Criminal Laws & Women's Right to Health

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Madam Chair, it is an honour to address this meeting and I'd like to thank Meghan Doherty and Action Canada for Population and Development for the opportunity to share the perspective of the Irish Family Planning Association on Criminal Law and Women's Right to Health.

The IFPA is a non-governmental organisation and engages in service provision and advocacy in relation to sexual and reproductive health and rights in a country where abortion is criminalised.

The IFPA provides non-judgmental abortion and post-abortion information and counselling services to over 4,000 women and girls each year. As such, the IFPA warmly welcomed publication of the Special Rapporteur's report and have found it invaluable in our work.

The report resonates with the feelings and experiences of our clients—*feelings* of anger and frustration and *experiences* of shame, stigma, isolation, of being judged, condemned, silenced and marginalised, of being abandoned by the health services—of being made to feel like criminals.

As the Special Rapporteur's report clearly articulates, women's reproductive autonomy is a human right that is intimately bound up with the right to life, the right to be free from inhuman, cruel and degrading treatment, the right to self-determination, the right to privacy, the right to bodily integrity and the right to health, as guaranteed by the UDHR, the ICCPR, the ICESCR, the CEDAW and the Committee on Torture.[1]

The report therefore provides a powerful lens for the consideration of Ireland's regulation of abortion as a human rights issue in the context of the criminal law and its chilling effect and casts light on an aspect that is not sufficiently addressed in public debate about abortion in Ireland.

One reason for the dearth of discussion on the criminalisation of abortion is that in order to avoid the criminal law, women travel to another jurisdiction to seek health services that are criminalised in their own state.

4,200 women gave Irish addresses at UK abortion clinics in 2011[2]. Many others do not give their addresses or travel to countries such as the Netherlands or Spain.[3] We do not know how many women import abortion pills.

Clearly the criminal law does not act as a deterrent in the Irish context. But by situating women's decision making in a context of criminality, the law infringes on women's dignity and autonomy.

And the criminalisation of abortion has significant impacts on women and on health service provision and also on the health care and other professionals who have a duty of care to women—another aspect that is little discussed in public debate on abortion in Ireland.

Abortion is criminalised in Ireland in all circumstances by the Offences Against the Person Act 1861, under which the maximum sentence is life imprisonment.

The only theoretical exception to the criminal provisions of the Act is where there is a real and substantial risk to the life (as distinct from the health) of a pregnant woman that can only be averted by terminating the pregnancy[4].

I say theoretical, because there is no evidence of lawful abortions being carried out in Ireland in this situation[5].

But the process by which a woman with a life-threatening pregnancy could have a lawful abortion in Ireland, which was explained in Parliament in March this year by the Minister for Health[6], illuminates why such abortions are not carried out. It also shows the chill effect at perhaps its coldest.

The Minister explained that it would be the responsibility of her doctor to determine whether the criteria at law were met. If so, a termination could lawfully occur. In the case of disagreement between a woman and her doctor, or refusal of necessary life-saving treatment, she could seek a second medical opinion or could apply to the High Court for orders directing the necessary treatment to be provided.

The seriously ill woman—or perhaps her family—could subsequently bring a complaint to the Medical Council or initiate proceedings on the basis of medical negligence under the law of tort.

This is an example of the way criminal law, as the Special Rapporteur's report notes, shifts the burden of realising the right to health away from the state and onto pregnant women. In Ireland the onus is placed on the seriously ill pregnant woman to seek treatment and on an individual doctor to make a legal determination in a context where a medical decision could become the subject of a criminal enquiry, a prosecution and potentially result in a criminal conviction.

In practice, as we know from the A, B and C v Ireland case decided by the European Court of Human Rights—and this was uncontested by the State in relation to the facts of the case—women in this situation find that doctors will not undertake the responsibility of making and standing over such a decision.

The doctors' position is a result of the interaction of the criminal provisions with the Constitution. No other country in Europe makes the distinction that is made in Irish law, permitting abortion to save a woman's life, but not to preserve her health. The distinction is clinically virtually impossible to make.

