Building an ethos of equal respect

The Pro-Life Campaign's submission to the Interdepartmental Working Group on the Green Paper on Abortion

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THE PRO-LIFE CAMPAIGN'S SUBMISSION

The Pro-Life Campaign's Submission to the Interdepartmental Working Group on the Green Paper on Abortion is based on the view that all human beings possess an equal and inherent worth simply by virtue of their humanity, and not on condition of their possessing certain other qualifications of size, physical, emotional or mental capacity, autonomy or dependence, level of bodily, emotional or mental development, race, ethnic origin, wealth or poverty, age, sex or capacity for interpersonal relationship.

The Pro-Life Campaign proposes this view to the Working Group because it believes that this view alone adequately acknowledges and respects the equal dignity of all human beings, because this view of equal and inherent worth is the foundation of the Republic's constitutional democracy, and because this view is the animating spirit behind the contemporary drive in Irish society to build an ethos of equal respect.

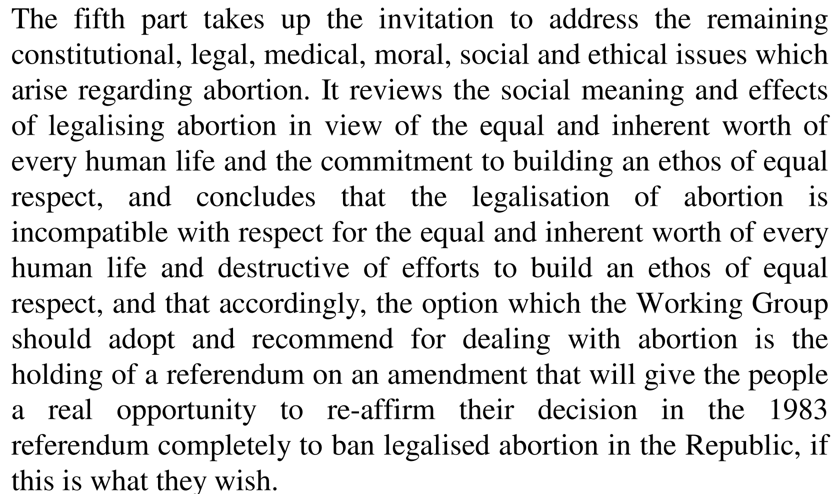
The Pro-Life Campaign's Submission is in five parts.

The first part presents the view of the equality and inherent worth of every human life upon which its submission is based, and which it proposes as the basis of the work and recommendations of the Working Group.

The second and third parts address the six legal areas to which the advertisement inviting submissions to the Working Group asked interested parties to have regard:

> Sections 58 and 59 of the Offences Against the Person Act 1861,
>
> Article 40.3.3° of Bunreacht na hÉireann,
>
> The Supreme Court's decision in **The Attorney General versus X and Others (1992) 1.I.R.1**,
>
> Protocol No 17 to the Maastricht Treaty On European Union signed in February 1992 and the Solemn Declaration of 1st May 1992 on that protocol,
>
> The decision of the people in the referendum of 25th November 1992 to reject the proposed Twelfth Amendment of the Constitution, and,
>
> The decision of the High Court on 28th November 1997 in **A & B versus Eastern Health Board, Judge Mary Fahy, C and the Attorney General (Notice Party).**

The fourth part of the Submission reviews the medical evidence showing that the provision of abortion is not a medical issue, that abortion is not necessary to save mothers' lives. It examines the relationship between the availability of legal abortion and maternal



mortality, and the grounds for abortion under British law, and discusses the medical meaning and use of foreseeability and the distinction between 'direct' and 'indirect' effects in the selection of appropriate treatments. It goes on to consider existing medical practice in the areas of cancer, suicide, sexual assault and heart disease. It concludes with a consideration of the consequences of abortion.

The fifth part takes up the invitation to address the remaining constitutional, legal, medical, moral, social and ethical issues which arise regarding abortion. It reviews the social meaning and effects of legalising abortion in view of the equal and inherent worth of every human life and the commitment to building an ethos of equal respect, and concludes that the legalisation of abortion is incompatible with respect for the equal and inherent worth of every human life and destructive of efforts to build an ethos of equal respect, and that accordingly, the option which the Working Group should adopt and recommend for dealing with abortion is the holding of a referendum on an amendment that will give the people a real opportunity to re-affirm their decision in the 1983 referendum completely to ban legalised abortion in the Republic, if this is what they wish.

BUILDING AN ETHOS OF EQUAL RESPECT

The subject of abortion raises issues across a wide range of disciplines, including law, medicine, sociology and politics. These issues are important and need to be addressed by the Interdepartmental Working Group on the Green Paper on Abortion, but they can only be adequately considered when certain underlying issues have been identified and reflected upon. The position adopted by the Working Group on these underlying issues will already point the way towards the conclusion it will reach on the question of how to deal with abortion.

The value of the human individual

These prior issues concern the value of the individual human life. Public discussion has tended to shy away from these issues, tending to regard them as exclusively religious matters not relevant to discussions and decisions of policy and law in a secular civic society. The question of the value of the human being as such, however, goes right to the heart of the most important issues on which we can reflect, relating to the meaning and significance of human existence, to the inherent value of each and every human life, to the rights that derive from the very fact of human existence, to the relationship between rights and responsibilities, and to human freedom.

Not an exclusively religious question

These issues have been addressed by the various religions, but that does not mean that they are in any sense exclusively restricted or relevant only to religious debate. Implicitly or explicitly, they underpin the common life of secular society also, and inform all public policy and law. It is our intention in these opening remarks to draw out the underlying attitude towards the individual human life and its dignity, and the protection which society should adopt towards it in public policy and law, that underlies and informs Irish society today, and to suggest to the Working Group that it is this attitude that should inform and guide its work and recommendations on abortion and the legal protection of the unborn, because it is the approach that alone corresponds to the inherent dignity and worth of every human individual, on which democracy is ultimately based, and because it is the animating principle of Irish society and public life today.

The State and the law cannot be "neutral" on this question

For individuals or society as a whole to refuse to address these questions overtly would, we submit, be mistaken. After all, the attitude taken on how one leads one's life follows from the prior

attitude one adopts to the value and dignity of that life. And how a society gives or denies protection to human beings and their acts depends in the last resort on how human beings are valued and respected.

Nor can the facing of these prior issues be evaded by holding that society should adopt a neutral stance with regard to them. Where society and the law adopt a "neutral" stance towards a right which up until that moment had enjoyed social support and legal protection, they are in effect transferring the weight of social endorsement and legal protection from actions which uphold it to actions which undermine, transgress or destroy it.

What public policy had heretofore sought to discourage by the enactment and enforcement of laws is from now on no longer to be discouraged. What hitherto had been prohibited by law and punished by law is henceforth no longer to be prohibited and punished but rather positively to be allowed by law, and indeed is even itself declared to be a right to be supported by public policy and law. The rhetoric of state and legal "neutrality" cloaks a reversal of social policy, a removal of social disapproval, a lifting of social and legal protection.

The value of every human being is inherent in their humanity

We propose that the Working Group adopt explicitly as its foundation the view that underlies the status of the Irish Republic as a constitutional democracy, namely, the view that perceives human existence as of profound significance.

According to this view, people are inherently valuable and their value therefore does not derive from the external estimate of their fellow human beings. Because they are inherently of value, they must be respected. What is of value must be respected and should never logically be treated with disrespect.

In this view, human beings are recognised as inherently valuable by virtue of their very humanity, rather than by virtue of their size, physical, emotional or mental capacity, autonomy or dependence, level of bodily, emotional or mental development, race, ethnic origin, wealth or poverty, age, sex or capacity for interpersonal relationship.

An inclusive approach based on human equality

This is an inclusive approach based on human equality. All, it recognises, are equal, as human beings. On this approach, the human family is composed of all its members and no further conditions are appropriate for recognition and acceptance as a fellow-member by society. As history and contemporary experience show, societies all too often single out some individuals and

categories of people for unjust treatment, sometimes treating some as non-members of the human family or as second-class citizens. By explicitly adopting this inclusive approach, the Pro-Life Campaign believes that the Working Group will be aligning itself clearly and strongly against such exclusion and with the positive inclusive thrust of Irish society, and of humane and enlightened international opinion, at this moment in history.

Since every human life has inherent value, no innocent human life should be damaged, let alone directly and intentionally taken. It is this approach which seeks to incorporate the fundamental values on which contemporary Irish society as a secular democracy is presently based, that the Pro-Life Campaign respectfully recommends to the Working Group.

Building an ethos of equal respect

When one looks critically at the Republic of Ireland today, one cannot help being struck by the commitment to building an ethos of equal respect. There is a growing sense of justice, an aspiration towards inclusiveness and mutual respect. There is a sense of shared responsibility, and a desire to offer help and support to those in difficult and painful situations that arises from an awareness of social solidarity.

Above all, there is a healthy and mature concern for honesty, generosity and compassion in acknowledging difficult realities and addressing them in a way that does not sweep them under the carpet or try to deal with them in a short-sighted manner that involves hurt to the weaker members of our society.

The Pro-Life Campaign invites the Working Group to see the restoration of adequate legal protection for the right to life of the unborn as part of this drive towards building an ethos of equal respect. Modern Ireland is trying to be a society where problems are faced honestly rather than being denied and hidden away. Bitter experience teaches that injustices done to vulnerable people and innocent lives taken cast long shadows and old wrongs and hurts return to haunt later generations.

This search for greater frankness, fairness and kindness is part of the historic wider struggle to take the violence out of every aspect of Irish society. More and more it is becoming clear that “solutions” which seem convenient and appealing in the short-term, even though they involve hurt or wrong to some marginalised members of society, not only fail truly to solve the problems but also store up additional problems for tomorrow.

The Pro-Life Campaign sees the question of the legal protection to be given to mother and unborn as situated within the overall struggle of contemporary Irish society for equality, for equal respect for all human beings, regardless of age or size, power or gender, for

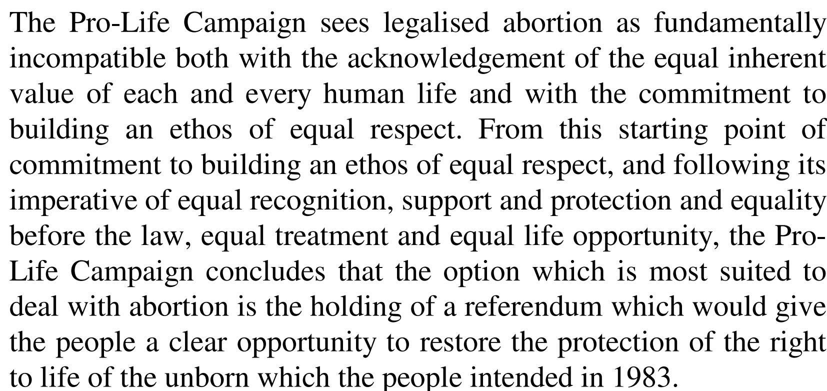
equality of life-opportunities, for equal treatment.

The Pro-Life Campaign sees the woman with a crisis or unexpected pregnancy, and the unborn child within her, as members of society, equal to the rest of us, equally entitled to whatever social support they need to be able to enjoy equal life-opportunities.

It recommends to the Working Group the attitude of the medical profession which sees every pregnancy as involving not one patient but two, the mother and the unborn, and acknowledges that it has an ethical and professional responsibility of best care towards the lives and health of both.

The Pro-Life Campaign sees the woman pushed towards abortion by the lack of practical assistance and personal warmth and reassurance, and her unborn child, as members of society who are singularly vulnerable and voiceless, singularly at risk of social exclusion or marginalisation, singularly in need of, and entitled to, support and help from society.

The Pro-Life Campaign sees the woman who has been through abortion, and the child she has lost, as victims of violence. The women who has been through abortion is a woman at risk of physical and emotional harm and heartbreak, in need of personal support, but surrounded by social silence and denial that makes it harder for her to recover from the violation she has been through, a woman at risk of social exclusion.



The Pro-Life Campaign sees legalised abortion as fundamentally incompatible both with the acknowledgement of the equal inherent value of each and every human life and with the commitment to building an ethos of equal respect. From this starting point of commitment to building an ethos of equal respect, and following its imperative of equal recognition, support and protection and equality before the law, equal treatment and equal life opportunity, the Pro-Life Campaign concludes that the option which is most suited to deal with abortion is the holding of a referendum which would give the people a clear opportunity to restore the protection of the right to life of the unborn which the people intended in 1983.

THE LEGAL QUESTIONS

Sections 58 and 59 of the 1861 Act

Sections 58 and 59 of the Offences Against the Person Act 1861 are the statutory prohibitions on abortion. They were, of course, enacted at a time when Ireland was part of a political and legal union with Britain, long before the promulgation of the 1937 Constitution or of the subsequent constitutional amendments in 1983 and 1992.

They read as follows:

> 58. Every woman, being with child, who, with intent to procure her own miscarriage shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and on being guilty thereof shall be liable to be kept in penal servitude for life.
>
> 59. Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage or any woman, whether she be or not be with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude for any period not less than three years and not exceeding five years.

The courts in this jurisdiction have not given any considered analysis of these provisions. Some judicial discussion of these sections occurred in Attorney General v X but that case was primarily concerned with analysing constitutional aspects of the subject.

In other jurisdictions the interpretations that courts have given to the same provisions are not consistent with the present constitutional position in Ireland, either on the interpretation of Article 40.3.3° which the Pro-Life Campaign regards as the correct one or on the interpretation of Article 40.3.3° provided by the Supreme Court in Attorney General v X.

Where does this leave sections 58 and 59?

Three possibilities appear open to the Supreme Court.

1. The Court could hold that the provisions should be interpreted as rendering abortion unlawful in all circumstances, whilst not

rendering unlawful in any way all necessary medical treatment of mothers during pregnancy even where this results in the death of the unborn child as an unintended side effect;

2. The Court could hold that the provisions should be interpreted as rendering abortion unlawful save in those circumstances specified by the Court in Attorney General v X;
3. The Court could hold that the provisions should be interpreted as rendering abortion unlawful save in cases, where not only the mother's life, but also her health, were deemed to require it.

We consider that the correct interpretation of the provisions is the first. It is the one observed by the legal and medical community within this jurisdiction over several generations. It is consistent with medical ethics and with the understanding of the effect of the statutory provisions after the amendment to the Constitution in 1983. We are not aware of any legal writer, prior to Attorney General v X who even suggested as a possibility that Sections 58 and 59 purported to refer to medical treatments of pregnant women which clearly are not abortion but which can impact even fatally on the unborn child. Nor did the medical profession act on this basis.

Of course, if the Court were to interpret the statutory provisions as we suggest they properly should be interpreted, this would generate a potential inconsistency with the Court's holding in Attorney-General v X. The difficulty that would result is not the fault of the statutory provision but rather because of the Court's mistaken interpretation of the effect of Article 40.3.3^{o}.

