



The Misuse of Criminal Law Regarding Abortion in Ireland and Northern Ireland

Submitted to the International Commission of Jurists, Joint United Nations Programme on HIV/AIDS, and Office of the UN High Commissioner for Human Rights

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Executive summary

The Abortion Rights Campaign (ARC) works for free, safe, legal access to abortion in the Republic of Ireland, and in Northern Ireland, in solidarity with Alliance for Choice. Because we believe that access to safe abortion free from stigma is a human right, ***our topline recommendations to States are to fully decriminalise abortion and to make abortion care available as early as possible and as late as necessary***. Criminalisation creates a chilling effect on medical providers and harms those who need abortion by stigmatising them, threatening them with prosecution and imprisonment, driving them underground, and violating their rights to health and life.

Introduction

The Abortion Rights Campaign (ARC) works for free, safe, and legal access to abortion. An all-island campaign on the island of Ireland, ARC is founded on respect for individuals' bodily autonomy and agency to make decisions. ARC works for change in the North and South, and our submission below focuses on the need to decriminalise abortion in both jurisdictions. We also advocate for the decriminalisation of sex work and equal rights for LGBT+ people and stand in solidarity with organisations campaigning for these goals globally.

ARC strongly recommends as our topline recommendation that States fully decriminalise abortion and treat abortion as the essential healthcare that it is. Decriminalisation is critical to the delivery of safe abortion care. The World Health Organisation and various bodies of the United Nations promote decriminalisation as best practice to protect both health and human rights. We further recommend that abortion be available as early as possible and as late as necessary.

In May 2018, people in the Republic of Ireland decisively voted to repeal the 8th Amendment to the Constitution, which had made abortion illegal in almost all cases. In response to the referendum, the Irish government enacted The Health (Regulation of Termination of

Pregnancy) Act 2018.¹ The new law, which came into effect on 1 January 2019, is a sea change for the country, but the legal access it provides remains in the form of exceptions carved out of a criminal framework. These exceptions are:

- Abortion on request up to 12 weeks since the last menstrual period (LMP), after a doctor sees the patient in person to certify that her pregnancy is under the time limit *and* after the patient has been made to wait three full days before returning for the abortion (typically in the form of medication), subject to the doctor's right to refuse to provide care based on grounds of conscience;
- Abortion in cases of risk to life or of "serious harm" to the health of the pregnant woman, provided that two doctors (one being an obstetrician) certify that there is such risk, that the foetus has not reached viability and it is appropriate to carry out the abortion to avert that risk;
- Abortion in an emergency, that is, if there is an immediate risk to the life, or of serious harm to the health, of the pregnant woman and it is immediately necessary to carry out the abortion to avert that risk, as certified by the medical practitioner before or within three days after the termination;
- Abortion in cases where two medical practitioners (one being an obstetrician) certify that the foetus suffers from an abnormality which will lead to its death either before or within 28 days after birth.

Along with grassroots activists, civil society organisations, and members of Parliament — and backed by expert legal and medical testimony — ARC vigorously opposed the criminal framework of the legislation. Abortion is healthcare and should be regulated under health statutes and codes. As we describe below, treating abortion as a crime has a chilling effect on healthcare providers and stigmatises people who decide to end a pregnancy. However, the Government ultimately prevailed in retaining the criminalisation of abortion.

In Northern Ireland, the situation remains dire. The laws on abortion are still some of the most restrictive in western Europe. The draconian 1861 Offences Against the Person Act prohibits abortion in almost all circumstances. Those who break the law, through the use of safe but illegal pills to induce their own abortions, for example, risk life imprisonment.

ARC strongly supports good governance. Ireland suffers from a lack of clear and transparent decision-making, especially when it comes to women's health. As described below, the Minister of Health repeatedly invoked confidential legal advice when rejecting suggestions to improve the abortion legislation. Ireland's history of denying life-saving abortion care and recent scandals over its cervical cancer screening programme further illustrate the need for good governance.

