Such a provision would produce some legal certainty as it would make it clear that legislation for abortion is permitted in respect of the specified grounds, subject to those grounds being defined with sufficient specificity to allow for legislative activity. A change of this kind would greatly limit the Oireachtas’ power and would not address the most prevalent reasons why women in Ireland access abortion care. It would produce an unduly complex and detailed constitutional provision. It would constrain the power of the Oireachtas to react to medical, scientific, and political developments in the future. It would be cumbersome and impractical. It would be unlikely to stand the test of time. It would be inconsistent with the recommendations of the Citizens’ Assembly.

### 3.3. Repeal Article 40.3.3 and replace it with a negative provision providing 'nothing in this Constitution shall prohibit abortion as provided for by law'

3.3.1 A third option is to repeal Article 40.3.3 and replace it with a negative provision such as 'Nothing in this Constitution shall prohibit abortion as regulated by law'. This would make explicit the power to legislate and allow future change through the legislative process. It would likely be interpreted as resolving uncertainties about the impact on the power to legislate of any residual and unenumerated rights of the foetus. It would also leave open the potential for the Protection of Life During Pregnancy Act 2013 to remain in place, although it would be vulnerable to constitutional challenge. It would leave the extent of a pregnant person's rights in respect of reproductive autonomy to be determined. It would be open to the Oireachtas to pursue the legitimate aim of preserving foetal life by imposing proportionate limitations on pregnant persons' rights. It would enable the Oireachtas to legislate to meet the needs of the electorate. A replacement of this kind would thus produce a reasonable level of certainty similar to that within which the Oireachtas operates in other contexts.

### 3.4 Repeal Article 40.3.3 and replace with a positive provision guaranteeing the right to bodily integrity and to self-determination in all matters of medical care

3.4.1 A fourth option is to remove Article 40.3.3 and replace it with express rights to bodily integrity and self-determination in medical decision-making. This would not tie the hands of the Oireachtas, although it would effectively compel legislation on abortion as the Protection of Life During Pregnancy A 2013 would almost certainly violate such an explicitly guaranteed right. It would address in a broad sense the need for autonomy in reproductive life, and thus go beyond abortion. It may have some further, unanticipated or undesired impacts around, for example, end of life decision-making and in that respect may create some legal uncertainty. The courts would determine the exact parameters of the right.

### 3.5 Repeal Article 40.3.3 and entrench legislation in the Constitution

3.5.1 A fifth option is to remove Article 40.3.3 but to regulate abortion by a piece of legislation prepared and published in advance of the referendum, and 'entrenched' in the Constitution (i.e. expressly mentioned in the Constitution and, thus, effectively requiring constitutional change for it to be amended in the future). This would echo the approach proposed in the 2002 referendum campaign. Inasmuch as it would create legal certainty it would do so by calcifying abortion law and making it immune from the normal processes of politics and law, and thus from the process of governance, once again. Furthermore, the meaning and operation of the legislation would be subject to judicial determination, thus potentially making it highly complex and difficult to use. The legislation could never be amended without a further referendum, even if the proposed change were merely technical, or it transpired that its processes

caused serious harm to pregnant persons, were incompatible international best medical practice, or resulted in violations of international human rights law. It would thus likely fail to stand the test of time.

## **6. Conclusion**

6.1 Of the options I have outlined above, Option 1 (simple repeal) and Option 3 (repeal and replace with a negative provision) seem most fully to ensure (i) reasonable levels of legal certainty, (ii) the ability to govern effectively and stand the test of time, and (iii) the ability to ensure compliance with international legal obligations.

6.2 I am happy to take any questions from the Committee.

END

## Supplementary Written Submission of Prof. Fiona de Londras to the Joint Committee on the 8<sup>th</sup> Amendment to the Constitution

27 September 2017

### 1. THE LAW ON ABORTION IN IRELAND

The law on abortion in Ireland primarily comprises Article 40.3.3 of the Constitution, the Protection of Life During Pregnancy Act 2013, the Access to Information (Services outside the State for Termination of Pregnancy) Act 1995, and relevant case law. In his paper to the Citizens Assembly, Dr Eoin Carolan outlined the law as it stands, therefore in this section I offer only a concise summary of important elements of the law on abortion in Ireland. The key points are as follows:

- The Constitution recognises “the unborn” has having a right to life (Article 40.3.3)
- The Constitution recognises a pregnant woman (“the mother”) as having an equal right to life to that of the unborn (Article 40.3.3)
- The Constitution obliges the state to protect and vindicate these equal rights “as far as practicable” (Article 40.3.3).
- The state is not required to do what is “futile” to protect either right (*Attorney General v. X* [1992] I.R. 1; *PP v HSE* [2014] IEHC 622)
- The constitutional protection of the right to life of the unborn means that abortion is only available where there is a real and substantial risk to the life of the pregnant woman, which can only be averted by termination of the pregnancy, and the unborn life is not yet viable (*Attorney General v X* [1992] 1 IR 1). Where viability has been reached, but there is a real and substantial risk to the pregnant woman’s life, the pregnancy would be terminated by another means (e.g. early delivery). This was illustrated by the case studies used by Professor Higgins in his submission to the Citizens Assembly.
- The general prohibition on abortion applies to all forms of abortion; it makes no distinction between surgical and medical abortion (the ‘abortion pill’).
- The practical operation of the constitutional law on abortion is now governed by the Protection of Life During Pregnancy Act 2013.
- The existence of a fatal foetal abnormality is not relevant to a determination under the Protection of Life During Pregnancy Act 2013. This only allows abortion in cases of real and substantial risk to the life of the pregnant woman.
- The constitutional right to access abortion is very limited, but does not distinguish between the different sources of risk to the life of the pregnant woman (e.g. a risk of suicide *versus* a risk of death from a disease). In other words, the constitutional right to access abortion applies equally whether the risk to life emanates from a physical condition or a risk of suicide (*Attorney General v X* [1992] 1IR 1). However, the Protection of Life During Pregnancy Act 2013 differentiates between the two, and imposes additional procedural

requirements where a woman claims her life is in danger because of a risk of suicide (section 9) compared to a risk from physical illness (section 7).

- Regardless of whether there is a risk to her life relating to the pregnancy or not, all pregnant women have a constitutional right to travel outside of the state to access abortion (Article 40.3.3).
- Regardless of whether there is a risk to her life relating to the pregnancy or not, all pregnant women have a constitutional right to information relating to abortion (Article 40.3.3). Information provided must be non-directional in respect of abortion (Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995, s. 5).
- Medical practitioners may not refer a woman for abortion services in another jurisdiction (Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995, s. 8).
- Medical professionals are entitled to exercise conscientious objection to being involved in abortion-related procedures and abortion care under the 2013 Act *except* in cases of emergency (Protection of Life During Pregnancy Act 2013, s. 17)
- It is a criminal offence for anyone to provide or access abortion within this jurisdiction outside of s.s. 7, 8 and 9 of the 2013 Act (Protection of Life During Pregnancy Act 2013, s. 22). This includes women who access and take abortion pills in Ireland.

## **2. AREAS OF UNCERTAINTY IN THE LAW OF ABORTION IN IRELAND**

There are at least three significant areas of continuing uncertainty in respect of the constitutional position on abortion under Article 40.3.3 of the Constitution:

First, there is no definitive definition of “the unborn” for the purposes of Article 40.3.3 generally, but following *Roche v Roche* [2009] IESC 82 it likely means an embryo post-implantation.

Second, it is not known whether the Constitution permits abortion in cases of fatal foetal abnormality. There are strong arguments that it does (because the state is not obliged to do that which is futile to preserve foetal life) and that it does not (because the fatal foetal abnormality does not alone create a real and substantial risk to the life of the pregnant woman). In the absence of a Supreme Court decision precisely on this issue, we do not know with certainty whether permitting abortion in cases of FFA would be constitutionally permissible at this time.

Third, it is not known whether the foetus *only* has a right to life under the Constitution, or whether the foetus has a broader range of constitutional rights. There are conflicting decisions from the High Court on this. An appeal from *IRM v Minister for Justice, Equality and Law Reform* [2016] IEHC 478 (in which Humphreys J. found that the ‘unborn’ has a wider range of constitutional rights than the right to life under Article

40.3.3) is now pending before the Supreme Court in which it is anticipated this matter will be resolved.

### **3. THE SIGNIFICANCE OF THE CONSTITUTIONAL REGULATION OF ABORTION IN IRELAND**

Constitutions clarify the boundaries within which the state may operate. These boundaries are absolute. In other words, if the state were to legislate in a manner that went beyond what the Constitution allowed, that legislation would be liable to being struck down by the Supreme Court and, thus, to being null and void. Similarly, if the state does not give effect to a right that is protected in the Constitution, one can sue the state in order to compel it do so.