If the Court were to take the second option, of interpreting the statutory provision as permitting abortion in cases where the woman's life as opposed to her health, was deemed so to require, this would mean that the provisions would be held by the Court to be consistent with the Constitution in the light of the Court's interpretation of Article 40.3.3^{o} in Attorney-General v X. The Pro-Life Campaign would naturally be opposed to such an interpretation of the statutory provisions.

If the Court were to interpret the statutory provisions as permitting abortion in cases where the woman's health or life were deemed to so require, this would, it seems, require the Court to hold that the provisions were not consistent with Article 40.3.3^{o} since the Court in Attorney General v X held that Article 40.3.3^{o} does not authorise abortion on the basis that the woman's health requires it.

The question of legislative explanation on the subject is entirely secondary to and dependent on a prior decision as to the protection to be afforded the unborn child under the Constitution. If that protection is properly afforded by the Constitution, the decisions regarding legislative policy are no longer deeply problematical. Certainly, legislation is not problematical when, as we propose, the unborn child receives fully effective protection under the

Constitution so that abortion is not legally permitted. All that legislation has to do is to reiterate that prohibition. If Sections 58 and 59 of the Act are interpreted as doing precisely this, then the issue of legislation is not a source of difficulty.

Article 40.3.3° of Bunreacht na hÉireann

On 7th September 1983 the electorate enacted the 8th Amendment to the Constitution:

> *The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.*

The purpose of the amendment was to copperfasten, rather than to change, the existing laws on abortion. People on both sides of the 1983 referendum debate understood the passage of the Amendment to mean that abortion could not be legalised in Ireland, either through the Courts or the Oireachtas, unless the electorate gave their consent in another referendum.

The impetus for the Amendment had arisen from fears that the legislative prohibition on abortion might not be strong enough to survive constitutional challenge. Abortion was prohibited in Ireland by a British act of 1861 which had already been interpreted by British courts as allowing for abortion.

Moreover, by the early 1980's, it seemed probable that at some stage, such a challenge might be heard in the Irish Courts. The laws on abortion had been liberalised in most other European countries, and a small but vocal campaign to change the law in Ireland was already underway by 1980. Thus many people, particularly in the medical and legal professions, felt that the existing law on abortion should be reinforced by a constitutional amendment.

The leading argument against the 1983 Amendment was that it would lead to a change in medical practice, and thus endanger women's lives.

According to the then Taoiseach, Garret FitzGerald:

> This amendment places the life of the mother on an equal, but no more than equal, footing with that of the unborn child. As a result, a legal action could be taken at some time in the future to declare unlawful medical actions, or surgical operations, to save the life of the mother. And I am talking of actions and operations that take place today in accordance with the medical ethics and the teaching of all our Churches.
>
> If this issue were to be raised in the courts at some future time, this risk to the right to life of the mother would, in the

> view of the Attorney General, be not merely possible, but even likely.[1]

Others expressed the same concerns. According to the then Tánaiste, Dick Spring, '...changes in medical practice would threaten the lives of hundreds of women...'[2], while Barry Desmond T.D. declared that 'Current medical practice could be thrown into serious doubt and the legality of many vital treatments and operations could be questioned. If this happened, the lives of women would be threatened.'[3] Nora Owen T.D. informed a Young Fine Gael meeting that as long as the possibility existed of the death of a woman who might now survive, she would be voting against the amendment.[4]

The issue was stressed by the Anti-Amendment Campaign. One leaflet was entitled 'This Amendment could kill women' and asked the question, 'Could a woman be refused medical treatment when she is pregnant?' 'Yes', was the reply, 'If she has cancer, like cancer of the breast or leukaemia, and is being treated with cell-destroying drugs or radiation she will not be treated while she is pregnant. This is because such treatment will seriously damage or kill the foetus'.[5]

These fears were, as predicted by the Amendment's supporters, proven groundless. The passage of the Amendment did not affect medical treatment. Before 1983 a range of circumstances were recognised as ethical and lawful where medical treatment of a mother had an indirect and unsought side-effect on her unborn baby. There is a world of difference between this and induced abortion, which is the direct, deliberate and intentional killing of the unborn. Medical practitioners have no difficulty making this distinction before, or after, the passage of the 1983 amendment.

Dr FitzGerald also raised the fear that the Supreme Court might find it impossible to define the word 'unborn', thus creating 'the possibility of an interpretation by the Supreme Court that would permit abortion up to the stage of pregnancy where the baby is capable of being born'.[6] Like Dr FitzGerald's other concerns, this did not come to pass.

Yet another argument put forward was that the amendment was sectarian, and would hinder the search for reconciliation between

[1] RTE, 5 September 1983. *The Irish Times*, 6 September 1983.
[2] *Irish Independent*, 2 September 1983. Quoted in Tom Hesketh, The Second Partitioning of Ireland?, Dublin 1990.
[3] *The Irish Times*, 5 September 1983. Quoted in Tom Hesketh, The Second Partitioning of Ireland?, Dublin 1990.
[4] *The Irish Times*, 1 September 1983. Quoted in Tom Hesketh, The Second Partitioning of Ireland?, Dublin 1990.
[5] The Anti-Amendment Campaign, P.O. Box 1285, Dublin 7.
[6] *Sunday Independent,* 4 September 1983. Quoted in Tom Hesketh, The Second Partitioning of Ireland?, Dublin 1990.

the Irish Republic and the majority community in Northern Ireland. This was perhaps to misunderstand the strong opposition to abortion in Northern Ireland, among people of both communities, and even to unwittingly cause offence to many of those people by misrepresenting their position. Speaking some years later, at the time of the enactment into Irish law of the Noonan Abortion Information Act, The Rev. Martin Smyth M.P., Grand Master of the Orange Order, told a Dublin newspaper:

> People are maligning the people of Northern Ireland. They were putting it [the Noonan Act] in the context of the Framework Document and the moves towards peace ...

Speaking of the cross-party opposition to the extension of the 1967 Abortion Act to Northern Ireland, the Rev. Smyth said

> having seen so many murders we didn't want to add to them by the murder of the unborn.[1]

Legal interpretation of Article 40.3.3^{o} in the *X* and *C* cases

Attorney General v X and Others[2]

The facts of the case known as *X* are well-known but require recounting in that the detail and sequence of events are of importance. The Attorney General sought an injunction to restrain *X* from going to England for the purpose of having an abortion.

X, a young girl, then aged fourteen and a half years was sexually molested by the father of a schoolfriend from the time when she was less than thirteen years old. Over the months in which it occurred this molestation was continuous and took different forms. In June 1990, abuse of a serious nature took place and this occurred again in the early part of 1991. In December 1991, he had full sexual intercourse with her to which she did not consent and as a result of which she became pregnant. On 27 January 1992 she told her parents everything that had happened, following which it was learned that she was pregnant. The Gardaí were duly informed and the parents concluded that the best course to adopt was to go to England for an abortion.

Having made known to the Gardaí what they were considering, the parents raised with the Gardaí the possibility of making arrangements for someone to be present in England for the purpose of obtaining foetal tissue by which the identity of the father could be confirmed. The Garda concerned, unsure as to whether or not such evidence would be admissible, made inquiries and legal opinion was sought from the office of the Director of Public Prosecutions. The parents were subsequently informed that the

[1] *Sunday Business Post*, 16 April 1995
[2] ([1992] IR 1) High Court (Costello J) 17 February 1992 (Finlay CJ, Hederman McCarthy O'Flaherty Egan JJ) 5 March 1992

evidence, which they sought to obtain, would not be admissible in court, at which time they confirmed that notwithstanding this *X* and her parents would go to England in any event. While in England – after arrangements for the abortion had been made – the parents learned that an injunction had been granted to the Attorney General, to whom the information had been conveyed. They cancelled the arrangements and returned to Ireland.

On the return date of the injunction, it was agreed that the hearing of the motion would be treated as the hearing of the action. Accordingly, the case was heard by Costello J. both on affidavit and on oral evidence.

The Attorney General sought orders restraining interference with the right to life of the unborn as contained in Article 40.3.3° of the Constitution, restraining *X* from leaving the jurisdiction and any other person from assisting her so to do for a period of nine months and restraining *X* from procuring or arranging a termination of pregnancy or abortion whether in Ireland or abroad.

The evidence accepted by the High Court was to the effect that when *X* learned that she was pregnant she was greatly distraught and upset and that later she confided in her mother that when she learned she was pregnant she had wanted to kill herself by throwing herself downstairs. It was also accepted that she had, on other occasions, expressed similar sentiments both to her mother and to members of the Garda Síochána.

She had been brought by her parents to a clinical psychologist who explained in his report (which was admitted, by agreement, in evidence) to the court that he had been asked to assess her emotional state. He was of the view that she did not seem depressed but considered that the psychological damage to her of carrying a child would be considerable and that the damage to her mental health would be devastating. His report was supplemented by oral testimony in which he explained that, as a result of his consultation with *X*, he understood her to mean that by ending her life she would end the problems through which she was putting her parents, with whom she has a very strong and loving relationship.

The High Court concluded that the duty of the Attorney General to seek the injunction in the circumstances of the case could not be in doubt and that he was obliged to act as he did. Moreover, the Court held that the failure of the Oireachtas to enact any law regulating the manner in which the right to life of the unborn and the right to life of the mother referred to in the Eighth Amendment could be reconciled did not mean that the court could make no order in a case in which an issue of reconciliation arose. Accordingly, it was held that

> [T]he right acknowledged in the Eighth Amendment is clear and unambiguous and the court's duty to protect it is

> imperative ... It seems to me that … the court … would be failing in its constitutional duty to protect it merely because the Oireachtas had failed to legislate on how it was to have regard to the equal right of the mother, as provided for in the Eighth Amendment.

Although complicated and difficult issues of fact might arise in individual cases, this did not, in the view of Costello J., inhibit the court from applying the clear rule of law laid down in the amendment.

Going on to consider the facts of the matter, Costello J. distinguished the instant case from cases involving surgical treatment of either mother or her unborn child. Where "a young girl in a highly distressing and deeply disturbing situation" may take her own life, he was of the view that the court has a duty to protect her life not just from the actions of others but from actions she may herself perform.

Accordingly, what was required of the court was to assess, by reference to the evidence, the danger to the life of the child and the danger to the life of the mother. On the evidence, the trial judge was quite satisfied that, in the circumstances, there was a real and imminent danger to the life of the unborn. He was also satisfied that the evidence also established that if the injunction sought were to be granted, there was a risk that *X* might take her own life. However, that risk was deemed to be much less and to be of a different order of magnitude than the certainty that the life of the unborn would be terminated if the injunction were not granted. Noting the love and care and support of the girl's parents, who were described as "devoted", the trial judge concluded that having had regard to the rights of the mother in the case, the court's duty to protect the life of the unborn required it to make the order sought.

The decision to grant of the injunctions was appealed to the Supreme Court where, following an *in camera* hearing lasting three days, and having heard submissions on the constitutional issues, with the exception of questions of European Union law, the appeal was allowed, the reasons for the decisions following later.

Although no submission was made to the Supreme Court on the question of the initiation of the proceedings by the Attorney General, Finlay CJ (Hederman, McCarthy, O'Flaherty JJ concurring) was firmly of the view that the decision of the High Court had been correct in this regard.

Having considered the relevant law, and the principles underlining them, the Chief Justice (Hederman, McCarthy, Egan JJ concurring) was in no doubt that the courts were not in any way inhibited (or, in the words of Egan J, 'relieved') from vindicating and defending the right to life of the unborn by reason of a want of legislation. O'Flaherty J was of the view that the Eighth Amendment was self-

executing in the absence of legislation.

Acknowledging that the facts in the case had been deposed to "without conflict or question" and having regard *inter alia* to the submission of counsel for the Attorney General

> that under the terms of the [Eighth Amendment] if it was established in any case that the continuation of the life of the unborn constituted a risk of immediate or inevitable death to the mother the termination of the pregnancy would be justified and lawful

and accepting that the doctrine of the harmonious interpretation of the Constitution involved in this case a consideration of the constitutional rights and obligations of the mother of the unborn child and the interrelation of those rights and obligations with the rights and obligations of other people and, of course, with the right to life of the unborn child as well, the Chief Justice concluded

> that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40, s.3, sub-s 3. of the Constitution.

McCarthy J appeared to go further. In his view, the true construction of the Amendment was that, in paying due regard to the equal right to life of the mother,

> when there is a real and substantial risk attached to her survival not merely at the time of application but in contemplation at least throughout the pregnancy,

it may not be practicable to vindicate the right to life of the unborn.

O'Flaherty J, for his part, believed that the Eighth Amendment was clear *inter alia* in that "abortion, as such, certainly abortion on demand, is not something that can be legalised in this jurisdiction." He further considered that until legislation – which must have due regard to the mother's right to life – was enacted to provide otherwise, that

> the law in this State is that surgical intervention which has the effect of terminating pregnancy *bona fide* undertaken to save the life of the mother where she is in danger of death is permissible under the Constitution and the law. The danger has to represent a substantial risk to her life though this does not necessarily have to be an imminent danger of instant death. The law does not require the doctors to wait until the mother is in peril of immediate death.

Egan J, in reliance on *Rex v Bourne* [1939] 1 KB 687, was of the view that under the *Offences Against the Person Act*, 1861, not every abortion was regarded as unlawful. He continued:

> The wording of the Eighth Amendment which guarantees to defend and vindicate the right to life of the unborn recognises by the inclusion of the words "with due regard for the equal right to life of the mother" and the words "as far as practicable" that an abortion will not in every possible circumstance be unlawful.

Rejecting the High Court's analysis of the risks to both mother and her unborn baby, Egan J regarded it

> as a denial of the mother's right to life if there was a requirement of certainty of death in her case before a termination of the pregnancy would be permissible.
>
> In my opinion the true test should be that a pregnancy may be terminated if its continuance as a matter of probability involves a real and substantial risk to the life of the mother. The risk must be to her life but it is irrelevant, in my view, that it should be a risk of self-destruction rather than a risk to life for any other reason.

Such an analysis was totally rejected by Hederman J. He reminded the court that the decision in *Bourne* relied upon the *Infant Life Preservation Act, 19*29, which does not apply in this jurisdiction, that there is no similar provision here, that the killing acknowledged in that Act could lead to a charge of murder in this jurisdiction and that no court here has ever expressed a view on whether the successful defence in *Bourne* would be accepted as a correct interpretation of the Act of 1861. That said, it was clear to him that the interpretation of the Constitution could not be made to depend upon the provisions of a statute, particularly a statute which was passed almost a century before the Constitution itself was enacted. In his view, the terms of the Eighth Amendment totally excluded any possible suggestion that the unborn life is any less a human life than a life which has acquired an existence independent of its mother. There could not, in his view, be a freedom to extinguish life side by side with a guarantee of protection of that life.