ARC uses legal rights and human rights in our advocacy to direct the debate away from questions of morality and "good" vs. "bad" abortions. Actively challenging stigma is essential in a culture that has so often shrouded pregnancy and abortion in shame. Human rights

¹ The Health (Regulation of Termination of Pregnancy) Act 2018 (Act 31 of 2018), hereinafter Health Act 2018. ARC's Submission on the Health Bill is available at: <https://www.abortionrightscampaign.ie/2018/10/03/arc-submission-on-abortion-legislation/>

provides a valuable counterpoint by emphasising the dignity of each individual and the universality of individuals' claims as rights-holders. ARC would incorporate new principles on the misuse of criminalisation developed by the International Commission of Jurists and its partners into our advocacy with the public and policy-makers. We know from experience that international standards and evidence are not enough to overcome political obstacles; however, we believe that the more such principles we have to draw on, the stronger our advocacy and chances of persuading decision-makers will be. As a grassroots campaign, we pair first-hand knowledge of lived experience with best practice and standards to highlight problems with the status quo and offer recommendations for change.²

Negative impact of criminalisation

Treating abortion as a crime has a chilling effect on medical practitioners that often prevents them from giving the best standard of care to their patients. When a doctor has to decide whether to provide an abortion, the fear of criminal sanctions might make them reluctant to provide an abortion in cases where the law is unclear. By denying care, they might endanger the health or even the life of the pregnant person. Indeed, this has happened in Ireland, most notoriously in 2012 when medical staff at University Hospital Galway denied Savita Halappanavar treatment for an incomplete miscarriage and she died of sepsis as a result, as well as in cases where women suffering from cancer and suicidal ideation were denied care.

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One month after the introduction of legal abortion, Dr. Fergal Malone, Master and CEO of the Rotunda Maternity Hospital in Dublin, explained that the hospital was limiting its early abortion service to 11 weeks LMP instead of 12, because, "the legislation is written with an upper limit of 12 weeks and zero days. But there is considerable ambiguity as to whether 12 weeks means the date at which the termination starts, or the date at which the termination ends." He continued, "Given there is a potential 14-year jail term for getting this wrong, you can understand why doctors are seeking absolute certainty and clarity on this matter....I can't put my staff in danger where if there is ambiguity."⁴

In a major victory for individuals' right to health, Ireland's new law does not sanction people seeking or having abortions. Under the 8th Amendment, people who had abortions within the State (for example through illegally importing abortion pills) could be prosecuted and sentenced to 14 years in prison. The chilling effect described above in relation to medics is also likely to have deterred pregnant people from seeking medical attention either before or after an abortion for fear of prosecution. Evidence internationally has consistently

² Abortion Rights Campaign (2016) Submission to the Citizens Assembly <https://www.abortionrightscampaign.ie/2016/12/24/abortion-rights-campaign-submission-to-the-citizen-assembly/>

³ "Abortions were Denied to Women at Suicide Risk", *The Times*, 20 June 2017 <https://www.thetimes.co.uk/article/abortions-refused-after-several-suicide-bids-1xq0k8r7> ; Irish Council for Civil Liberties, "Case in Focus: Michelle Harte," available at <https://www.iccl.ie/her-rights/health/michelle-harte/>

⁴ Bray, Jennifer, "Abortion in Ireland: Four weeks in, how's it working?" *The Irish Times*, 26 January 2019.

demonstrated that countries where abortion is legal on request have lower levels of unsafe abortion and related health risks.⁵

Under the 8th Amendment, activists were threatened with prosecution⁶ for giving out information about how to access abortion in the United Kingdom (UK). The prohibition of the 8th sufficiently intimidated doctors from offering practical advice to patients. Now that the 8th is gone, there is still a lot of uncertainty and perhaps even greater fear of prosecution among medics.