In the context of Article 40.3.3 this has significant implications, such as:

- Even if there were a political appetite to do so, the state could not legislate in a manner that goes beyond what the Constitution permits. Any such legislation would be unconstitutional. Thus, for example, the Constitution as currently understood does not allow for the Oireachtas to pass a law allowing for abortion in situations of a risk to the health of a pregnant woman where that risk falls below the threshold of a “real and substantial risk to the life”. In other words, the Constitution acts as an absolute barrier to legislative change to liberalise abortion law to allow for greater reproductive autonomy for women; this could only be done pursuant to appropriate constitutional change.
- Logic dictates that under the existing constitutional law, the abortion pill could be licenced for use and prescription by medical practitioners but *only* where there is a real and substantial risk to the life of the pregnant woman, because medical abortions have the same effect as surgical abortions. More extensive access to the abortion pill would require amendment of the Constitution.
- If it were found that the foetus enjoys a range of constitutional rights, and not just the right to life under Article 40.3.3, that might be used as a basis to require the state to do or not to do certain things, such as preventing deportation of a parent of the foetus, where the foetus would be an Irish citizen when born and thus has a prospective right to enjoy family life with the prospective deportee (this was the issue in *IRM v Minister for Justice, Equality and Law Reform* [2016] IEHC 478). Thus, if “the unborn” has rights beyond Article 40.3.3 this has implications for the mechanisms of constitutional reform that might be required in order to liberalise abortion law in Ireland.

### **3. OPTIONS FOR CONSTITUTIONAL REFORM**

Given the nature of, and constraints emanating from, the current constitutional position, constitutional reform is fundamental to any attempts to ensure meaningful reform of the law on abortion in Ireland. In this section, a number of options for



constitutional law reform are outlined, together with the arguments that might be levied for and against each option.

### ***The importance of constitutional design***

Questions of constitutional design are important, and proposed constitutional texts should be carefully considered.

The implications and interpretation of the 8<sup>th</sup> Amendment have served greatly to limit women's reproductive autonomy and ability to refuse consent (HSE, National Consent Policy, p. 41). These were not the inevitable outcomes of the 8<sup>th</sup> Amendment, which is worded in such a way that much more regard for women's autonomy was possible. For example, the commitment to vindicate the right to life of the unborn "as far as practicable" may be interpreted as permitting abortion where it is desired in cases where the foetus was certain to die before or shortly after birth. Similarly, the constitutional text does not clearly require the extremely restrictive abortion information regime that currently exists under the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995, or the general criminalisation of abortion. However, a sustained and effective process of litigation resulted in Article 40.3.3 being subjected to an extremely restrictive interpretation, which allows for the termination of pregnancies by abortion in Ireland only in the very restricted circumstances outlined above.<sup>2</sup>

In addition, Article 40.3.3 does not conform to the usual principle of 'chrononomy' in constitutional design, i.e. the principle that constitutions should be capable of reflecting the past, governing the present, and adapting to the future. The 8<sup>th</sup> Amendment tied the hands of the Oireachtas by introducing an absolute barrier to meaningful reform of abortion law in Ireland, regardless of changing political, social, medical or other circumstances. While it is in the nature of a constitution to place limits on the ability of the state to exercise its power, this should be done to the extent possible without stymying parliament in undertaking its proper role (governance), or allowing it to abdicate responsibility for taking difficult political decisions (by pointing to the Constitution as tying its hands).

Furthermore, to the extent possible, where constitutional change is being undertaken it should be done in a manner that ensures Ireland can comply with its international obligations, including obligations under international human rights law treaties that have been ratified by the Irish state such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

### ***Option 1: Repeal Article 40.3.3 without Replacement***

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<sup>2</sup> A comprehensive account of the constitutional *status quo* and this litigation is available in Fiona de Londras, "Constitutionalizing Fetal Rights: A Salutory Tale from Ireland" (2015) 22(2) *Michigan Journal of Gender and the Law* 243-289.

On the face of it, the simplest option is to simply remove Article 40.3.3 and not replace it. This would remove any explicit mention of the right to life of the unborn from the text of the Constitution and, some argue, would ‘deconstitutionalise’ the question of abortion. However, there are some concerns about such an approach.