The argument by the Attorney General that such a 'test', submitted by *X* and accepted by the Chief Justice, was disproportionate and even having regard to the considerations which it was conceded were relevant, was a failure to approach sufficiently equality between the two rights concerned, was rejected. The question then arose as to whether or not the evidence adduced was sufficient to satisfy such a 'test'.

On this point, the Chief Justice was satisfied that the only risk put forward to the life of the mother was the risk of self-destruction. He continued:

> Such a risk to the life of a young mother, in particular, has it seems to me, a particular characteristic which is relevant to

> the question of whether the evidence in this case justifies a conclusion that it constitutes a real and substantial risk to life.
>
> If a physical condition emanating from a pregnancy occurs in a mother, it may be that a decision to terminate the pregnancy in order to save her life can be postponed for a significant period in order to monitor the progress of the physical condition, and that there are diagnostic warning signs which can readily be relied upon during such postponement.
>
> In my view, it is common sense that a threat of self-destruction such as is outlined in the evidence in this case, which the psychologist clearly believes to be a very real threat, cannot be monitored in that sense and that it is almost impossible to prevent self-destruction in a young girl in the situation in which this defendant is if she were to decide to carry out her threat of suicide.

The Chief Justice concluded on the uncontested evidence adduced before the High Court that the 'test' set out by him had been satisfied and that it had been established, as a matter of probability, that there was a real and substantial risk to the life of the mother by self-destruction which could only be avoided by termination of her pregnancy.

Hederman J, however, strongly disagreed. Having reviewed the evidence of the High Court in detail, and the basis upon which submissions that *X* should be permitted to have an abortion were made, and the submissions themselves, he noted, in passing, that the psychologist who gave oral evidence in the High Court had been of the view that in-patient treatment of *X* would be essential. On the vital matter of the threat to the mother's life, he was struck by the paucity of evidence. He stated:

> It is inevitable that if the procedure is adopted the child's life is extinguished. Therefore before that decision is taken it is obvious that the evidence required to justify the choice being made must be of such a weight and cogency as to leave open no other conclusion but that the consequences of the continuance of the pregnancy will, to an extremely high degree of probability, cost the mother her life and that any such opinion must be based on the most competent medical opinion available.

Hederman J noted that:

> In the present case neither this court nor the High Court has heard or seen the mother of the unborn child. There has been no evidence whatever of an obstetrical or indeed of any other medical nature. There has been no evidence upon which the court could conclude that there are any obstetrical problems, much less serious threats to the life of the mother of a medical nature. What has been offered is the evidence of a

> psychologist based on his own encounter with the first defendant and on what he heard about her attitude and behaviour from other persons, namely, the Garda Síochána and her parents. This led him to the opinion that there is a serious threat to the life of the first defendant by an act of self-destruction by reason of the fact of being pregnant. …

He drew the Court's attention to a previous ruling:

> [A]s was pointed out in this court in *SPUC v Grogan* [1989] IR 734 the fact that a pregnancy is unwanted was no justification for terminating it or attempting to terminate it.

Discussing the issue of a risk of suicide, he said:

> If there is a suicidal tendency then this is something which has to be guarded against. If this young person without being pregnant had suicidal tendencies due to some other cause then nobody would doubt that the proper course would be to put her in such care and under such supervision as would counteract such tendency and do everything possible to prevent suicide. I do not think the terms of the Eighth Amendment or indeed the terms of the Constitution before the Amendment would absolve the State from its obligation to vindicate and protect the life of a person who had expressed the intention of self-destruction. This young girl clearly requires loving and sympathetic care and professional counselling and all the protection which the State agencies can provide or furnish.

He continued:

> There could be no question whatsoever of permitting another life to be taken to deal with the situation even if the intent to self-destruct could be traced directly to the activities or the existence of another person.
>
> … Suicide threats can be contained. The duration of the pregnancy is a matter of months and it should not be impossible to guard the girl against self-destruction and preserve the life of the unborn child at the same time. The choice is between the certain death of the unborn life and a feared substantial danger of death but no degree of certainty of the mother by way of self-destruction.

He was of the opinion that the evidence offered would not justify the Supreme Court in granting the appeal.

McCarthy J, however, appeared to go further than the Chief Justice did. On the facts of the case, which he accepted were not in contest, he was

> wholly satisfied that a real and substantial risk that the girl might take her own life was established.

Accordingly, in McCarthy J's view, it followed that "she should not be prevented from having a medical termination of pregnancy." (*sic*) In a *non sequitur* that is difficult to comprehend, he was of the opinion that his conclusion led "inevitably to the recognition that the wording of the Amendment contemplates abortion lawfully taking place within this State."

He also considered that the 'acknowledgement', in the course of argument, by counsel for the Attorney General that the Amendment "envisage[d] the carrying out of a lawful abortion within the State" was correct. Although not apparent on the face of the judgment, he also concluded that the High Court had considered that there could be circumstances in which an abortion within the State might lawfully be carried out.

O'Flaherty J believed that the case came within the principle he had enunciated. Egan J was satisfied that the evidence established that such risk as would render an abortion lawful – according to his construction of the Eighth Amendment - existed in the case.

For these reason the majority of the Supreme Court considered that the orders made in the High Court should be set aside.

Commentary

The Pro-Life Campaign does not argue that the 1983 amendment should have been interpreted as conferring an injunctive power against women who might leave the State to have abortions. However, the Supreme Court went further than clarifying this issue, when it ruled that in certain circumstances, abortion was lawful in Ireland. Quite apart from the improper concession of counsel for the Attorney General as to the proper meaning of the wording of the Eighth Amendment that was accepted by the Supreme Court and the uncontroverted, untested and, it seems to the Pro-Life Campaign, inadequate evidence upon which the findings of fact of the High Court and Supreme Court were ultimately based, a number of important misconceptions as to the nature of the right to life are evident in the judgments of the majority in *X*.

Thus, McCarthy J's assertion that "life itself … until 1990 [was] qualified as a fundamental right (see s. 1 of the *Criminal Justice Act, 1990*, and Article 13, s. 6 of the Constitution" mis-understands the protection of life afforded in the Constitution. The right to life is absolute in that it is impermissible to directly and intentionally take the life of any innocent human being. That the Constitution contemplates, and legislation did provide for, capital punishment does not in any way detract from this core value that the Constitution seeks to protect. Nor can it imply that either the life, or the right to life, of an innocent human being is qualified in any way. However, it does not imply that that right to life can be vindicated in all circumstances either. Egan J's assertion that the right to life might not be paramount in all circumstances – and the analogy he

uses is that of the prevention of a serious sexual assault on one's daughter - demonstrates the same philosophical and legal error.

McCarthy J's further assertion that

> The right of the girl here is a right to a life in being; the right of the unborn is to a life contingent; contingent on survival in the womb until successful delivery

hardly seems correct in all of the circumstances. True, the <u>life</u> of the unborn child is contingent upon his or her survival *in utero* until successful delivery. But the <u>right to life</u>, of both mother and unborn child, is absolute. Thus, in the words of Hederman J:

> The Eighth Amendment establishes beyond any dispute that the constitutional guarantee of the vindication and protection of life is not qualified by the condition that the life must be one which has achieved an independent existence after birth. The right of life is guaranteed to every life born or unborn. One cannot make distinctions between individual phases of the unborn life before birth, or between unborn and born life. … one cannot consider the unborn life only as part of the maternal organism. The extinction of unborn life is not confined to the sphere of private life of the mother or family because the unborn life is an autonomous human being protected by the Constitution. …

That, of course, is not to say, however, that the right to life of the unborn is capable of being vindicated in all circumstances. The manner in, and the extent to, which it may be so vindicated is delimited by considerations of reasonable practicability. This in no way qualifies the right, but merely reflects the practical limitations of human endeavour and medical practice. It is a human limitation, not a statement of legal philosophical principle, as McCarthy J appears to suggest.

Indeed, Hederman J addressed the nub of the issue:

> The death of a foetus may be the indirect but foreseeable result of an operation undertaken for other reasons.

McCarthy J readily identified the purpose of the Eighth Amendment - to enshrine in the Constitution the protection of the right to life of the unborn thus precluding the legislature from an unqualified repeal of Sections 58 of the Act of 1861 or otherwise, in general, legalising abortion. O'Flaherty J was similarly of the view that the enactment of the Eighth Amendment did not bring about any fundamental change in Irish domestic law on abortion. However, McCarthy J's consequential questions as to what pregnant women, the parents of a pregnant girl "under age" and the medical profession are to do seem hardly apposite in the context of an absence of legislation following its passage. His assertion that the medical profession has "no guidelines save what may be

gleaned from the judgments in this case" mis-states and mis-understands the nature of medical practice. Furthermore, his concern as to what additional considerations there are whether in respect of pregnancy following rape or incest seem irrelevant from the perspective of the principle enshrined in the Eighth Amendment.

Hederman J, on the other hand, dissenting, was clearly of the view that it did more than that:

> The Eighth Amendment to the Constitution was quite clearly designed to prevent any dispute or confusion as to whether or not unborn life could have availed of Article 40 as it stood before the Eighth Amendment. The Eighth Amendment made it clear, if clarity were needed, that the unborn life was also life within the guarantee of protection. It went further, and expressly spelled out a guarantee of protection of the life of the mother of the unborn life, by guaranteeing her life equality - equality of protection, to dispel any confusion there might have been thought to exist, to the effect that the life of the infant in the womb must be saved even if it meant certain death for the mother.

The Pro-Life Campaign recommends this view to the Working Party.

The C case[1]

In the later case that came to be known as *C*, the facts were not dissimilar from *X*. *C*, who was then thirteen and a half years of age, and a member of the travelling community, became pregnant as a consequence of a serious sexual assault by a family friend and neighbour. In the High Court, Geoghegan J stated that

> there was a well-founded view that the behaviour of her parents, the applicants … after the rape did not correspond in various respects to the kind of behaviour one would expect of parents in such appalling circumstances. It was in this context that temporary care orders were made and sought…

although he did not state the evidential basis for this view.

Following *in camera* hearings in the District Court, an interim care order had been granted to the Eastern Health Board, pursuant to the provisions of the *Child Care Act, 1991*. *C* was accordingly placed with foster parents, with the consent of her own parents. In the making of the care order, certain directions were applied for, and made. Thus, it was directed that *C* be permitted to proceed to Britain for the purpose of "securing treatment, to wit, a termination

[1] A and B v Eastern Health Board, Judge Mary Fahy and C and The Attorney General (Notice Party) ([1997] Unreported High Court Judgment, Geoghegan J)

of her pregnancy" and that she be afforded such "treatment" or other treatment as might be advised. The District Court had further directed that the Eastern Health Board be permitted to execute consent to the "treatment" and to matters incidental thereto or such further treatment or examination as might be advised by her medical advisers; and the court permitted the Eastern Health Board to make such arrangements as might be required to facilitate the implementation of the directions forthwith. This was despite the fact that the District Judge, in her judgment, at the time of making the directions, had held that the evidence before her failed to satisfy the tests set down in *X*.

The parents sought judicial review of the decision of the District Court in the High Court. The directions in relation to the procuring of *C*'s abortion, rather than the making of the care order itself, were challenged by the parents. The grounds included *inter alia* that the expression "medical or psychiatric examination, treatment or assessment" in the *Child Care Act 1991* could never be interpreted to include a termination of pregnancy whether lawful or unlawful; that to so hold involved construing a statutory provision, involving consideration of conflict between, and reconciliation of, different constitutional rights, which the District Court was not empowered to do; that if the statutory expression included abortion, it was constitutionally invalid on the grounds that it would then be an unjust attack on the right to life of the unborn child and on the constitutional authority of the family and it would also breach the State's guarantee to respect the inalienable right and duty to provide for the moral education of *C*. The directions were also challenged on due process and other procedural and constitutional grounds.

When the matter came on for hearing in the High Court, the parents of *C*, *C* herself, the Eastern Health Board and the Attorney General were all represented by separate legal teams. In addition, a further legal team, appointed by the Attorney General was appointed to argue the case from the point of view of *C*'s unborn child. The matter was heard *in camera* by Geoghegan J.

The High Court rejected the parents' application advanced on due process grounds. In the course of that rejection, however, Geoghegan J appeared repeatedly struck by the "urgency" of the matter and that

> if there was going to be a termination it was essential that the matter be dealt with as quickly as possible.

He was also satisfied that the District Judge had been correct in refusing the parents' application to have C assessed by another psychiatrist. Geoghegan J was of the view that the District Judge was entitled to decide what was in the best interests of the child. In an assertion that is empirically unjustifiable, he noted that there had been evidence before the District Court

> that further investigations either by a new psychiatrist or indeed by the psychiatrists who had already questioned *C* were not in the interests of *C*'s own mental health.

The High Court also rejected the parents' application on constitutional grounds. In the course of that rejection, the High Court repeated the conceptual error noted in the judgments of the majority of the Supreme Court in *X*. Thus, Geoghegan J asserted that the constitutional right to life of the unborn "is not an absolute right".

The parents' application was also opposed by *C* on the grounds *inter alia* that the expression "medical treatment" in the *Child Care Act 1991*

> must necessarily include termination of pregnancy in all circumstances but at the very least it must include it in the circumstances of this case having regard to medical evidence that termination of pregnancy was in the interest of *C*.

Geoghegan J agreed, at least in part. He considered that

> [W]here a psychiatrist as in this case gives strong evidence to the effect that a child is likely to commit suicide unless she has a termination of pregnancy, that termination of pregnancy which is a medical procedure is clearly in my view also a medical treatment for her mental condition. It is not necessary therefore to consider whether all terminations of pregnancy come within the expression "medical treatment" I am satisfied that on the facts of this case it would come within that expression.

Having reviewed some of the evidence of one consultant psychiatrist who had examined *C*, Geoghegan J concluded:

> In the light of this evidence coming from a consultant psychiatrist including the advice that she undergo medical procedures involving the termination of her pregnancy because of her suicidal tendencies, such medical procedures must, in my view, constitute "medical treatment" within any normal definition.

It is this stark assessment that is empirically unsustainable.

The parents argued that, even if one *were* to assume that the provisions of the *Child Care Act, 1991* envisaged that 'lawful abortion' constituted 'treatment' for the purposes of the Act, the District Court had not found, that as a matter of probability, there was a real and substantial risk to the life of *C* which could only be avoided by the abortion of her unborn child. Geoghegan J reviewed the evidence and the context of the District Judge's conclusions. Notwithstanding the clear conclusion of the District Court to that effect, he noted that he failed

> to see how any judge could have avoided the conclusion that

> as a matter of probability there was a real and substantial risk to the life as distinct from the health of *C* which could only be avoided by the termination of her pregnancy and I do not interpret [the District Judge] as coming to any different conclusion.

Accordingly, he was satisfied that the case came within the terms of *X* and that such an abortion was lawful.

The psychiatric evidence in C

A brief observation might be made about the nature of the evidence adduced. To decide such an important issue where a human life is at stake on the basis of a single uncorroborated psychiatric opinion is not satisfactory. A second psychiatric assessment was undertaken to assess the girl's competency and not her suicidal intentions.