Doctors in other jurisdictions are not asked to make it or to wait for a situation to deteriorate until the risk to health becomes life-threatening. In the context of fear of criminal prosecution, medical services providers are effectively prevented from exercising clinical discretion in their patients' best interests and applying best clinical practice and intervening when a serious health risk presents.

In practice, doctors decline to decide and seriously ill women are forced to leave the State. [7]

When women travel for an abortion for health reasons, they encounter further infringements on the right to health. Some hospitals will not send medical records to an abortion clinic in the UK.[8] So in many cases, women have no option but to travel without files detailing their medical history or proper referral by their doctor.

No patient is expected to access any other medical treatment in this way, especially not patients with a life-threatening illness or possible future complications.

At best women are referred to organisations like the IFPA which can give information and support—indeed, by law, women can only access information through medical or counselling services. But many women are effectively abandoned by the health services.

In 2010, a woman called Michelle Harte became pregnant whilst in remission from cancer. She was refused an abortion on the basis her life was not under "immediate threat". In Ms Harte's words: "Why is it that such a simple medical treatment is not available, even when a mother's life is at risk? Anyone else who was even half as sick as I am shouldn't have to uproot themselves and fly over to England. It's not fair and it's not humane".

Upon returning to Ireland, Michelle Harte stated: "There was no follow-up support, either medically or emotionally. It was back to the hospital and continue with the cancer treatment as if nothing had happened".[9]

Women seeking guidance from hospital doctors in relation to diagnoses of fatal foetal abnormality report reactions that range from compassion and a list of UK hospital contacts, to the euphemistic suggestion that the woman returns for a check-up "*in three weeks time*" and no mention of termination. [10]

There is no legal impediment to referral and transfer of files to abortion clinics or hospitals in the UK. But the chill effect promotes confusion and uncertainty rather than clarity and there are no proper protocols for the continuation of care of women who have abortions for medical or psychological reasons. Support and information provision by medical services are inconsistent and ad hoc. And there is little evidence of accountability or transparency.

The system makes women feel like outcasts. In one woman's words, *"My husband and I felt no shame about the decision we had made, but this journey made us feel like criminals".*[11]

Such treatment and the need to travel to the UK, according to another woman, *"made an already traumatic experience feel infinitely worse."* [12]

The health impacts can be significant. An abortion in the UK may well not appear in a woman's medical history. Some women who had abortions because of a diagnosis of fatal foetal abnormality report being denied subsequent genetic testing and experiencing a repeat of the same situation with a later pregnancy.

Women who travel to the UK for terminations for all reasons report significant physical, financial and psychological hardship and the sense of shame, isolation and stigma they experience when seeking health services abroad that are criminalised in Ireland.

The State has put a range of services in place to facilitate women to travel abroad to avail of a reproductive health service that is criminalised within its borders.

In some cases, where the pregnant woman is a minor in the care of the Health Services Executive, the State will fund the journey and the procedure. However, the lack of transparency is such that we don't know how often such cases arise, how decisions are made or by whom, or, more particularly, how many young women in such circumstances are denied access to services.

The vast majority of women and girls of course must find the financial resources privately to pay for the costs involved, which are high. And they must have the legal right to enter another State and to return to Ireland.

Women and girls who experience most difficulty are those who are already marginalised and disadvantaged, those with little or no income, women with care responsibilities, women with disabilities, women with mental illness, women experiencing violence, young women, asylum seekers and other women of uncertain residency status.

Some women for whom travel is impossible are forced to continue with an unwanted or problematic pregnancy. Others resort to unlawful means within the State.

In conclusion, the criminal law in Ireland intersects with the Constitutional law to stigmatise and isolate women and to deny women appropriate, accessible and affordable health services. It results in lack of consistency and accountability in the delivery of health care, lack of training and skills development for doctors, lack of continuity of care for women and significant constraints on the ability of doctors to act in their patients' best interest.