*A. Foetal rights may still be protected by the Constitution*

Although the constitutional right to life of the foetus was expressly introduced by the 8<sup>th</sup> Amendment, there have been some judicial statements claiming that it existed prior to this, specifically as an unenumerated right.<sup>3</sup> There is a (slim) possibility that this would be used to establish foetal rights even if Article 40.3.3 were removed, so that constitutional ‘silence’ on this matter may not be wise.<sup>4</sup>

The contrasting cases of *IRM v Minister for Justice, Equality and Law Reform* [2016] IEHC 478 and *Ugbelese v Minister for Justice, Equality and Law Reform* [2009] IEHC 598 show that there is some disagreement in our courts about whether the right to life in Article 40.3.3 is the only constitutionally protected right of the unborn or whether there are others. If the unborn has further constitutional rights removal of Article 40.3.3 does not necessarily remove those further rights (although it might be interpreted as doing so), which might frustrate efforts to reform abortion law.

*B. This may result in an ‘absolute’ right to abortion under the Constitution*

Prof. Gerry Whyte has claimed that removal of Article 40.3.3 would result in an absolute right to access abortion without limitations.<sup>5</sup> His argument rests on the presumption that repeal would mean ‘the People’ intended all constitutional protection to be removed from the foetus *resulting in* an absolute right. However, this argument is undermined by the experience in other jurisdictions, which shows that, even where there is no constitutional right to life of the foetus, courts still recognise a state interest in the preservation of foetal life. However, that interest can be pursued only in a manner that recognises and respects the right to bodily integrity and to privacy of a pregnant woman so that abortion would be made available but could be limited by, for example, term limits and grounds provided they did not disproportionately interfere with the rights of the pregnant woman. This is the case, for example, in the United States (most recently affirmed by the US Supreme Court in *Whole Women’s Health v Hellerstedt* 579 U.S. \_\_\_ (2016)).

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<sup>3</sup> *Attorney General (SPUC) v Open Door Counselling Limited and the Wellwoman Centre Ltd* [1988] 1 I.R. 593

<sup>4</sup> See further Enright et. al. “Abortion Law in Ireland: A Model for Change” (2015) 5(1) *feminists@law* (extract below)

<sup>5</sup> Gerry Whyte, “Abortion on Demand the Legal Outcome of Repeal of the 8<sup>th</sup> Amendment”, *Irish Times*, 28 September 2016. See responses from Ivana Bacik & Fiona de Londras, *Irish Times* letter page, 29 September 2016. See su-rebuttal from Gerry Whyte, *Irish Times* letter page, 30 September 2016. See further response from Fiona de Londras, *Irish Times* letter page, 5 October 2016.

### *C. Simple repeal does not compel legislation*

A simple repeal of Article 40.3.3 would not, by itself, confirm or clarify the constitutional position; neither would it make abortion more freely available without subsequent legislative enactment.

The Protection of Life During Pregnancy Act 2013 would remain in place but it would be vulnerable to challenge and may be struck down in whole or in part in future litigation. Should the legislation be struck down there would be no legislative scheme to govern abortion, which would instead be governed by medical ethics and guidelines. This poses considerable challenges such as (i) lack of preparedness of medical profession as it has been operating for 33 years in an idiosyncratic and punitive legal regime, (ii) lack of clarity re conscientious objection, especially given high volume of medical care institutions under the patronage of the Catholic Church, (iii) lack of access in practical terms in large parts of the country, as has been documented in parts of Canada, where there are few or no doctors who will perform abortions (either medical or surgical).

While there would be political pressure (and popular expectation) for some legislation to be introduced, the Constitution itself would not clearly determine what needed to be included. Should the Constitution not compel legislation, the difficult nature of these questions and issues are such that they may hold up legislating for a substantial period of time.

### ***Option 2: Repeal Article 40.3.3 and Replace with Abortion-related Provision***

A second option is to remove Article 40.3.3 and replace it with a provision that permits abortion in limited circumstances. Such a provision might (i) recognise the right to life of 'the unborn'/the societal value of the protection of foetal life, (ii) recognise the rights of the pregnant woman to life and to health, and (iii) explicitly allow for abortion in express circumstances that align with the internationally recognised grounds for access to abortion, i.e. protection of the life of the pregnant woman, rape, incest and fatal foetal abnormalities. It might also allow for abortion in cases of risk to health. However, such an approach would pose serious difficulties.