Thus, as in *X*, uncontroverted, untested evidence of putative suicidal risk was used as the benchmark for establishing the lawfulness of, and permitting, abortion.

REJECTION OF THE PROPOSED TWELFTH AMENDMENT OF THE CONSTITUTION IN NOVEMBER 1992

Anxious to respond to the changed legal situation after the X case, the then Government decided upon the route of Constitutional referendum. However, its Amendment did not allow for a full reversal of the Supreme Court judgment and, if approved, would only have removed the threat of suicide as a ground for legal abortion. The Government argued that it was necessary to leave the option of legal abortion open because medical circumstances could arise in which direct abortion might be necessary to save the life of a pregnant woman. The Amendment which the Government asked the electorate to support, therefore, would have allowed 'limited' abortion i.e. abortion on the grounds of a real and substantial risk to the life of the mother (not including the risk of her suicide) and the Government stated that if its proposal was rejected it would then bring in laws to give effect to the full decision of the Supreme Court in the X case, i.e. allowing abortion in even wider circumstances, including threatened suicide of the mother.

The Government's proposed 1992 Amendment was:

> *It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother, where there is an illness of the mother giving rise to a real and substantive risk to her life, not being a risk of self-destruction.*

The Pro-Life Campaign rejected these arguments, pointing out that

the medical evidence did not support the view that abortion was a necessary part of any treatment, and that rates of maternal mortality in Ireland were in fact lower than in countries with liberal abortion laws. The Campaign opposed the Government's Amendment on the basis that it would have meant legalised abortion.

Many in the medical profession also opposed the Amendment. In a letter to *The Irish Times*[1] signed by over thirty consultant obstetricians and gynaecologists, the point was made that 'the wording allows for abortion on a wider scale than that acknowledged by the Government', and that, 'The question of what constitutes a substantial risk will always be highly subjective.' The consultants concluded: 'The choice now offered to the electorate is, therefore, not a reasonable one nor, on the basis of Irish obstetric practice, can it be said to have any medical justification or scientific merit.'

The holding of the referendum coincided with the (unrelated) fall of the Government, and the subsequent general election campaign seriously affected the amount of debate on the abortion issue. Three comments might be made about the Government's campaign for a 'Yes' vote in that 1992 referendum:

- The Government spent a large sum of public money on its campaign, a practice subsequently found illegal by the Courts in the McKenna case;
- The ballot papers were misleadingly entitled 'Right to life', despite the fact that the proposal was to provide for abortion, on so-called 'limited' grounds;
- The Government's advertising campaign promoted a 'Yes' vote for the 'Right to Life';
- Pressure was put on people who were anti-abortion by the oft-stated threat that if they rejected the proposal before them for 'limited' abortion, they would be faced with legislation allowing much more abortion.

Even in these circumstances, which created widespread confusion, the Government's proposal was defeated by 65% to 35%. The national distribution of the votes makes it clear that those who voted against the Amendment were mainly those who opposed abortion and that among the 'Yes' voters were many who opposed abortion but who wished to prevent legislation for still-more wide-ranging abortion.

It is beyond argument that the electorate rejected the proposal to allow for induced abortion in limited circumstances. Any future

[1] *The Irish Times*, 16 November 1992

referendum should give the opportunity to prohibit induced abortion in all circumstances, thus returning to the situation which existed in law before the *X* case.

Future options

The Pro-Life Campaign advocates a complete prohibition on induced abortion, similar to the situation that existed prior to 1992. This would, of course, necessitate a constitutional amendment.

How best can abortion be constitutionally prohibited? Several different wordings could advance the purpose in a perfectly satisfactory way. This purpose is clear: to restore the legal position to what it was understood to be prior to the Supreme Court decision in the *X* case. The Constitution should protect current practice in every Irish hospital as regards medical treatment and care afforded mothers and their unborn children during pregnancy. Fortunately Irish doctors and nurses have held firm to medical ethics and consequently abortions do not take place in Irish hospitals, in spite of the mistaken Supreme Court judgment.

While including a formula which we believe would achieve the stated objective, we are not in any way suggesting that there are not other forms of words which could be used. However, as an example of what *could* be included in Article 40.3.3^{o} we suggest that a single sentence be added to the first sentence of the sub-section. The first two sentences would thus read as follows:

> *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.*
>
> *No law shall be enacted, and no provision of this Constitution shall be interpreted, to render induced abortion lawful in the State.*

This formula aims to be as plain and as easily understood as possible. The term ‘induced abortion’ has a clear meaning in medicine, and is clearly understood and recognised by clinicians. An induced abortion is in contrast to a spontaneous abortion or miscarriage, and refers to a procedure or intervention which is directed at, and has as its primary or predominant or sole object, the death of an unborn child.

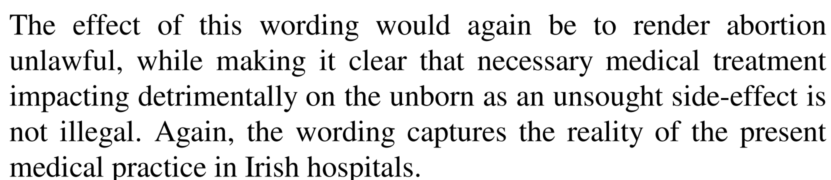
It is equivalent to a procured abortion, as contemplated and prohibited by the provisions of the Health (Family Planning) Act 1979, a termination of pregnancy, pursuant to the provisions of the British Abortion Act 1967 and a procuring of a miscarriage, pursuant to the provisions of the Offences Against the Person Act 1861.

There is a legal dictum, ‘ordinary words have ordinary meanings’. The words ‘induced abortion’ are ordinary words, with an ordinary meaning which is readily understood and which does not lend itself easily to misinterpretation.

The effect of this change would be to protect the excellent standard of medical care in Irish hospitals. Irish mothers would continue to receive all the medical treatment that they need during pregnancy, even when this may impact detrimentally on the unborn as an injurious or even potentially fatal side effect. Abortions would not be carried out. That is what the electorate voted for in 1983. There is a democratic obligation to give the electorate the opportunity now to exercise that choice.

As already mentioned, it is possible to achieve this purpose by a wide variety of wordings. For example, a wording published by the Pro-Life Campaign in October 1992 adds to Article 40.3.3° as follows:

> *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.*
>
> *It shall be unlawful to terminate the life of an unborn unless such termination is the unsought side-effect of medical treatment necessary to save the life of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life.*



The effect of this wording would again be to render abortion unlawful, while making it clear that necessary medical treatment impacting detrimentally on the unborn as an unsought side-effect is not illegal. Again, the wording captures the reality of the present medical practice in Irish hospitals.

THE EUROPEAN DIMENSION

Introduction

The European dimension is a matter for serious reflection. The reason is simple. Over the past thirty years or so, there has been a significant transformation in social and legal attitudes towards abortion internationally. The sad fact is that wide-ranging abortion is lawful in many European countries today.

This change has had one effect on the law at a European level in several ways. First, the shift in attitudes means that the direct taking of the life of an unborn child, which formerly was regarded as deeply violative of the child's rights, is now regarded within the legal systems of a number of European countries as perfectly acceptable, if not, indeed, an aspect of the exercise of a woman's fundamental human rights. Secondly, at a pragmatic level, the fact that abortion is legally available in so many European countries must make it difficult for the European Court of Human Rights to avoid taking this reality into account when addressing the issue of the protection afforded by the European Convention on Human Rights. This was apparent in Open Door Counselling and Dublin Well Woman v Ireland 15 EHRR 244 (1992) where the Court declined to determine whether the term "others" under Article 10 (2) included unborn children. Thirdly, once abortion becomes part of the legal system, its acceptability can affect other aspects of the law in a way that was not originally foreseen. Thus, for example the Court of Justice has characterised abortion as a "service", bringing the practice into an entire corpus of European Union law relating to the provision of services. This necessarily impacts on the protection of the unborn in particular member States.

There are therefore two sources of concern. The first is that the European Convention on Human Rights may be interpreted as including a right to abortion authorising among the fundamental rights and freedoms it protects, and further as authorising the provision of abortion facilities, if not, indeed, requiring abortion to be part of the law of states that adhere to the Convention. The second is that European Union law will develop in such a way as to lead to pressures, direct and indirect, on Ireland to introduce abortion in wide-ranging circumstances. No one can predict with any certainty how these two trends will develop. It is notoriously difficult to assess how shifts in social attitudes will affect, and in turn be affected by, legal concepts.

European Union Law

In its original manifestation, the 'Common Market' was seen as being concerned with trade and commerce among Member States. The remit of the subject-matter was economic, the scope of the interrelationship between Member States being in the nature of an

agreement between sovereign states rather than involving the creation of a new "super State" or federation. As time has gone by, with changing political and legal developments, including the Single European Act and the Maastricht and Amsterdam Treaties, the subject-matter has greatly expanded. There is an increasing emphasis on social and environmental factors, and the principle of sex equality has been applied in new areas.

In many respects these developments are to be enthusiastically welcomed. There was a need for improvements in social policy, the protection of the environment and the development of genuine sex equality. Ireland has benefited greatly from the lead that Europe has given on these issues. But, sadly, intertwined with the thinking on these issues in many European circles today is a philosophy of life and of humanity which offer no solidarity to unborn children.

Thus, some have argued that sexual equality requires "reproductive freedom", which translates into wide-ranging abortion facilities. If abortion is a "service", and reproductive freedom requires access to that service, then the implications for the unborn are clearly significant and disturbing. It is also possible to envisage similar developments taking place on the basis of health considerations. European Union law has shown no disposition to treat unborn children as worthy of protection on an equal basis with those who have been born. The criteria it employs in relation to human rights give no basis for believing that the unborn will be given such protection. Certainly neither the European Convention on Human Rights nor the common constitutional values of the Member States (as they are at present being interpreted by the courts of most of those States) give any reason for assuaging one's concerns.

The Protocol

Protocol 17 to the Maastricht Treaty, which the Irish Government negotiated in December 1991, was required to afford some protection to the Irish Constitution's recognition of the right to life of the unborn. It provides as follows:

> Nothing in the Treaty on European Union or in the Treaties establishing the European Communities or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3. of the Constitution of Ireland.

One major effect of the Protocol is to ensure that the constitutional protection afforded by Article 40.3.3° to the unborn cannot be overridden or modified by Union law so as, for example, to result in the striking down of legislation consistent with Article 40.3.3° prohibiting abortion in Ireland.

This is a most important matter, since, as we have mentioned there are significant reasons for apprehending that European Union law

may, over the coming years, become increasingly disposed to treat abortion as a "right" within its terms.

Clearly, when the Government negotiated the Protocol in December 1991, it did so on the basis that Article 40.3.3^{o} prohibited abortion completely. That was the universal understanding of Article 40.3.3^{o} prior to the decision of the Supreme Court in Attorney General v X, three months later.

The effect of that decision was, however, that the mistaken principles of law stated in Attorney General v X represent the judicial interpretation of Article 40.3.3^{o}. Such mistaken principles have been reiterated by the Supreme Court in the Abortion Information Bill Reference and in In re a Ward of Court in 1995, as well as in a later chapter in the litigation between the Society for the Protection of Unborn Children (Ireland) and some student unions. Given this judicial interpretation, the Protocol's protection of Article 40.3.3^{o} from the effect of European Union law is less than fully helpful. One should not, however, ignore the fact that the Protocol does protect the unborn from all other risks of potential application of European Union law where 40.3.3^{o} and Union law are in conflict.

If, as we propose, Article 40.3.3^{o} is amended to override the mistaken interpretation in Attorney General v X, will this mean that the Protocol will protect the revised 40.3.3^{o} from potential conflict with European Union law? Dr. Gerard Hogan ("Protocol 17", chapter 14 of Patrick Keating's Maastricht and Ireland: What the Treaty Means, pp.119 – 120 (1992)) analyses the issue as follows:

> On the one hand, legal certainty would seem to require that our community partners should only be bound by the version of Article 40.3.3^{o} as existed at the time of the ratification of the Treaty. On the other hand, it may plausibly be argued that the intention of the Protocol was to commit these matters entirely to the provenance of Irish constitutional law. If this argument is correct, it would mean that the Protocol includes any future changes to Article 40.3.3^{o}, at least where prior changes were in harmony with the original version of that provision.

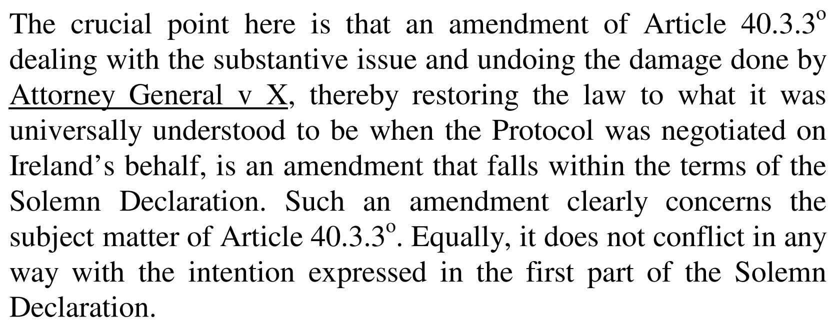
Dr. Hogan considers that there is "much force" in both of these arguments. In support of the latter argument, few commentators would seek to argue that even in the absence of the Solemn Declaration (which we shall discuss below) the Protocol could have no application to the revised version of Article 40.3.3^{o} after the constitutional referenda of November 1992. So far as European Union law is concerned, the Court of Justice will have the last word on this issue of interpretation. As a matter of Irish Constitutional law, the Irish people have still the sovereign capacity to protect the unborn from the detrimental application to them of European Union law which conflicts with their protection under the Constitution.

The Solemn Declaration

In this context, the Solemn Declaration is of some considerable relevance. It provides as follows:

> The High Contracting Parties to the Treaty on European Union signed at Maastricht on the 7th day of February 1992
>
> Having considered the terms of Protocol No. 17 to the said Treaty on European Union which is annexed to that Treaty and to the Treaties establishing the European Communities
>
> Hereby give the following legal interpretation: that it was and is their intention that the Protocol shall not limit freedom either to travel between Member States or, in accordance with conditions which may be laid down, in conformity with Community law, by Irish legislation, to obtain or make available in Ireland, information relating to services lawfully available in Member States
>
> At the same time, the High Contracting Parties solemnly declare that in the event of a future constitutional amendment in Ireland which concerns the subject matter of Article 40.3.3^{o} of the Constitution of Ireland and which does not conflict with the intention of the High Contracting Parties hereinbefore expressed, they will, following the entry into force of the Treaty on European Union, be favourably disposed to amending the said Protocol so as to extend its application to such constitutional amendment if Ireland so requests.