The law criminalises third parties such as family members or friends who help loved ones to obtain abortion care outside the parameters of the law, for example, by ordering safe but illegal pills online or perhaps even advising someone of the availability of such an option. Despite abortion in early pregnancy being available in Ireland, it is not fully accessible to all who need it. Not everyone can easily reach a provider or make repeated trips to their doctor as required by the law's mandatory waiting period. This is evident in the recent news that abortion pills continue to be ordered — and seized — in spite of the new law.⁷ Even under Ireland's more liberal legal framework, those intending to help their pregnant loved ones obtain an abortion remain at risk of prosecution.

Prosecutions are a reality in Northern Ireland. In recent years both women seeking an abortion⁸ and those assisting them have been prosecuted, including a mother who wanted to help her own daughter.⁹ These individuals have been punished for obtaining abortion, a health service which is broadly available in the rest of the UK. Northern Irish citizens and residents are discriminated against when it comes to accessing reproductive healthcare. Those who lack financial or other resources to travel suffer the most from the extreme criminal sanctions imposed.¹⁰

In 2018, the UN Committee on the Elimination of Discrimination Against Women found that the UK is violating the rights of women and pregnant people in Northern Ireland and that the

⁵ World Health Organisation (2012) Safe abortion: technical and policy guidance for health systems. Second edition. Geneva: World Health Organisation.

⁶ RTÉ Archives "Students' Union expect prosecution", 2 October 1988

<https://www.rte.ie/archives/2018/1001/999180-tcd-abortion-information/>

⁷ Lynch, Priscilla "HSE probes data leaks as abortion pills still ordered online despite new laws", *Irish Independent*, 4 February 2019

<https://www.independent.ie/irish-news/health/hse-probes-data-leaks-as-abortion-pills-still-ordered-online-despite-new-laws-3777208.html>

⁸ McDonald, Henry, "Northern Irish woman given suspended sentence over self-induced abortion", *The Guardian*, 4 April 2016

<https://www.theguardian.com/uk-news/2016/apr/04/northern-irish-woman-suspended-sentence-self-induced-abortion>

⁹ "Abortion pills prosecution challenge by NI mother adjourned", *BBC*, 20 September 2018

<https://www.bbc.co.uk/news/uk-northern-ireland-45550006>

¹⁰ Alliance for Choice (2018) "Written Submission from Alliance for Choice", Abortion Law in Northern Ireland Inquiry:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/abortion-law-in-northern-ireland/written/93751.pdf> .

near total ban on abortion amounts to cruel, inhuman and degrading treatment.¹¹ The Committee also held that the question of devolution did not absolve Westminster of responsibility to rectify these wrongs. Also in 2018 the UK Supreme Court ruled that Northern Ireland's current laws are incompatible with Article 8 of the European Convention on Human Rights — on respect for private and family life — in cases of fatal foetal abnormality, rape and incest.¹² This ruling has paved the way for individual lawsuits to be brought by women, putting mounting pressure on the system that may produce change.

Safety valve preserving women's health

Illegal abortion has not been a major source of maternal mortality because pregnant people in Ireland and Northern Ireland have had access to safe, legal abortion care in neighbouring countries such as England. In 2009, the Abortion Support Network (ASN) was established in the UK. ASN is a volunteer-led charity which offers advice, accommodation and financial assistance to Irish and Northern Irish residents who can't otherwise afford to travel to the UK for medical care. ASN was predated by underground networks, such as the Irish Women's Abortion Support Group, that were in operation from the 1980s and supported pregnant people who were forced to travel from the island of Ireland when it was still illegal to do so.¹³ More recently, residents have been able to access safe but illegal abortion pills through reputable online sources. If these avenues for safe abortion were not available and women in Ireland were dying at the same rates as they die in other countries with abortion bans, it is unlikely that the Government would have been able to ignore the issue for so long.

Dangerous ambiguities in the new abortion law

Ireland's new abortion law is not entirely clear regarding what constitutes criminal conduct. The law uses vague phrases instead of standard medical terms. As a result, physicians are quite nervous about making a mistake by providing abortion care to anyone whose situation appears to fall into a grey area, including those whose pregnancies put their health at risk or whose foetuses are diagnosed with severe but not necessarily "fatal" anomalies. Within the first month of legal abortion, we know of at least one woman and her partner who had to travel to England to access abortion care when their foetus was diagnosed with life-threatening anomalies,¹⁴ precisely the situation the law should have prevented. In addition, as described above, the law permits abortion until 12 weeks LMP, but in practice

¹¹ United Nations Convention on the Elimination of All forms of Discrimination against Women (2018) "Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women." Geneva: United Nations.