#### *A. It would tie the hands of the Oireachtas*

The role of the Oireachtas is to make law in a manner that is compatible with the Constitution and which is based on evidence. A key critique of Article 40.3.3 is that it means the Oireachtas' 'hands are tied' and it has little space to make evidence-based, policy decisions about the availability of abortion that could be reflected in legislation. An 'Option 2' provision would replicate that difficulty, with the Oireachtas having extremely limited space for maneuverer and being unable to reflect best medical practice, scientific advances, and popular will in the legislation *beyond* within the limited grounds outlined in the Constitution.

Furthermore, such a provision would not conform to the usual thesis of 'chrononomy' in constitutional design, i.e. the principle that Constitutions should be capable of reflecting the past, governing the present, and adapting to the future.<sup>6</sup> A provision of this kind would not allow for the Oireachtas to make law in the future in response to changes in public, popular sentiment, international human rights law, medical science etc but would, rather, require constitutional change by means of referendum again.

*B. It would be unduly complex*

Such a provision would be extremely complex when compared to almost all other constitutional provisions, which generally lay down broadly worded, policy statements. The exception is Article 41.3.2 (on divorce) introduced pursuant to the 29<sup>th</sup> Amendment of the Constitution. This provision does not allow for sensible and progressive divorce law reform and requires a very long period of separation before divorce is possible.

Some of the terms that would be used in such a provision are themselves contested. For example, the term 'fatal foetal abnormality' is difficult to define. The same is true of 'risk to life', where questions arise about whether this requires abortion to be permitted only to avoid death or whether it can have a broader meaning (e.g. maintaining a quality of life), and about how imminent a risk to life must be before an intervention resulting in 'destruction of foetal life' can be taken. Such a constitutional provision would require the Oireachtas to define these terms and those definitions would be susceptible to litigation and challenge before the Supreme Court.

*C. It may cause harm to women*

Should the Constitution explicitly permit abortion in cases of rape or incest, questions would arise as to how a woman seeking an abortion would be required to establish her 'qualification' under these grounds. The difficulties of this would become especially acute should abortion be criminalised outside of the specific grounds that such a provision would allow for in the constitutional text. Recognising a general right to life of the "unborn" whilst allowing for abortion in exceptional cases (such as rape) may mean that abortion would not be available on the basis of a 'mere' claim of rape or incest (in order to vindicate the general right to life of the unborn). If this were so, women may be required somehow to prove rape or incest (for example, by engagement with the police) or at the very least to convince a medic of the veracity of the claim. Medics may be subject to criminal liability should they provide abortion care to someone who made a false claim, and this would likely produce a "chilling effect" where medics would be cautious about such claims. This would not only cause harm to women and assault their dignity, but it would also place significant power in the hands of doctors, which power may not always be exercised in good faith. Should a

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<sup>6</sup> Richard Kay, "Constitutional Chrononomy" (2000) 13 *Ratio Juris* 31.

criminal report of rape or incest be required, this would require women to engage with the criminal justice system whether she is ready or willing to do so or not, and further strip a woman of her control and autonomy in a situation in which she has already suffered an extreme assault on her dignity and disregard for her consent. Ultimately such an arrangement may result in ‘rape trauma syndrome’ in some cases and would be severely damaging to women.<sup>7</sup>

*D. It would not resolve the problem*

Such a provision would still result in most women who require or desire abortion abroad to access abortion or importing abortifacients, either because the Irish law does not accommodate abortion for the grounds on which it is required or desired by most women or because the Irish regime is harmful and traumatic (e.g. by requiring women to report rape in order to access abortion). Thus, the core problem produced by the 8<sup>th</sup> Amendment (i.e. the lack of availability of abortion care in Ireland) would not be resolved.

Such a provision would also fail to address further problems caused by (or related to) the 8<sup>th</sup> Amendment including the criminalisation of a safe and health-improving medical practice and medical practitioners, compelling medical practitioners to act against their conscience and what they believe to be in the best interest of their patients, undermining the principle of consent in maternal care, the stifling of political innovation and debate about abortion, and the ability of individuals to effectively make autonomous moral judgements relating to their pregnancies.