Undoubtedly, the concerns underlying the Solemn Declaration were in the areas of travel and information but it is to be noted that the Solemn Declaration does not seek to restrict itself to these issues. The second part of the Solemn Declaration is to the effect that the High Contracting Parties, in the event of a future constitutional amendment "which concerns the subject matter of Article 40.3.3^{o}" and which "does not conflict" with the intention expressed in the first part of the Solemn Declaration, will be favourably disposed to extend the application to the Protocol to the new amendment.



The crucial point here is that an amendment of Article 40.3.3^{o} dealing with the substantive issue and undoing the damage done by Attorney General v X, thereby restoring the law to what it was universally understood to be when the Protocol was negotiated on Ireland's behalf, is an amendment that falls within the terms of the Solemn Declaration. Such an amendment clearly concerns the subject matter of Article 40.3.3^{o}. Equally, it does not conflict in any way with the intention expressed in the first part of the Solemn Declaration.

THE MEDICAL QUESTIONS[1]

The provision or prohibition of abortion is not a medical issue.

In pregnancy, a doctor uniquely has a simultaneous duty to two patients. In general the promotion of maternal well-being enhances that of her unborn child. Conversely, enhancing the well-being of the unborn child must not endanger his/her mother's life. If the mother does not survive neither will the child (save in very exceptional circumstances).

Despite the Medical Council's statement to the contrary, the idea that abortion is a 'medical treatment' and may be necessary to save a mother's life has been frequently expressed in media comment and in two judgments, one from the High Court and another from the Supreme Court. The vast body of evidence that contradicts this statement was not considered in either case before the Courts and has received little comment in the media.

The Pro-Life Campaign contends that:

- abortion is never necessary to solve complications in pregnancy;
- there is a real distinction between treatments presently regarded as ethical which may lead indirectly to damage or death to the unborn baby, and induced abortion;
- abortion is not a necessary part of the treatment of cancer in pregnant women;
- abortion is not necessary to prevent a women with an unwanted pregnancy from committing suicide;
- abortion is not a compassionate way forward in cases of rape;
- abortion should not be contemplated as a way of preventing the birth of a handicapped child.

Maternal Mortality

Irish maternal mortality figures are excellent. They compare more than favourably with those of England and Wales, Scotland and Northern Ireland.[2]

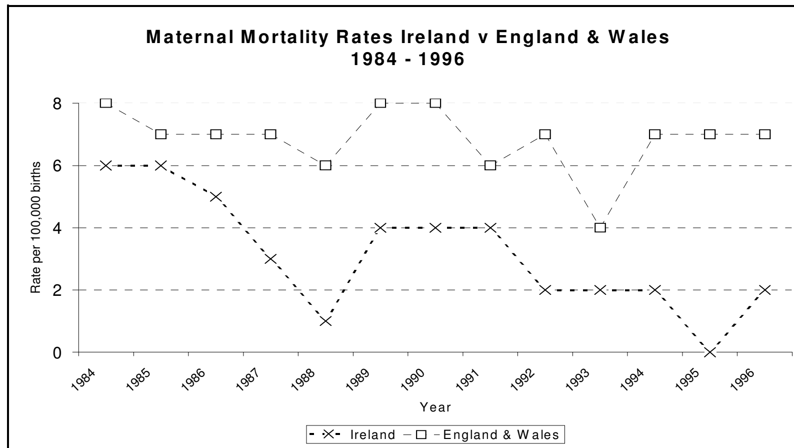
Between 1984 (the year after the passing of the Eighth Amendment) and 1996 (the last full year for which figures are available) Irish maternal mortality figures have been consistently better than those in England and Wales (Table 1). In 1996, for instance, there were 50,390 births in Ireland and there was 1

[1] This sections draws upon the work done by Doctors For Life, an affiliate of the Pro-Life Campaign. A more detailed examination of the medical issues is contained in the submission made by Doctors for Life to the Green Paper Group.

[2] Vital Statistics 1984 - 1996, Central Statistics Office, Cork. One death that occurred in 1993 was not registered until 1995. There were no maternal deaths recorded for 1995.

maternal death.[1]

Table 1



In 1982, a review all maternal deaths in the National Maternity Hospital, Dublin over a ten-year period revealed that there were 21 maternal deaths from a total of 74,317 births.[2] Analysis of the cause of death in each case led the authors of the study to conclude that the availability of induced abortion would not, in any way, have reduced the number of maternal deaths over the study period. A more recently published 1996 countrywide study of maternal mortality in Ireland between 1989 and 1991 revealed five direct maternal deaths arising from 157,752 births giving a rate of 3.2 per 100,000. The authors commented:

> The Republic of Ireland is unusual in the developed world in that termination of pregnancy is not available, This does not appear to have influenced these figures significantly, the maternal mortality rate directly due to obstetric causes being half that in the nearest European neighbour, i.e. England and Wales.[3]

Independent United Nations figures further re-inforce this finding and confirm that Ireland has the lowest maternal mortality rate in the world. Britain and the United States, where abortion on demand is freely available, rank joint 14th on the league table for industrialised countries.[4] The excellent Irish maternal mortality figures owe nothing to the fact that some Irish women travel to the UK for abortions. Analysis of the stated reasons for abortions in non-residents shows that in no case was the abortion sought to save the life of the mother.[5]

[1]Vital Statistics 1996 Yearly Summary, Central Statistics Office, Cork.

[2]Murphy J, O'Driscoll K: Therapeutic Abortion: The Medical Argument. *Ir Med. J* **75**:304-6, 1982.

[3]Jenkins, DM, Carr C, Stanley J, O'Dwyer T. Maternal Mortality in the Irish Republic 1989 -1991. *Ir Med J* **89** 140 - 141, 1996.

[4] *The Progress of Nations* 1993, 33 - 39 UNICEF, New York, USA.

[5]Abortion Statistics 1974 - 1996 (Series AB) Office of Population Census and Surveys, HMSO, London

Because of a countrywide hospital confinement rate in excess of 99% of total births and the publication of annual reports by the three Dublin Maternity Hospitals (which together, account for nearly half of all births in the country), the published figures suggest that Irish maternal mortality figures are complete and that the data are accurate. In Britain, however, there appears to be some discrepancy between official figures published by the Central Statistics Office and those compiled by the Committee of Inquiry into Maternal Deaths in the United Kingdom, reporting every three years, which suggests a degree of under-reporting. Such is not the case in Ireland.[1] Accordingly, a recent United Nations publication[2] which suggests an alarmingly high Irish maternal mortality rate and which is based on mathematical models related to the fertility rate and "sisterhood surveys" - rather than actual collection and collation of data - does not reflect either the reality of the situation or the excellence of Irish obstetric care for mothers and their babies.[3]

Abortion Trends

General

Given that the majority of abortions carried out on Irish women are carried out in England and Wales, it is apposite to consider the abortion regime operating in that jurisdiction. Furthermore, it is clear from British statistics, that abortions on Irish women account for the majority of abortions carried out there on non-resident women. There is no evidence to suggest that Irish, or Irish resident, women avail of abortion regimes in other European jurisdictions.

Great Britain

Abortion on demand was not the intention of abortion legislation introduced in Britain in 1967. Rather it was sought to help the "hard cases". In the House of Commons it was stated that the Act would benefit mothers "broken down physically and emotionally with the continual bearing of children."[4]

The Abortion Act 1967, which came into effect on the 27th April, 1968 permitted abortion by a registered medical practitioner on any or a combination of six statutory grounds, i.e. where it was certified as justified by two medical practitioners on the grounds that:

1. the continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were

[1] See: Jenkins, DM, Carr C, Stanley J, O'Dwyer T. Maternal Mortality in the Irish republic 1989 -1991. *Ir Med J* **89** 140 - 141, 1996 at 140.
[2] The Progress of Nations 1996, UNICEF, New York
[3] In contrast, see: The State of the World's Children 1996, UNICEF, New York which records an Irish maternal mortality rate closer to the national calculation.
[4] Hansard: House of Commons Debates, 22 July 1966.

terminated;

2. the continuance of the pregnancy would involve risks of injury to the physical or mental health of the pregnant woman greater than if the pregnancy were terminated;

3. the continuance of the pregnancy would involve risk of injury to the physical or mental health of any existing child(ren) in the family of the pregnant woman greater than if the pregnancy were terminated;

4. there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped;

or, in an emergency, certified by the operating practitioner as being immediately necessary -

5. to save the life of the pregnant woman; or

6. to prevent grave permanent injury to the physical or mental health of the pregnant woman. [1]

The Abortion Act 1967 was amended by the Human Fertilisation and Embryology Act 1990[2] with effect from 1st April 1991 and the statutory grounds were re-defined as follows:

A. the continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated; (previously **Ground 1**)

B. the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; (**'new' Ground**)

C. the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman; (previously **Ground 2**)

D. the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of any existing child(ren) in the family of the pregnant woman; (previously **Ground 3**)

E. there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped; (previously **Ground 4**)

or, in an emergency, certified by the operating practitioner as being immediately necessary -

F. to save the like of the pregnant woman; (previously **Ground 5**) or

[1] Abortion Act, 1967 s. 2.
[2] Human Fertilisation and Embryology Act 1990 s. 37.

G. to prevent grave permanent injury to the physical or mental health of the pregnant woman (previously **Ground 6**).[1]

In addition to creating the new **Ground B** - essentially a subset of the old Ground 2 - the 1990 act also:

(i) reduced the 28 week presumption of foetal viability in the English Infant Life Preservation Act 1929 to 24 weeks in respect of Grounds C and D;

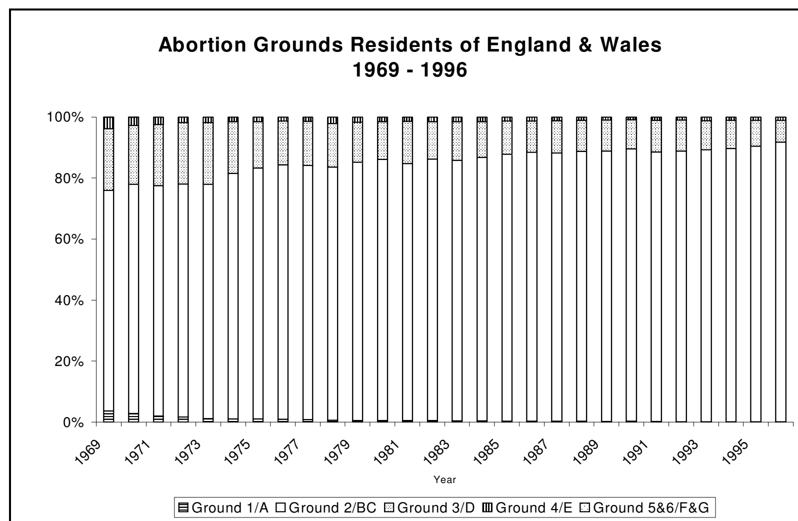
(ii) removed all time limits in respect of Grounds A and E; and

(iii) allowed for the selective reduction of a multiple pregnancy.

Since 1968 the number of total abortions has nearly quadrupled with one in five pregnancies ending in induced abortion.

Analysis of the stated grounds for abortions carried out on residents of England and Wales for the years 1974[2] to 1996[3] reveals that Ground 1/A is relied upon in less than 0.25% of abortions (from a high of 1% in 1974). That is not to say that these abortions were even necessary to save the life of the mother. Analysis of the stated grounds (in terms of the underlying conditions) indicates that none were suffering from conditions in which an abortion would improve the prognosis or outcome. Ground 2/BC alone accounts for between 80% and 90% of all abortions, with the other grounds making up the remainder. Suspected congenital malformation in the unborn child accounts for less than 1% of all abortions.[4] (Table 2) The re-classification of the grounds in 1991 has not altered this trend.

Table 2



[1] Abortion Act, 1967 s. 2 as amended by the Human Fertilisation and Embryology Act 1990 s. 37.

[2] When the current AB Series was first published by the Office of Population Census and Surveys (OPCS), HMSO, London.

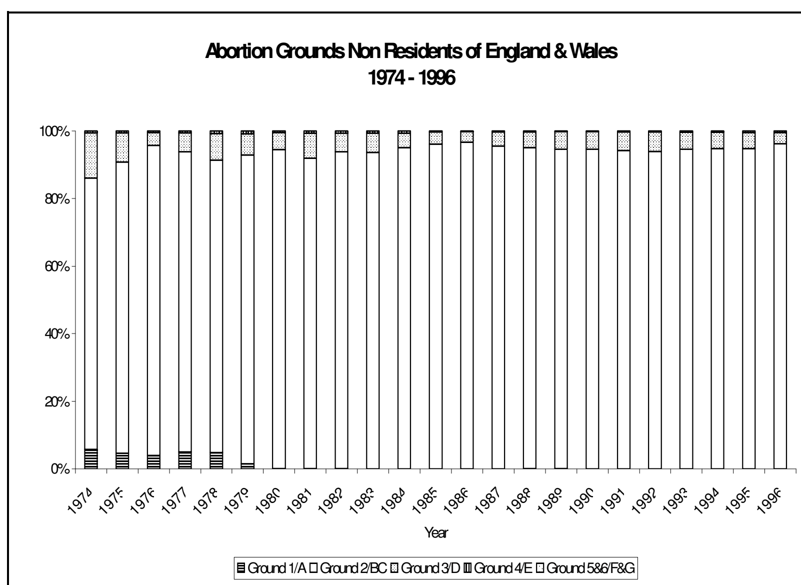
[3] The last full year for which figures are available.

[4] Abortion Statistics 1974 - 1996 Series AB Office of Population Census and Surveys (OPCS), HMSO, London.

Out of a total of 3,613,605 abortions performed on residents of England and Wales between 1969 and 1996, 3,094,056 (over 86%) were performed on Ground 2/BC alone, with increasing reliance on psychological grounds. Three conditions account for 99% of all psychological disorders relied upon: personality disorder, depression not elsewhere classified and neurotic disorders.

The stated ground profile for non-residents shows a similar but more marked trend i.e. ground 1 is relied upon in 0.02% of cases (from a high of 5.7% in 1974) and ground 2/BC alone accounts for approximately 95% of all abortions. Suspected congenital malformation in the foetus accounts for less than 0.2% of all abortions (Table 3). Again, this trend has not altered following the re-classification of grounds in 1991.

Table 3



Out of 213,178 abortions performed on non-residents of England and Wales between 1984 and 1996, there was not a single case of Eisenmenger's complex, significant heart disease or cancer of the breast; other cases of unspecified neoplasia accounted for 0.003%. Ground 2/BC accounted for 203,112 (95%) cases. Overall, psychological reasons account for over 98% of all stated reasons. Although it has not been possible since 1994 to ascertain from the published data the clinical condition stated as the reason for abortion in non-residents, because of the manner in which the data is compiled, there are no indications whatsoever to suggest that Irish women seek abortions in Great Britain because they suffer from life-threatening conditions that are not treated, or treatable, in this country, because of the non-availability of induced abortion. Indeed, the recently (February 1998) published study *Women and Crisis Pregnancy - a report presented to the Department of Health*

and Children, similarly confirmed that Irish women who seek abortions in Great Britain do so for social/personal reasons rather than because they suffer from medical conditions which are not being treated here because of the non-availability of induced abortion.