Criminalisation of abortion in Ireland imposes financial, psychological and physical hardship on women. It acts as a form of discrimination and intersects with other forms of discrimination to further disadvantage vulnerable and marginalised women.

The UN committees and other human rights monitoring bodies have made it clear that criminalisation of abortion prevents Ireland from being in conformity with international human rights standards and prevents women in Ireland from the enjoyment of the highest possible standard of health.[13]

Criminalisation of abortion constructs the women who terminate pregnancies as criminals or as victims of the criminal law. Decriminalisation can re-construct these women as autonomous citizens, as agents, as subjects and as rights holders.

Decriminalisation of abortion would by no means address all the issues that have been raised by the UN human rights treaty monitoring bodies.

Decriminalisation of abortion would reduce the stigma, and remove the fear of prosecution from women and from their doctors. It would mean, at the very least, that a woman who needs an abortion because of a risk to her life would be able to consult in confidence with her doctor, rather than a lawyer.

Decriminalisation would not change the Constitution, but it would shift the responsibility back to the state to develop a coherent and system wide health services approach to women who seek abortions in other States.

It would create an environment where women who experience complications after using abortion medication they have imported illegally to present at a hospital without fear of prosecution and receive timely and appropriate treatment.

A moratorium on prosecutions could be the first step towards decriminalisation, as it was in the case of the decriminalisation of male homosexual relationships in Ireland in the 1990's.

But, fundamentally, decriminalisation requires action, political leadership and political will. This political leadership has to happen at national level. But in order for it to happen, there needs to be a shift in thinking and a change of discourse.

The Report of the UN Special Rapporteur, in framing abortion clearly in the context of the right to health and in focusing on criminalisation of reproductive health services has made a significant contribution to this kind of change.

Appendix I

UN TREATY BODIES AND EXPERT COMMITTEE OBSERVATIONS TO IRELAND ON ABORTION AND HUMAN RIGHTS

Ireland's prohibitive regulation of abortion and the discriminatory nature of its application have been subject to criticism by a range of UN treaty bodies and other human rights monitoring bodies which have criticised Ireland's regulation of abortion as being inadequate to fulfil Ireland's human rights obligations due to:

- The extremely restrictive legal regime whereby abortion is lawful only to save the life, as distinct from the health, of a pregnant woman and in no other circumstances;
- The failure of successive governments to give legislative effect to even this limited right, so that abortion is not in practice available in any circumstances;
- The continued existence on the statute books of harsh criminal sanctions in relation to abortion;
- The need for women who seek abortion to travel to other jurisdictions to avail of these services and the consequent psychological, financial and health burdens that these women incur; and
- The discriminatory ways in which the regulation of abortion impacts on vulnerable groups of women—minors, undocumented women, migrant women and women living in poverty.

UNITED NATIONS COMMITTEE AGAINST TORTURE (CAT)

June 2011 CAT Concluding Comments to Ireland: The Committee notes the concern expressed by the European Court of Human Rights about the absence of an effective and accessible domestic procedure in the State party for establishing whether some pregnancies pose a real and substantial medical risk to the life of the mother (case of A, B and C v. Ireland), which leads to uncertainty for women and their medical doctors, who are also at risk of criminal investigation or punishment if their advice or treatment is deemed illegal. The Committee expresses concern at the lack of clarity cited by the Court and the absence of a legal framework through which differences of opinion could be resolved. Noting the risk of criminal prosecution and imprisonment facing both the women concerned and their physicians, the Committee expresses concern that this may raise issues that constitute a breach of the Convention. The Committee appreciates the intention of the State party, as expressed during the dialogue with the Committee, to establish an expert group to address the Court's ruling. The Committee is nonetheless concerned further that, despite the already existing case law allowing for abortion, no legislation is in place and that this leads to serious consequences in individual cases, especially affecting minors, migrant women, and women living in poverty (arts. 2 and 16).