*E. This may not satisfy Ireland’s human rights obligations*

A provision of this kind may be sufficient to satisfy international human rights law *for now*, but the *Mellet v Ireland* decision of the Human Rights Committee (2016), together with comparative developments in constitutional and human rights law relating to abortion, suggest that international human rights law may recognise a broader right to access abortion (either as a stand-alone right, or within the right to adequate health care, the right to be free from inhuman and degrading treatment, the right to non-discrimination, or the right to privacy) in the near future. Should this happen the *status quo* in which Ireland’s constitutional arrangement puts it in violation of its international obligations would reemerge.

*F. It would require immediate replacement or amendment of the Protection of Life During Pregnancy Act 2013*

Any such provision would require the 2013 Act to be replaced or amended immediately in order to ensure access to abortion on the new constitutional grounds,

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<sup>7</sup> See the argument against a ‘rape ground’ in Enright et. al., above n. 4.

meaning that fully developed legislation would have to be ready and, almost certainly, agreed upon in principle within the Oireachtas before the referendum.

***Option 3: Repeal Article 40.3.3 and replace with a Negative Provision***

One could propose removal of Article 40.3.3 and its replacement with a negative provision that makes it clear that the Constitution does not prohibit making abortion available through law. Such a provision would be worded in a manner along the lines of: ‘Nothing in this Constitution shall prohibit abortion as regulated by law’.

*A. It makes it clear that the Oireachtas may legislate on abortion*

Such a provision would make the regulation of abortion a firmly political matter, leaving it to politics to decide (i) whether and (ii) how to regulate abortion by law. There would be substantial political pressure to introduce legislation, but no constitutional compulsion to do so. However, the removal of Article 40.3.3 would mean that the 2013 Act would be vulnerable to a challenge as to its constitutionality (see C. below).

*B. It would not tie the hands of the Oireachtas*

Whatever legislation the Oireachtas introduced in the wake of such a constitutional amendment could be changed in the future through the ordinary legislative process, so that the hands of the Oireachtas would not be tied and the principle of chrononomy in constitutional design would be respected.

*C. It would leave the Protection of Life During Pregnancy Act 2013 in place but vulnerable to challenge*

The precise meaning of any such amendment would fall to be determined by the Supreme Court, most likely in a challenge to the PLDPA 2013. Such a provision would likely to be taken to mean that the Oireachtas can regulate abortion by law, *but in so doing* it must respect constitutional rights, so that this provision would be interpreted ‘harmoniously’ with the remainder of the Constitution. That includes a right to privacy and a right to bodily integrity on the part of pregnant women, which would almost certainly no longer be subjected to counter-weight by a *constitutional* right to life of the foetus, although it would be subject to limitations that pursue the objective of preserving foetal life. It may also be balanced against other constitutional rights of the ‘unborn’ depending on the outcome of the appeal to *IRM v Minister for Justice, Equality and Law Reform* [2016] IEHC 478. Thus, the question would be whether the Protection of Life During Pregnancy Act 2013 constituted a *proportionate* interference with those rights. Given the extremely limited nature of the Act it is quite possible that it would be struck down as a disproportionate interference with these rights.

*D. It does not positively protect the rights of pregnant women*

Such a provision would fail to address further issues related to Article 40.3.3 including the criminalisation of a safe and health-improving medical practice and medical practitioners, compelling medical practitioners to act against their conscience and what they believe to be in the best interest of their patients, undermining the principle of consent in maternal care, a medical culture of paternalism and lack of autonomy for pregnant women, the stifling of political innovation and debate about abortion, and the ability of individuals to make autonomous moral judgements relating to their pregnancies.

***Option 4: Repeal Article 40.3.3 and replace with a Positive Provision***

One could propose removal of Article 40.3.3 and its replacement with a positive protection of the right to bodily integrity and self-determination in medical decision-making. The provision would also include a second clause that ensures abortion cannot be considered unconstitutional. Thus, a new provision that reads something like this is contemplated here:

The State guarantees by its law to protect and vindicate the right of all persons to bodily integrity and, in particular, to self-determination in all matters of medical treatment.

Nothing in this Constitution shall be read as prohibiting abortion as regulated by law.

This provision is that suggested in Enright et. al. "Abortion Law in Ireland: A Model for Change" (2015) 5(1) *feminists@law*.

*A. It compels political action on abortion without tying the hands of the Oireachtas*

Although this does not expressly require the Oireachtas to legislate for abortion, the positive protection for bodily integrity and self-determination in all matters of medical treatment would almost certainly make the general criminalisation of abortion, as is currently the case, unconstitutional.