Comparative Abortion Rates

The present Irish abortion rate is approximately one in eleven. This compares to a British rate of approximately one in five. On occasion, those who support making abortion available in Irish hospitals have argued that there is not a direct link between the legal availability of abortion, and the actual numbers of women who have abortions. The Dutch experience has been cited to support this: allegedly, the abortion rate in the Netherlands is similar to the Irish rate, despite the easy availability of abortion in Holland.

The Dutch figure does not stand up to closer examination. According to the Dutch State statistical agency, 'Figures on abortion, though available from the early 1970s, are not complete. The data refers mostly to abortions performed in abortion clinics. Therefore, data such as age, nationality, parity of most women who have abortion in a hospital are not known. Moreover, not all reports are available to us.'[1]

Moreover, it appears that the Dutch figure does not include what are officially classified as 'menstrual extractions', which are carried out from 16 to 44 days after the missed period. This procedure may account for many early abortions.

In short, the Dutch abortion figures do not include all abortions carried out in Holland and therefore are not comparable to the Irish or British figures.

Existing medical practice

In the world of clinical practice, the professional and legal prohibition on induced abortion did not inhibit medical practitioners from providing the best and most appropriate treatment and care for pregnant mothers.

The medical profession's approach to the issue of such treatment is outlined in the 1994 edition of the Medical Council's Guide to Ethical Conduct and Behaviour and to Fitness to Practise:

> It has always been the tradition of the medical profession to preserve life and health. Situations arise in medical practice where the life and/or health of the mother or of the unborn, or

[1] Letter from the Centraal Bureau voor de Statistiek, Prinses Beatrixlaan 428, Postbus 4000, 2270 JM Voorburg. 21 March 1997.

> both, are endangered. In these situations it is imperative ethically that doctors shall endeavour to preserve life and health…
>
> While the necessity for abortion to preserve the life and health of the sick mother remains to be proved, it is unethical always to withhold treatment beneficial to a pregnant woman, by reason of her pregnancy.

Foreseeability (‘direct’ and ‘indirect’)

Foreseeability is not the test of intention in a complete prohibition on induced abortion. In everyday clinical practice, harm or injury to a patient can be readily foreseen as a consequence of some types of medical intervention. Nevertheless, especially in instances of life-threatening conditions, it is perfectly permissible to use treatments that are associated with serious or even life threatening side effects. In such circumstances, the doctor’s judgment may well be that it is proper to incur grave risks in the management of grave conditions.[1]

This is an essential component of ethical practice but does not, of itself, preclude running serious risks in grave conditions. In summary, the risks of treatment must be proportionate to the condition being treated and the expected benefits. In pregnancy, where uniquely, there is a simultaneous duty to two patients, *a fortiori*, these considerations apply – with due regard to side effects not alone to the mother but also to her unborn child. In no circumstances, however, is it permissible to compromise the therapeutic objective merely by virtue of the mother’s pregnancy. In this regard, the Medical Council’s position on induced abortion as a therapeutic option reflects the reality of such an approach and ought to be reflected in the law on abortion.

A clear judicial expression of the underlying principle, in a case involving a charge of attempted murder of a patient by her consultant physician, which encapsulates the essentials of ethical (and lawful) treatment was stated thus:

> We all appreciate … that some medical treatment, whether of a positive, therapeutic character or solely of an analgesic kind … designed solely to alleviate pain and suffering, carries with it a serious risk to the health or even the life of the patient. Doctors … are frequently confronted with, no doubt, distressing dilemmas. They have to make up their minds as to whether the risk, even to the life of their patient, attendant upon their contemplated form of treatment, is such that the

[1] For example, in the treatment of leukaemia, induced myelosuppression exposes the patient to the risks of overwhelming sepsis and severe haemorrhage. Nevertheless, in the circumstances, such risks are assessed as acceptable in terms of the desired outcome of cure. However, the medical and ethical principle governing such decisions is that the therapeutic option chosen must be the most effective and least toxic. Thus, if there are two treatments, Treatment A and Treatment B, of equivalent therapeutic efficacy, the ethical obligation is to chose that which is associated with the least severe side effects.

> risk is or is not medically justified. Of course, if a doctor genuinely believes that a certain course is beneficial to his patient, either therapeutically or analgesically, even though he recognises that that course carries with it a risk to life, he is fully entitled, nonetheless to pursue it. If sadly, and in those circumstances the patient dies, nobody could possibly suggest that in that situation the doctor was guilty of murder or attempted murder. …
>
> There can be no doubt that the use of drugs to reduce pain and suffering will often be fully justified notwithstanding that it will, in fact, hasten the moment of death, but … what can never be lawful is the use of drugs with the primary purpose of hastening the moment of death. … It matters not by how much or by how little [a] death is hastened or intended to be hastened … even if [it be the case that death was only hours or minutes away] no doctor can lawfully take any step deliberately designed to hasten that death by however short a period of time. … Alleviation of suffering means the easing of it for so long as the patient survives, not the easing of it in the throes of and because of deliberate purposed killing.[1]

Even more recently, the High Court in London reiterated the principle that high doses of pain-killers which were necessary to relieve pain can be given, even when - as an indirect and unintended (but foreseeable) side effect - they shorten life.[2] There is no reason to suggest that the courts in this jurisdiction would differ from this statement of the law in its articulation of the underlying principles in relation to the death of an unborn child during the course of the treatment of an ill mother.

Abortion and the treatment of cancer

The simultaneous occurrence of cancer and pregnancy is uncommon with a reported incidence of 0.07% to 0.1%.[3,4]

Numerous studies have shown over and over again that the outcome for pregnant women with cancer is no different than that of women who are not pregnant, when matched for age, stage and cancer type.

Cancer treatment involves the following modalities either singly or in combination

[1] *R v Cox* 12 BMLR 38 (Winchester Crown Court per Ognall J and approved in *Airedale NHS Trust v Bland* 1993 1 All ER 821 (HL).

[2] *Irish Independent*, 29 October 1997

[3] Mulvihill JJ, McKeen EA, Rosner F, Zarrabi MH. Pregnancy outcome in cancer patients. *Cancer 60: 1143 1987.*

[4] Doll DC, Ringberg QS, Yarbo JW. Antineoplastic agents and pregnancy. *Seminars in Oncology 16(5) 337 1989*

⇒ surgery

⇒ chemotherapy

⇒ radiotherapy

Surgery can, and frequently is, performed without undue difficulty on a pregnant women. Excluding caesarean sections, approximately 50,000 pregnant women per year in the United States will undergo a surgical procedure.[1]

The unborn child has developed all its organs and limbs by the 12th week of pregnancy. Hence chemotherapy can be given to a women in the second and third trimester without causing any abnormality in the unborn child. With judicious selection of chemotherapeutic agents pregnant women can be treated even in the first trimester. Some drugs cannot cross the placental barrier, some others appear not to cause malformations. If the folic acid antagonists are excluded the incidence of congenital malformation is 6% for single agents.[2] Fortunately, methotrexate, the principal folic acid antagonist used, is not part of any curative regimen for which a therapeutically equivalent substitute is lacking.[3]

To optimise the efficacy of radiotherapy for cancer patents who are pregnant, the following factors must be considered: the potential effects of the therapy on the unborn child, the stage and prognosis of the mother's disease and the possible risks to the patient of restricting cancer treatment. The risk to the unborn is negligible if the foetal exposure does not exceed 0.1Gy.[4].

Where cure is a realistic goal, therapy should not be modified in such a way as to compromise its achievement. If there is no hope for cure or even significant palliation, the primary goal may become the protection of the foetus from any harmful effects of anticancer therapy and the delivery of a healthy infant. Therapy should be individualised for each patient and patient choice must be respected.

Abortion and suicide

Pregnancy reduces the overall risk of suicide compared with a population that is not pregnant.[5] This has been confirmed over and over again in studies in the U.K., the U.S and most recently in

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[1] Barron W, The pregnant surgical patient: Medical evaluation and management. *Ann Intern Med 101:683-691 1984*

[2] Mulvihill JJ, McKeen EA, Rosner F, Zarrabi MH. Pregnancy outcome in cancer patients. *Cancer 60*: *1143 1987.*

[3] Mulvihill JJ, McKeen EA, Rosner F, Zarrabi MH. Pregnancy outcome in cancer patients. *Cancer 60*: *1143 1987.*

[4] Nakagawa K, Aoki Y, Kusama T, Ban N, Nagawa S, Sasaki Y. Radiotherapy during pregnancy: effects on fetuses and neonates. *Clin Ther 19(4) 770-7 1997*

[5] Sim M: Abortion and the psychiatrist. *BMJ 2:145, 1963.*

Finland. In a study in the U.S. the estimated suicide rate for pregnant women is 0.6 per 100,000 compared to 3.5 per 100,000 for non-pregnant women and 16 per 100,000 for men.[1]

A study in the U.S. found that the number of suicides of pregnant women was only one third of that expected.[2]

Suicidal thoughts are relatively common in normal adolescent girls occurring in up to 16.5% while in girls referred for psychiatric treatment suicidal thoughts occurred in 36%.[3,4] Actual suicide rates for teenage girls were 0.0003% for those aged 10-14 and 0.0034% for those aged 15-19 years.[5]

Prediction of suicide is at the basis of the decisions in Irish Courts relating to abortion. Numerous studies have attempted to predict suicide in high risk populations. The most thorough assessment showed that the prediction of suicide was wrong 97 times out of 100.[6] There is no literature on the association between threats and completion of the act since threats are so common and completed suicide is so rare. Thus, extrapolating clinically or statistically from threats to complete suicide would be impossible.

All studies on suicide concur that depression is the most closely associated factor with suicide. Depression should be looked for and treated in any pregnant woman with suicidal ideation.

Abortion and sexual assault

Sexual assault is a crime of violence. Post-traumatic symptoms which occur immediately may not be integrated for a number of years. A distinct sub-category of post-traumatic symptoms experienced by victims of sexual assault includes shame, feeling dehumanized and reduced capacity for intimacy. Long term effects include anxiety, depression and impaired social adjustment.[7,8]

Social support is the most important single factor influencing rehabilitation after sexual assault. The social support network provides an atmosphere for feeling loved, valued and esteemed. The goal of treatment is: "*to regain a sense of safety .... a sense of*

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[1] Minnesota Maternal Mortality Committee. *Am J Obstet Gynecol 6:1, 1967.*
[2] Marzuk P M, et al: Lower risk of suicide in pregnancy. *Am J Psychiatry 154 (1) 122-3 1997*
[3] Achenbach & Edelbrock: Manual for youth self-report and profile. *Dept of Psychiatry, University of Vermont, 1987.*
[4] Rey JM, Bird KD: Sex differences in suicidal behaviour of referred adolescents. *B J Psychiatr 158:776-781, 1991.*
[5] Eisenberg L: Adolescent suicide: On taking arms against a sea of troubles. *Paediatrics 315-320, 1980.*
[6] Pokorney A D: Prediction of suicide in psychiatric patients. *Arch Gen Psychiat 40 249-257 1983.*
[7] Bownes T, O'Gorman EC, Sayers A: Assault characteristics and post-traumatic stress disorder in rape victims. *Acta Psychiatr Scand 83: 27-30,1991.*
[8] Moscarello R: Psychological management of Victims of Sexual Assault. *Can J Psychiatry 35; 25-30,1990.*

self and (to) reestablish sharing .... relationships with men, women and society".[1]

It is difficult to estimate the incidence of pregnancy due to sexual assault: studies have defined sexual assault differently, and assaulted women may be sexually active and hence the pregnancy may not have resulted from the assault. Different studies give estimates varying from 0.6% to 5%. The relative rarity of rape-induced pregnancy coupled with the fact that women traumatised by rape need to be treated with great sensitivity and hence are not often suitable subjects for research explains why there are few studies on the management of pregnancy resulting from sexual assault.

Abortion is freely available on demand in the U.S. Hence any woman pregnant as a result of rape can get an abortion without difficulty. The fact that so many do *not* choose this option in these circumstances seriously challenges the assumption made by so many that abortion is somehow beneficial to a woman who has been raped. In one study in 1996 of the prevalence and incidence of rape there were 34 cases of rape-related pregnancy. Only 17 women chose abortion and of the women who did not choose abortion 10 actually kept the baby after delivery.[2]

In a study of 37 pregnant rape victims in the USA in 1979[3] identified through a social welfare agency, 28 choose to continue the pregnancy, five had an abortion and four were lost to follow up. Of this 28, 17 chose adoption and 3 kept the child themselves and the placement of the remaining eight was undetermined.

Several reasons were given for not having an abortion. First, many women expressed the feeling that abortion was another act of violence. Secondly, some saw an intrinsic meaning or purpose in the child. Thirdly, at a subconscious level, some victims felt that by continuing the pregnancy, they would in some way conquer the rape.

Issues relating to the rape experience, not the pregnancy, were the primary concern for over 80% of the pregnant rape victims. The remaining 20% placed primary emphasis on their need to confront their feelings about pregnancy. In the group (28 of 37) who carried their pregnancies to term, the majority saw their attitude toward the child improve consistently throughout the pregnancy.[4]

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[1] Bassuck EL: Crisis theory perspective on rape. In McCombie SL (ed): *The rape crisis intervention handbook.* Plenum Press, New York, 1980.

[2] Holms M M, Resnick H S, Kilpatrick D G, Best C L: Rape related pregnancy: estimates and descriptive characteristics from a national sample of women. *Am J Obstet Gynecol 175(2) 320-4 1996*

[3] Mahkorn S: Pregnancy and Sexual Assault. In *Psychological Aspects of Abortion Mall and Watts (eds) 5: 1979.*

[4] Mahkorn S: Pregnancy and Sexual Assault. In *Psychological Aspects of Abortion Mall and Watts (eds) 5: 1979.*

Abortion and heart disease

The incidence of heart disease in pregnancy is extremely low.

The spectrum of heart disease in pregnancy has been changing over the last thirty years with a fall in the incidence of rheumatic heart disease and a relative increase in the numbers of pregnant women with congenital heart disease (both corrected and uncorrected). The balance comprises miscellaneous cardiac problems and acquired conditions.[1]

With early detection and successful correction of congenital heart defects, Eisenmenger's syndrome has become increasingly rare in developed countries in recent decades. The incidence of Eisenmenger's syndrome in pregnancy is very low.[2] By 1992 there had been less than 150 reported cases in the world literature over the previous 45 years. One case has been reported in Ireland since 1969. There is not a single reported case of the condition among the 115,567 abortions performed on non-residents in England and Wales between 1984 and 1990.[3]

The most recent review of pregnancy in women with Eisenmenger's syndrome is from the Heart Institute of the University of São Paulo, Brazil. It reviewed the outcome of 13 pregnancies in 12 women with Eisenmenger's. Three women in the series died: one had refused hospitalization, another died at home unexpectedly and the cause of death was unclear, and the third woman died in the puerperium of a femoral artery thrombosis having discontinued anticoagulant therapy.[4] This confirms other case reports that show that with intensive pre-, intra- and post-partum care these women can be taken safely through pregnancy and labour and even through caesarian section.[5,6] With advances in intensive care and in the critical understanding of the pathophysiology of this condition over the last 10 to 15 years pregnancy and labour have become safer for these patients.