¹² Supreme Court Judgement "In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion) (Northern Ireland)." 7th June 2018.

¹³ Rossiter, A. (2009) Ireland's hidden diaspora: the abortion trail and the making of a London-Irish underground, 1980-2000.

¹⁴ Bray, Jennifer and Cullen, Paul "Coombe hospital says board has no role in certifying terminations", Irish Times, 18 January 2019, available at <https://www.irishtimes.com/news/health/coombe-hospital-says-board-has-no-role-in-certifying-terminations-1.3762054>

the Rotunda Maternity Hospital is likely not the only hospital to deny care after 11 weeks LMP because ultrasound dating scans have a margin of error and because abortion induced by medication takes more than one day to complete.

In other areas, the law is clear. For example, a doctor breaks the law if she or he provides abortion care before the mandatory three-day waiting period has elapsed. The limited data collection specified in the law is geared toward policing doctors more than improving health services. Doctors must forward reports of abortions they have provided to the Minister of Health on a monthly basis, listing their Medical Council registration number, the statutory ground on which they provided the abortion, and the county of residence of the patient.¹⁵ The Health Service Executive must report to the Minister annually on the number of reviews (or appeals) of decisions to deny abortion care to patients after the first trimester, the outcomes of reviews, and the clinical justification for abortions provided.¹⁶ These requirements are holdovers (essentially copied and pasted) from the 2013 Protection of Life During Pregnancy Act (PLDPA) that allowed for abortion in extremely limited circumstances and kept a tight rein on providers of abortion.

Misguided aims of criminalisation

The stated goal of criminalisation is to protect women from being coerced to have an abortion and to protect women from “backstreet” abortion.¹⁷ Minister of Health Simon Harris explained the Government’s view during parliamentary debate:

“A number of Deputies have proposed deleting the subsection which makes it an offence for a person to aid, abet, counsel or procure a pregnant woman to intentionally end or attempt to end the life of that pregnant woman's foetus other than in accordance with the provisions in the Bill. However, criminalising a person who does this is necessary from a policy perspective. The health and well-being of pregnant women are at the heart of this policy. Helping a pregnant woman to end her pregnancy outside of the provisions of the Bill is not in her best interests and may on occasion put her health or her life at risk.”

“The provisions in the Bill protect people from forced abortions or an attempt to intimidate women, for example, in a situation of domestic or sexual abuse. A dominant personality trying to forcibly terminate a woman's pregnancy might induce a woman to terminate the pregnancy herself instead of attending a medical practitioner. I accept there is a difference of views on this, but we proposed these offences in the general scheme of the Bill which the people saw in advance of the referendum. It is important that termination of pregnancy remains illegal outside the circumstances in

¹⁵ Section 20, “Notifications,” Health Act 2018.

¹⁶ Sections 18, “Report by Executive on operation of reviews,” and 19, “Form of certification etc,” Health Act 2018.

¹⁷ The justification of protecting women resonates with the problematic history cited by the Report on the May 2018 Expert Meeting of Jurists, esp. Par. 28,

which it is legal. I have taken significant advice from the Attorney General on this matter and I am not in a position to accept the proposed amendments.”¹⁸

However, lawyers and other experts countered the Minister’s rationale by saying that Ireland already has laws to deal with such problems or could better address them with narrowly tailored measures.¹⁹ Medical Regulators and Registration Bodies can discipline members, even revoking their right to practice, and individuals can use medical misadventure or malpractice laws to bring cases in court. Attorney General advice is confidential and not shared with members of Parliament, let alone the public, making it impossible for anyone to evaluate the advice.