This would leave the Oireachtas with sufficient space to determine grounds, time limits, conscientious objection and all other such matters that it might be thought need to be dealt with in a legislative scheme to govern abortion. It would require that the Oireachtas do so by reference to express constitutional rights to bodily integrity and self-determination of pregnant women. Thus, while a right to access abortion *per se* would not be introduced, the rights against which all limitations to abortion that might be introduced (e.g. time limits, grounds) would have to be assessed would be express thus introducing further clarity to law-making, although the question of proportionality of any such law would ultimately be determined by the Supreme Court.

Any legislation introduced on foot of such a provision would be subject to future amendment through the ordinary legislative process.

*B. It would address the issue in a broad sense*

A provision of this kind would not only address the problems caused by the 8<sup>th</sup> Amendment in a narrow sense (i.e. lack of access to abortion for most people who require or desire it), but also in a broader sense inasmuch as it would positively assert and protect the right to bodily integrity and to self-determination in medical matters thus forcing or nudging a cultural shift in maternal medical care towards autonomy. This would have significant advantages in liberalising maternal care in Ireland (e.g. the National Consent Policy, the availability of and support for home births, a reduction in 'managed labour'). Thus, such a provision would both help to address these broad issues *and* recognise the wide range of harms related to Article 40.3.3 and experiences by many women who experience maternal care in Ireland well beyond the discrete question of whether a woman who requires or desires it can access abortion (on which I refer the Committee to the submission of Midwives for Choice to the Citizens' Assembly).

*C. It would leave the Protection of Life During Pregnancy Act 2013 in place but vulnerable to challenge*

The Protection of Life During Pregnancy Act 2013 would remain in place but it would be vulnerable to challenge and may be struck down in whole or in part in future litigation.

The PLDPA would be particularly vulnerable in the face of an express right to bodily integrity and self-determination in medical matters given its extremely restrictive provisions which would almost certainly not be proportionate by reference, in particular, to a right to self-determination in medical matters.

Should the PLDPA be struck down the positive right protected in the new clause would almost certainly mean that abortion should be constitutionally available, but would be difficult to access in practical terms in the absence of a legislative scheme. Thus, it is to be expected that such a constitutional change would be followed by comprehensive legislative reform.

*D. It may have undesired or unpredictable implications*

A provision of this kind may have broader implications for autonomy in medical decision-making including in relation to end-of-life decision-making. The courts would determine the exact parameters of the right. This might introduce considerable uncertainty until such a determination was made.



### ***Option 5: Repeal Article 40.3.3 and entrench legislation in the Constitution***

A further option is to remove Article 40.3.3 but to regulate abortion by a piece of legislation prepared and published in advance of the referendum, and 'entrenched' in the Constitution (i.e. expressly mentioned in the Constitution and, thus, effectively requiring constitutional change for it to be amended in the future). This would echo the approach proposed in the 2002 referendum campaign. The proposed change in that referendum, *inter alia*, would have required the Oireachtas to pass the proposed Protection of Human Life in Pregnancy Act 2002 within 180 days of the referendum, and granted that proposed Act constitutional protection so that, in future, it could only be amended by referendum of the People. A similar approach could be taken in any future referendum.

#### *A. This would tie the hands of the Oireachtas*

Such an arrangement would require the Oireachtas to pass the law as proposed at the time of the referendum within a set period of time. It is likely that no variations between the text as it stood on the day of the referendum and the text that would be passed would be permitted.

As in 2002, the amendment would probably include a provision that it would lapse unless the legislation in question were to be passed within the determined timescale.

The Oireachtas would be under a political obligation to pass such a law in these circumstances *but* refusal to pass the legislation would be an option that would result in the constitutional change being nullified and Article 40.3.3 reinstated. Thus there may be perverse incentives for legislators strongly opposed to any change to the 8<sup>th</sup> Amendment to attempt to torpedo the legislation and thus reinstate the *status quo ante*.

The legislation in question could not be changed in the future without a constitutional referendum. This would almost certainly be required even for a simple or technical change, not to mention a substantive change. Thus, the hands of the Oireachtas would be tied, and the principle of chrononomy would not be respected. Hence, regardless of its content, the creation of entrenched legislation is, in principle, an unfavourable approach.