Other cardiac conditions can be safely managed in pregnancy. There were no maternal deaths in a review of 214 pregnancies in 182 women with valve prostheses.[7]

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[1] Clark SL: Cardiac disease in pregnancy. *Ob Gyn Clin North Am 18(2):237-256, 1991.*

[2] Gleicher N, Midwall J, Hochberger D, Jaffin H: Eisenmenger's syndrome in pregnancy. *Ob Gyn Surv 34(10):721741, 1979.*

[3] Office of Population Census and Surveys (OPCS): Abortion Statistics 1984 - 1990, HMSO, London.

[4] Avila W S, Grinberg R, et al: Maternal and fetal outcome in pregnant women with Eisenmenger's syndrome. *Europ Heart J 16, 460-464, 1995*

[5] Spinnato JA, Kraynack BJ, Cooper MW: Eisenmenger's syndrome in pregnancy: epidural anaesthesia for elective caesarean section. *N Eng J Med 304(20):1215-1217, 1981.*

[6] Atanassoff P, Alon E, Schmid ER, Pasch T: Epidural anaesthesia for caesarean section in a patient with severe pulmonary hypertension. *Acta Anaesthesiol Scand 34(1):75-77, 1990.*

[7] Sbarouni E, Oakley C M: Outcome of pregnancy in women with valve prostheses. *Br Heart J 71: 196-201 1994*

Numerous reports of cardiovascular surgery during pregnancy include successful correction of most types of congenital and acquired cardiac disease. Maternal mortality is dependent on the specific nature of the procedure being performed and is not increased by pregnancy. [1] Successful pregnancy following heart transplantation has also been reported.[2,3]

Consequences of abortion

Notwithstanding some high profile cases of abortion survivals the mortality rate for the unborn child in abortion is effectively 100%.

While the introduction of so-called 'lunch-time' or 'quickie' abortion would seem to emphasise the safety of the procedure for the mother yet there is significant maternal morbidity and even mortality.

Maternal mortality following abortion

The Report on Confidential Enquiries into Maternal Deaths in the United Kingdom 1991-1993 reports 5 deaths directly related to abortion, a further 2 deaths due to suicide within 42 days of the abortion and another 2 deaths in women known to be substance abusers who died of injecting substance abuse overdose within 1 year of an abortion.[4]

A surveillance of pregnancy related deaths carried out by the U.S. Centres for Disease Control and Prevention found that 1 in every 20 maternal deaths was due to induced abortion.[5]

A study of maternal mortality in Finland found the suicide rate following abortion was much higher than that associated with birth. The mean annual suicide rate was 11.3 per 100,000; the rate associated with birth was 5.9; the rate associated with induced abortion was 34.7.[6]

Abortion begets abortion.

A study of 2,925 women in Norway showed that the incidence of repeat induced abortion doubled from the second to the third abortion, indicating that the likelihood of choosing an abortion is

[1] Bernal JM, Miralles PJ: Cardiac surgery with cardiopulmonary bypass during pregnancy. *Obstet Gynecol Surv 41:1, 1986.*
[2] Hedon B: Heart Transplant Patient gives Birth to Twins. *Ob Gyn News 26:30, 1990.*
[3] Eskander M, Gader S, Ong B Y: Two successful vaginal deliveries in a heart transplant patient. Obstet Gynecol 87(5) 880, 1996
[4] Report on Confidential Enquiries into Maternal Deaths in the United Kingdom 1991-1993.
[5] *CDC Obstet Gynecol 88 161-67 1996*
[6] Gissler M, Hemminki E, Lonnqvist J. Suicides after pregnancy in Finland 1987-94: register linkage study. *BMJ 1996 313(7070) 1431-4*

increased by having done so before.[1] In a review of women having abortions in 1987 59% were under 25 years of age and 42% had had a previous abortion[2] and in a review of 2,001 women seeking abortion in Wichita, Kansas in 1991-1992 34% had had a previous abortion.[3] In a study of 163 patients seeking abortions who attended Irish Family Planning Association clinics in a 1 year period 10 of the women had had an abortion in the past with 4 of these having had 2 abortions. One teenager had 2 abortions during the study period of 1 year and returned for a third abortion one month after the study ended.[4]

Medical complications following abortion

Incidence of postabortal upper genital tract infections varies across populations. Incidence rates range at 5-20%. Infecting organisms include Chlamydia trachomatis, Neisseria gonorrhoeae, Mycoplasma hominis, Ureaplasma urealyticum, Group B streptococci and Human Papillomavirus. Long term sequelae of postabortal infection include chronic pelvic pain, ectopic pregnancy, dyspareunia and infertility.[5,6]

Previous induced abortion has also been shown to be associated with clinically significant neurotic disturbances in subsequent pregnancy and it is postulated that this phenomenon may reflect a reactivation of mourning which was previously suppressed.[7]

A number of studies have suggested that induced abortion may be a risk factor for developing breast cancer. One study suggested that women aged 45 or younger who have had induced abortions have a relative risk of 1.5 (50% increased risk) for breast cancer compared to women who had been pregnant but never had an induced abortion. The highest risk was for women who had an abortion younger than age 18 or older than 30.[8] A meta-analysis of 28 papers concludes that even one abortion significantly increases the risk and that overall the relative risk of breast cancer for women who have

[1] Skjeldestad FE, The incidence of repeat induced abortion - a prospective cohort study. *Acta Obstetricia et Gynecologica Scandinavica 1994 73(9) 706-10.*

[2] Henshaw S K, Koonin LM, Smith J C. Characteristics of U.S. women having abortions, 1987. *Family Planning Perspectives 1991 23(2) 75-81*

[3] Westfall J M, Kallail K J. Repeat abortion and use of primary care health services. *Family Planning Perspectives 1995 27 (4) 162-5*

[4] *Irish Medical Times* April 18, 1997 page 5.

[5] Sawaya G.F., Grady D., Kerlikowska K., Antibiotics at the time of Induced Abortion: the case for universal prophylaxis based on meta-analysis. *Obstet Gynecol 1996 87(5) 884-90*

[6] Stray-Pedersen B, et al; Induced abortion: micrological screening and medical complications. *Infection 1991 19(5) 305-8*

[7] Kumar R., Robson K., Previous induced abortion and ante-natal depression in primiparae: preliminary report of a survey of mental health in pregnancy. *Psychological Medicine 1978 8(4): 711-5*

[8] Daling JR, Malone KE, Voigt LF, White E, Weiss NS, *J Natl Cancer Inst 1994 2*

had an abortion is 1.3.[1]

Crisis Pregnancies

While calling on the government to restore the fullest possible protection to the unborn the Pro-Life Campaign also calls upon the government to tackle in a creative and sensitive manner the on-going problem of crisis pregnancies. Some pointers as to how this might be done can be gleaned from the recently published report *Women and Crisis Pregnancy. A Report Presented to the Department of Health and Children.* The report, compiled by Evelyn Mahon, Catherine Conlon and Lucy Dillon, was commissioned by the government in 1995. It sought to identify factors which contribute to the incidence of unwanted pregnancies and the issues which resulted in women choosing the option of abortion.

In their analysis of 88 women who choose abortion the researchers point out that only 17 women used 'right to choose' language to explain or justify their decision. The main themes related to the abortion decision were:

Themes related to abortion decision	Number who mentioned abortion (Total is 88; more than one theme per woman)
Career/ job concerns	36
Stigma of lone parenthood	30
Child needs	30
Financial concerns	28
Not ready for a child now	27
Could not cope	24
'My body, my right'	17

As can be seen from the above table most of the factors which could be said to pressurise a woman into choosing abortion are amenable to social and/or financial support. We suggest the government should review again the funding it gives to the voluntary organisations that help women with unwanted pregnancies to continue with the pregnancy. With more funds at their disposal these organisations would be able to provide more support and counselling, housing and other practical help including financial assistance where needed. It seems essential that the

[1] *Journal of Epidemiology and Community Health 1996 50: 481-96*

government would back up its commitment to the right to life of the unborn by giving funding **only** to organisations that fully respect that life. To do otherwise leaves the government open to the accusation of hypocrisy. A woman with an unwanted pregnancy should be given all the support and help she needs to cope with the 9 months of the pregnancy and until she can make an informed decision for the child's future.

The fact that some women chose abortion because they did not think they would be able to provide the sort of good quality care they thought the child was entitled to is a challenge to policy makers not only to see that adequate practical help is available but also to counter an excessively quality based view of the value of human life. This has great significance also for the handicapped and disabled. A health education programme that encourages and supports women in nurturing and protecting their unborn children should help them recognise the value of all life and offset this growing tendency to evaluate it terms of quality.

The report points out that whereas 71% of non-marital births were adopted in 1971 only 7% of non-marital births were adopted in 1991. They suggest that changing attitudes to lone parenting and the availability of legalised abortion in Britain have been the main factors in the declining numbers of adoptions. While we cannot change the fact that abortion is legal and readily available in Britain it is possible that health education programmes directed at promoting and facilitating adoption might be effective in encouraging many women to avail of this option and thus save many lives. In their analysis of the women who actually did chose adoption rather than lone-parenthood or abortion the report mentions that the women

> see adoptive parents as people who would be made extremely happy with the opportunity to rear their child, an experience they would otherwise be deprived of...

and this was a factor which helped make the decision to opt for adoption. Given that a conservative estimate of infertility is 1 in ever 10 couples, this is an aspect that should receive much more attention.

Of the 88 women in the study who chose abortion some did in fact consider the option of adoption. Yet they ultimately rejected this option because they felt they would not be able to go through the pregnancy and then part with the baby. This fact points to the need to look again at the way in which adoption has traditionally been organised and formulated. It suggests we need to look for alternative and varied formulas that could better meet the needs and abilities of the birth mother while still providing adequate and secure nurturing for the child and respecting the role of the adopting or fostering parents.

ABORTION AND CONSTITUTIONAL DEMOCRACY

Introduction

The Pro-Life Campaign based this Submission to the Interdepartmental Working Group on the Green Paper on Abortion on the view that all human beings possess an equal and inherent worth simply in virtue of their humanity, and not on condition of their possessing certain other qualifications of size, physical, emotional or mental capacity, autonomy or dependence, level of bodily, emotional or mental development, race, ethnic origin, wealth or poverty, age, sex or capacity for interpersonal relationship.

The Pro-Life Campaign adopted this view and proposes it to the Working Group because it believes that this view alone adequately acknowledges and respects the equal dignity of all human beings, because this view of equal and inherent worth is the foundation of the Republic's constitutional democracy, and because this view is the animating spirit behind the contemporary drive in Irish society to build an ethos of equal respect.

Having examined the legal and medical issues indicated by the advertisement inviting submissions, it is now proposed to evaluate the key point in each issue in the light of the principle of equal respect and to draw some conclusions from this evaluative review of the issues, which are proposed to the Working Group as the Pro-Life Campaign's recommendations.

Morality and the law in a secular democracy

It is sometimes argued that laws in a secular democracy should not embody morality because to do so would be to impose the religious or moral values of some, whether a majority or a minority, on others. It is undoubtedly true that in a secular democracy, religious freedom is a basic civil right, that one should not be forced to accept religious beliefs and practices. Muslims should not be forced by the civil law to recite the Angelus, nor should Catholics be forced by the civil law to observe Ramadan.

It does not follow from this, however, that a secular democracy has to exclude every moral principle and precept that is taught by every religion -- if it did, the result would be social anarchy. In order to have a society at all, certain minimal moral conditions have to be met by most of the members most of the time, and these are required of their adherents by the main religions. For example, the Bible enjoins respect for the civil authorities, payment of taxes, the requirement of corroborative evidence in legal proceedings on serious charges. A secular democracy is quite entitled to enact laws

requiring obedience of lawful civil authorities, payment of taxes and corroborative evidence on serious charges, notwithstanding the fact that these moral requirements are also enjoined on their adherents by religions, *because it needs them in order to exist and function properly as a secular society*.

If this is true for all societies, it is especially true for constitutional democracy. A democracy is a society governed by the whole population through elected representatives, in accordance with laws that reflect the will of the people. The Concise Oxford Dictionary (9th edition) defines democratic as “favouring social equality.” What makes a society truly democratic, therefore, is a spirit of respect for social equality. Take that away and even though the structures and procedures may remain, the ethos, the spirit, of democracy is gone.

Democracy is government according to the rule of law, where the law is the fabric of rights and responsibilities, entitlements and liberties, ordering human interaction. Human rights are just and reasonable claims on others to do or refrain from doing actions which impede the natural human existence, life and development of each human being. The minimum moral condition for having a democratic society at all, therefore, is a shared respect for social equality.

The fundamental human right is the right to life. It is only if one is alive, if one’s life is respected and protected, that one can possess and exercise all the other rights such as the right to rational self-determination which are so important in a democratic society.

The foundation of democracy, in the literal sense of that upon which the rest of the edifice is based and built, is equality before the law. And since life is the fundamental good, the right to life, and to the protection of the law for one’s life, is the fundamental human right and protection on which the rule of law in a democracy is grounded. Take that away and the rest is undermined, weakened and unbalanced.

It is appropriate and legitimate, and indeed, necessary, for the laws in a democratic society to recognise and protect the right to life, especially of the weaker members of society, the voiceless and powerless. It is for this reason that abortion should not be legalised.

The advertisement seeking submissions to the Working Group invited interested parties to address the “constitutional, legal, medical, moral, social and ethical issues which arise regarding abortion.” On the basis of the view presented of the equal and inherent worth of every human life, the Pro-Life Campaign submits that in a secular democracy abortion is wrong on each and every one of these grounds.

Abortion is morally wrong

Abortion is wrong *morally* because it is the direct and deliberate taking of an innocent human life.

Abortion is legally and constitutionally wrong

It is wrong in terms of *legal ethics* because the purpose of law in a democracy is to protect and vindicate the rights of the members in a just and equal manner, but abortion legalises the treating of some human lives unequally and unfairly under the law.

Abortion is wrong *legally* because in a democracy, the law exercises, in addition to its regulative function, a declarative, educative and normative role. What the law forbids, the society as a whole thereby declares, in the most formal, authoritative and official manner, to be impermissible.

When the law prohibits abortion, the society as a whole thereby declares in the most formal, authoritative and official manner that it throws the full moral weight of its backing behind the humanity of the unborn and its equal right to life as a human being equal in inherent worth to every other member of society.