The Committee urges the State party to 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.[14]

COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW)

2005 CEDAW reiterated its “concern about the consequences of the very restrictive abortion laws [in Ireland].” The Committee urged Ireland “to continue to facilitate a national dialogue on women’s right to reproductive health, including on the very restrictive abortion laws.”[15]

1999 “The Committee is concerned that, with very limited exceptions, abortion remains illegal in Ireland. Women who wish to terminate their pregnancies need to travel abroad. This creates hardship for vulnerable groups, such as female asylum seekers who cannot leave the territory of the State.[16]

UNITED NATION’S HUMAN RIGHTS COMMITTEE

2008: Recommendation 13 on Article 6 of the Covenant: The Committee reiterates its concern regarding the highly restrictive circumstances under which women can lawfully have an abortion in the State party. While noting the establishment of the Crisis Pregnancy Agency, the Committee regrets that the progress in this regard is slow. (arts. 2, 3, 6, 26) The State party should bring its abortion laws into line with the Covenant. It 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).[17]

COUNCIL OF EUROPE HIGH COMMISSIONER ON HUMAN RIGHTS

2011: The Commissioner notes with concern that despite the 1992 Supreme Court judgment in the *X case*, still no legislation is in place to set a framework allowing for abortion in limited circumstances where a woman’s life is deemed to be in danger because of pregnancy, in compliance with domestic case law and the Irish Constitution.16 He observes that this lacuna caused the European Court of Human Rights in 2010 to find Ireland in breach of the right to respect for private life as guaranteed in Article 8 of the European Convention on Human Rights.17 The Commissioner reiterates that the lack of legislation adversely affects women who do not have the financial means to seek medical services outside the country and are therefore particularly vulnerable. He notes that on 16 June 2011 the Government submitted to the Council of Europe Committee of Ministers an action plan for the implementation of the European Court of Human Rights’ judgment in the case of A., B., and C.18 The Commissioner noted with interest that according to the action plan, the Government undertook to establish an expert group by November 2011 to make recommendations on how to implement the above judgment. The Commissioner hopes that this expert group will speedily fulfil its mandate and that a coherent legal framework including adequate services will be put in place without delay.

2008 The Commissioner expressed his concern in his report on Ireland "that despite the already existing case law allowing for abortion under limited circumstances, no legislation is in place to ensure this happening in practice." The Commissioner noted the serious consequences "especially in such cases in which vulnerable women such as minors and migrants are concerned." He called upon the government "to ensure that legislation is enacted to resolve this problem and that adequate medical services are provided in Ireland to carry out legal abortions in line with the jurisprudence of the Supreme Court."[18]

PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE (PACE)

2008 The right of women to choose whether to end a pregnancy was also affirmed by the Parliamentary Assembly of the Council of Europe (PACE). PACE adopted a resolution in April 2008 stating that the "ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising the right in an effective way." The resolution calls on all member states of the Council of Europe to decriminalize abortion and guarantee the right to safe and legal abortions.[19]

Appendix II

RESPONSE BY THE MINISTER FOR HEALTH TO A PARLIAMENTARY QUESTION IN RELATION TO THE COE COMMITTEE OF MINISTERS COMMENTS 29TH MARCH 2012

Question 241: To ask the Minister for Health in view of the March 2012 decision of the Committee of Ministers of the Council of Europe in relation to the execution of the judgement in the case of A, B and C versus Ireland, which noted that, given the current status of execution of the judgement, the question is raised of how whilst waiting form measures to execute the judgement to be adopted, the situation of women who find themselves in a similar position to the third applicant is addressed and which expressed concern regarding the situation of such women: the interim measures that are in place to ensure that women in circumstances similar to those experienced by Applicant C have access to the services to which they are entitled under the Irish constitution; and if he will make a statement on the matter. [17435/12]

James Reilly (Minister, Department of Health): If a case similar to Ms C were to arise, it would be the responsibility of her doctor to determine whether there is a real and substantial risk to her life, as distinct from her health, and if such risk can only be avoided by terminating the pregnancy, i.e. the X case criteria. A termination can lawfully occur if these criteria are met. If the patient does not agree with her doctor's assessment, she is free to seek a second or subsequent medical opinion under Medical Council Guidelines, or could apply to the High Court for orders directing the necessary treatment to be provided.