In addition, the law defines a “termination of pregnancy” as “a medical procedure which is intended to end the life of the foetus,” evoking a criminal offence and stigmatising the very medical care the Government plans to introduce. The Government steadfastly rejected all testimony and amendments designed to define abortion in neutral medical terminology.

Finally, criminalisation creates space for bad actors. It emboldens opponents of legal abortion to engage in “sting operations” or “malicious reporting” of doctors. These pernicious actions further discourage doctors from providing care and make abortion less accessible to those who need it. Within the first month of legal abortion in Ireland, a rogue “pregnancy counseling” agency went to the police to report the “killing” of an innocent person at a hospital (i.e., an abortion) and ask for the 14-year prison sentence to be imposed.²⁰ This same organisation is trying to induce medical practitioners to refer their patients for free ultrasounds, preying on the medics’ fears of providing care to anyone whose pregnancy might be over the legal limit.²¹ Anyone referred would be subjected to anti-abortion intimidation.

While doctors and patients are required to navigate a criminal framework for abortion health care, rogue agencies operate without regulation. Long promised legislation to regulate rogue agencies has yet to materialise.

Impact on marginalised and vulnerable groups

In the past under the 8th Amendment, the necessity to travel abroad or break the law to obtain abortion pills posed especially insurmountable obstacles to certain groups, such as young women or migrants without the necessary travel documents. Indeed, a number of the women who brought cases against the State to try to secure their rights to abortion care were from these vulnerable groups. ARC is greatly concerned that the new law will

¹⁸ Harris, Simon, Dail Debate, 28 November 2018. Transcript available at: <https://www.oireachtas.ie/en/debates/debate/dail/2018-11-28/33/>

¹⁹ Fletcher, Ruth, et al., “Briefing Paper on the Health (Regulation of Termination of Pregnancy) Bill 2018: Making the Legislation Work, Delivering on the Referendum,” 23 October 2018. Available at: https://lawyers4choice.files.wordpress.com/2018/10/hrtop_briefing_final.pdf

²⁰ Coyne, Ellen, “Anti-abortion activists ‘getting details’ of cases,” *The Times UK - Ireland Edition*, 1 February 2019.

²¹ Coyne, Ellen, “Anti-abortion activists try to trick GP’s with ultrasound offer,,” *The Times UK - Ireland Edition*, 5 February 2019.

perpetuate these inequalities. Consider the plight of pregnant people who miss the deadline for abortion on request but cannot travel — for lack of funds, lack of travel documents, or lack of control over their lives, such as situations of intimate partner violence or asylum seekers living in Irish “direct provision centres” who are subject to strict travel limitations. Young people and people with disabilities that may make international travel inadvisable or impossible will also suffer.

The new Irish medical guidelines require abortions between 9-12 weeks LMP to be performed in hospitals,²² which is a hardship for people living in rural areas away from the city-based maternity hospitals charged with providing care. This requirement has no basis in evidence as doctors can safely provide abortion care throughout the first trimester and beyond in the community.

Now that a law is in place, including a mandated review of the operations of the law in three years, ARC plans to monitor the implementation of abortion care services in Ireland throughout the country as well as to continue advocating for improvements that might be achieved prior to the review.

We will also continue to advocate for the full decriminalisation of abortion across the UK by means of repealing sections 58 and 59 of the 1861 Offences Against the Person Act. This is the only way to ensure that pregnant people receive the patient-centred and stigma-free care they deserve where they live. We support our sibling organisation Alliance for Choice who operate North of the Irish border as they fight for free, safe, legal and local abortion in Northern Ireland.

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²² Irish College of General Practitioners, press release on interim clinical guidelines, 19 December 2018, available at https://www.icgp.ie/go/about/policies_statements/2018/617ACD40-3942-4578-93F433E7428CC128.html; Institute of Obstetricians and Gynaecologists, “Interim clinical guidance on termination of pregnancy under 12 weeks,” available at <https://rcpi-live-cdn.s3.amazonaws.com/wp-content/uploads/2018/12/FINAL-INTERIM-CLINICAL-GUIDANCE-TOP-12WEEKS.pdf>