If a doctor refuses to give necessary life-saving treatment, the applicant could in the first instance seek a second opinion for immediate management of her concerns and as follow up bring a complaint against that doctor to the Medical Council.

The law of tort also exists to vindicate the rights of any person who is given negligent or substandard medical advice. I would also point out that the European Convention on Human Rights Act 2003 would apply and be of relevance. First, in general terms, the legislation imposes obligations on organs of the State to perform their functions in a manner compatible with the State's obligations under the Convention. Secondly, it requires that judicial notice shall be taken of, inter alia , any judgment of the European Court of Human Rights (ECtHR). While the Government understands that the scenarios described above were not deemed satisfactory or appropriate by the ECtHR, they do provide an interim process until the Expert Group on the A,B and C v Ireland judgment of the ECtHR issues its recommendations.

References

[1] Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, p.4.

[2] UK Department of health https://www.wp.dh.gov.uk/transparency/files/2012/05/Commentary1.pdf

[3] According to statistics compiled by the Crisis Pregnancy Programme 1,470 women travelled from Ireland to the Netherlands from 2005-2009 to access safe abortion services.

[4] Attorney General v. X and Others, [1992] 1 I.R. 1(Ir.) In this case, the Supreme Court interpreted the relevant article of the Irish Constitution as having this meaning. Article 40.3.3 says 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.".

[5] In argument before the European Court of Human Rights in the *A, B and C v Ireland* case, the State could not point to a single lawful life-saving abortion that had been carried out in Ireland.

[6] Dáil Eireann 29th March 2012. The Minister acknowledged that the scenarios described above were not deemed satisfactory or appropriate by the European Court of Human Rights. Full text of response appended below.

[7] Women have the constitutional rights to receive information about legal abortion services available abroad and to travel to avail of such services. Ir. Const., 1937, *as amended in* 1992, art. 40.3.3. The exercise of the right to information about abortion is governed by the Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 which defines the conditions under which information relating to abortion services lawfully available in another State might be made available in Ireland.

[8] The Irish Times, March 24, 2012 *Stories of Abortion*

[9] The Irish Times December 21, 2010

[10] The Irish Times, March 24, 2012 *Stories of Abortion*

[11] The Irish Times, March 24, 2012 *Stories of Abortion*

[12] The Irish Times, March 24, 2012 *Stories of Abortion*

[13] Ireland's prohibitive regulation of abortion and the discriminatory nature of its application have been subject to criticism by a range of United Nations treaty bodies—the Committee on the Elimination of Discrimination Against Women in 2005, the Human Rights Committee in 2008 and the Committee Against Torture in 2011—and by other international human rights monitoring bodies, including the Council of Europe Commissioner for Human Rights in 2010. See Appendix II for text of comments.

[14] [United Nations Committee against Torture, 46th session, 9 May - 3 June 2011 Concluding Observations: Ireland, CAT/C/IRL/CO/1, 17 June 2011]

[15] [UN Committee on the Elimination of Discrimination against Women, "Concluding Comments: Ireland," CEDAW/C/IRL/CO/4-5, 2005.]

[16] [Committee on the Elimination of Discrimination Against Women, 21st session, June 1999: Concluding Comments \ions to the State of Ireland.]

[17] Human Rights Committee, 93rd Session, July 2008: Concluding Observations to Ireland.

[18] [Report by the Commissioner for Human Rights, Mr. Thomas Hammarberg, on his Visit to Ireland, 26 - 30 November 2007, adopted Strasbourg, April 30, 2008, CommDH (2008).

[19] [Parliamentary Assembly of the Council of Europe, Resolution 1607, April 16, 2008 (15th sitting).]