When a society which hitherto has made abortion unlawful turns around and legalises abortion, it is declaring the dislodging of the old norm of recognition, equal respect, social support, and the protection of the law for the humanity and right to life of the unborn. The legalisation of abortion is the denial by society as a whole in the most authoritative and official manner of the equal humanity and inherent worth of the unborn as a fellow member of the human family and fellow member of society. It is the revoking of equal respect from the unborn as a human being, and the formal withdrawal of society's support and the law's protection for his or her life and right to life.

And in place of equal recognition, respect, support and protection, by legalising abortion, the society as a whole is declaring permissible what hitherto it had declared to be impermissible, namely, the direct and intentional killing of that innocent and defenceless human life by another member of society.

Small wonder, then, that when the law declares permissible what hitherto it had declared to be the unlawful taking of innocent human life, an ever increasing number of the members of the society come to believe that this killing of the unborn actually is morally permissible.

For this reason, Article 40.3.3° should be retained, and the people should be offered an opportunity to amend it along the lines

suggested in this Submission so as to reverse the effect of the Supreme Court ruling in the *X* case and to restore the protection to the right to life of the unborn which the people intended in enacting Article 40.3.3° to ban completely abortion in the Republic.

As regards a legislative approach, legislation is at all stages secondary to the basic constitutional provisions. Sections 58 and 59 of the 1861 Act harmonise with a constitutional approach which prohibits abortion, and the Pro-Life Campaign has no objection in principle to any legislative model which would harmonise with such a constitutional provision.

As made clear in the discussion above of the decision of the people in the referendum of 25th November 1992 to reject the amendment that would have inserted into the Constitution a right to abortion in certain instances, that amendment was unacceptable to the majority because it did not offer them the opportunity they wished to have to decide whether or not they want to ban abortion here altogether.

It is clear from the submission to this Working Group by the Irish Family Planning Association, the Irish affiliate of the International Planned Parenthood Federation, the most powerful international pro-abortion body in the world, that what the proponents of legalised abortion want is for abortion no longer to be regarded as a criminal matter at all but simply a matter of "women's health." This involves a complete denial of the humanity and equal and inherent worth of the unborn and is a view only held by a minuscule and entirely unrepresentative handful of people. The Irish Family Planning Association's proposal would require two referenda to be implemented, and in terms of realistic politics in the Republic today, given the balance of opinion among the general public on abortion, there is not the remotest chance that such referenda would pass.

Democracy, in Lincoln's memorable phrase from the Gettysburg Address, is government of the people, by the people for the people. It is that form of government in which the most important questions are put to the people as a whole for their decision. Article 6 of the Irish Constitution recognises explicitly the "right" of the people "in final appeal, to decide all questions of national policy, according to the requirements of the common good."

If any matter is a question of national policy it is surely whether or not abortion should be legalised. This matter, more than many other issues, should be put to the people as a whole for their decision. The common good in a democracy means the fabric of key social conditions that facilitate the existence, development and well being of all the members of the society, so it should surely include a legal framework that at the very least binds the society in its laws to respect the equal and inherent worth of all its members by acknowledging and pledging itself to protect their equal right to life.

The signatories of the Easter Proclamation pledged to defend religious and civil liberty, to seek equal rights and equal opportunities for all members of the society, and to cherish all the children of the nation equally. How can the Republic today claim a true continuity of commitment to these pledges if equal and inherent worth of the unborn as members of society is denied? Will not the commitment to religious and civil liberty ring hollow if legal protection is removed or withheld from the most elementary liberty of the unborn, the liberty to be born, to live? Surely the Republic cannot honestly claim to be respecting equal rights and equal opportunities for all as long as the unborn are denied equal legal protection for their right to life, equal opportunity to be born and to live. All the children of the nation are not being cherished equally as long as the laws of that nation withhold the protection of the law from the right to life of those children who are unborn. Abortion is wrong *constitutionally* because it is incompatible with these democratic pledges of equality.

Abortion is wrong *constitutionally* also because the purpose of the Constitution is to safeguard the most important rights of the members of society from unjust attack. In a constitutional democracy, the insertion of certain personal rights in the Constitution serves as an additional protection for them, withdrawing them from easy access in the cut and thrust of day to day politics, where otherwise they might be infringed when political expedience or a temporary social crisis seemed to require it.

But the right to life is the fundamental right; the unborn are among the most voiceless and vulnerable members of society, and abortion destroys the life of the unborn, so it is especially appropriate and imperative that the protection of the Constitution be given to the right to life of the unborn, having due regard, as Article 40.3.3^{o} requires, to the equal right to life of the mother.

Abortion is medically wrong

It is wrong in terms of *medical ethics* because it violates the first principle of medical ethics, on which the whole practice of medicine has been based down through the centuries, *primum non nocere*, first do no harm, and the Hippocratic Oath, which originated outside the Judaeo-Christian tradition, that prohibits the procuring by a doctor of an abortion. Abortion makes the medical profession a party to the deliberate shedding of innocent blood.

Abortion is wrong *medically* because, as shown above, the provision of abortion is not really a medical issue at all as abortion is never necessary to save the life of a mother; it is not a necessary part of the treatment of cancer or heart disease in pregnant women; it is not an appropriate medical response to suicidal inclinations;

and it is not a truly compassionate response where pregnancy has resulted from sexual violence.

Medical treatments in which the loss of the life of the unborn follows as a foreseeable though undesired side-effect are *not* the same morally, legally or medically as induced abortion. All medical treatments involve side-effects, often foreseeable, and the practice of medicine is quite familiar with the distinction between foreseeable direct and indirect effects.

Abortion to prevent the birth of a handicapped child is medically wrong because when a doctor treats a pregnant women he or she has an ethical and professional duty of best care towards not one but two patients, the mother and the unborn child, and the fact that a patient is suffering from a disability is not a reason to seek to bring about the death of that patient. On the contrary, a human being is not any the less human or worth any less because they suffer from a disability. We are equal in worth to the other members of the human family and the society into which we are born by virtue of our humanity, and not as a result of having passed some kind of quality control test.

Abortion is socially wrong

Abortion is wrong *socially* because in a democracy all the members are equal and their lives have an equal and inherent value, but abortion treats some unequally and regards their lives as of lesser or no inherent worth, but rather allows some to decide upon the value of the lives of others, and actually to dispose of those lives, according to their own wish or convenience.

It is also wrong *socially* because by allowing some to bring about the death of others, it undermines, weakens and destroys the sense of human brotherhood and sisterhood, breaking the bonds of fellowship that bind the members into a society.

When, as in this submission, we look at the grounds on which legal abortion is available in Britain, we realise that the legalisation of abortion is wrong *socially* also because it throws the weight of society's moral approbation behind the violation of its own most intimate bonds, the bonds uniting mother and unborn, father and unborn, born and unborn brothers and sisters. It signals a rejection of the handicapped. It signals a rejection of the weak. If the most vulnerable can lawfully be killed, then any lesser abuse may well be visited on the less vulnerable. The medical and legal professions are those to whom we have to turn in our moments of greatest distress and weakness. Legalised abortion involves both of these professions in the taking of innocent life, in the violation of the most fundamental right of the most voiceless members of society. Democracy is that form of society animated by a spirit of social equality. If the legislature or judiciary in a democracy make laws

that deny the equal humanity and inherent worth of some of the members of the society, as happens when abortion is legalised, they thereby render the society entrusted to them ever more undemocratic, less suffused by a spirit of respect for equality, and they alienate ever more radically those who are affronted by this attack on the fundamental rights of the innocent and defenceless. Legalising abortion saws away the very branch on which democracy rests, the respect for social equality.

Proponents of legalising abortion argue that, because of the tragic fact that several thousand women go to Britain for abortions, abortion should be legalised in the Republic. This is a false and hypocritical argument. What is tragic is that those women undergo abortion, not that the abortions happen in Britain. They would be just as tragic if they happened in the Republic.

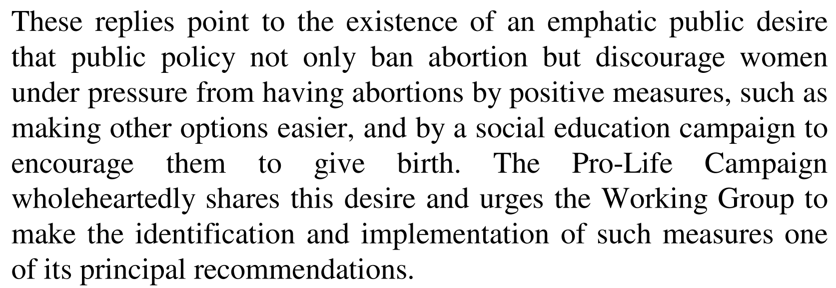
Abortion is only tragic because it is the taking of the life of an unborn child, and for that reason is profoundly distressing for the women. If it were a medical operation like having an appendix removed, it would not be tragic. It is gross insensitivity and hypocrisy for the proponents of abortion to trade on the tragedy by suggesting that it constitutes a reason for legalising abortion in Ireland. The only way to avoid the tragedy is to avoid what makes it tragic, namely, the abortion itself. The tragedy is not any less tragic because it happens in the Republic rather than happening in Britain.

The Pro-Life Campaign is deeply concerned that so many women feel they have to have recourse to abortion and is committed to pressing for the introduction of measures that will help them to find another way to resolve the terrible dilemma in which they find themselves, but it insists that each of these abortions is tragic, not because it happens in Britain, but because it happens at all, because it involves the taking of an innocent human life and the violation of a vulnerable women.

The Pro-Life Campaign further points out that the clear and ineluctable lesson of international experience is that the legalisation of abortion is followed by a massive increase in the numbers having recourse to abortion. If every women going for an abortion is tragic, and it is, this is a reason for not going down the road of legalising abortion here, because were it to be legalised here, the certainly foreseeable consequence would be a huge rise in the numbers of women who would have recourse to it.

As an expression of its concern that every effective measure that will help women not to turn to abortion should be explored, the Pro-Life Campaign wishes to draw the attention of the Working Group to the findings of the opinion poll published in the *Sunday Independent* (30 November 1997), which found 87% of people in favour of Government action to make adoption easier where a single mother is unable or unwilling to care for the child, and 59% in favour of a major Government campaign to persuade single

expectant mothers to allow their pregnancies to proceed to birth.



These replies point to the existence of an emphatic public desire that public policy not only ban abortion but discourage women under pressure from having abortions by positive measures, such as making other options easier, and by a social education campaign to encourage them to give birth. The Pro-Life Campaign wholeheartedly shares this desire and urges the Working Group to make the identification and implementation of such measures one of its principal recommendations.

CONCLUSION

The need for a referendum to ban abortion completely

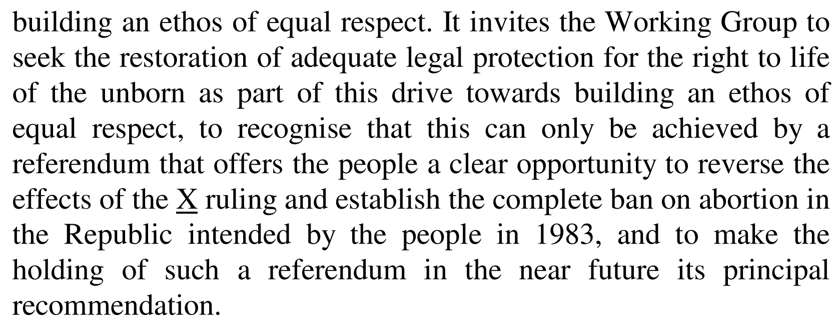
The Pro-Life Campaign proposes the view that all human beings have an equal and inherent worth because it believes that this view alone adequately acknowledges and respects the equal dignity of all human beings; because it is the foundation of the Republic's constitutional democracy; and because this view is the animating spirit behind the contemporary drive in Irish society to build an ethos of equal respect.

The woman with a crisis or unexpected pregnancy, and the unborn child within her, are members of society, equal to the rest of us, equally entitled to whatever social support they need to be able to enjoy equal life-opportunities. The woman pushed towards abortion by the lack of practical assistance and personal warmth and reassurance, and her unborn child, as members of society who are singularly vulnerable and voiceless, singularly at risk of social exclusion or marginalisation, singularly in need of, and entitled to, support and help from society. For this reason the P.L.C. urges the Working Group to make the identification and implementation of effective measures to offer women in crisis pregnancies real alternatives to abortion a top priority in its recommendations.

The woman who has been through abortion, and the child she has lost, are victims of violence. The women who has been through abortion is a woman at risk of physical and emotional harm and heartbreak, in need of personal support, but surrounded by social silence and denial that makes it harder for her to recover from the violation she has been through, a woman at risk of social exclusion. For this reason, it is crucial that the Working Group make the identification and implementation of adequate support and counselling for women who have been through abortion another top priority in its recommendations.

The question of the legal protection to be given to mother and unborn is situated within the overall struggle of contemporary Irish society for equality, for equal respect for all human beings, regardless of age or size, power or gender, for equality of life-opportunities, for equal treatment. The Pro-Life Campaign recommends to the Working Group the attitude of the medical profession which sees every pregnancy as involving not one patient but two, the mother and the unborn, and acknowledges that it has an ethical and professional responsibility of best care towards the lives and health of both.

The Pro-Life Campaign sees legalised abortion as fundamentally incompatible both with the acknowledgement of the equal inherent value of each and every human life and with the commitment to



building an ethos of equal respect. It invites the Working Group to seek the restoration of adequate legal protection for the right to life of the unborn as part of this drive towards building an ethos of equal respect, to recognise that this can only be achieved by a referendum that offers the people a clear opportunity to reverse the effects of the X ruling and establish the complete ban on abortion in the Republic intended by the people in 1983, and to make the holding of such a referendum in the near future its principal recommendation.

APPENDIX ONE

Submission made by the Pro-Life Campaign to the All-Party Oireachtas Committee on the Constitution in January 1997 in response to the report of the Constitutional Review Group.

SUMMARY OF SUBMISSION

Constitutional Review Group's Proposals on Definition

'The Pro-Life Campaign is of the view that the protection of the law should extend to all life from conception to natural death. Any attempt to limit this protection by way of statutory definition or otherwise is both unconstitutional and undesirable.'

Possible approaches

'The position of the Pro-Life Campaign is simple and clear. Irish medical practice has no difficulty in distinguishing between abortion and medical treatment for the mother. Irish obstetricians make the distinction every day in the hospitals. They do not carry out abortions, since they recognise that the Supreme Court was mistaken, legally and medically, in its holding in the X decision. The Irish electorate should be given the democratic choice, in a referendum, to restore full protection to the unborn, consistent with contemporary medical practice.

'The Pro-Life Campaign, therefore, rejects the proposal of the Review Group to legislate to allow abortion and stands by the alternative approach of a referendum to allow the electorate to constitutionally prohibit abortion.'

INTRODUCTION

The legal situation in regard to abortion has been unsatisfactory since the Supreme Court in 1992 interpreted the Eighth Amendment, inserted by the electorate into the Constitution to expressly prohibit abortion, as actually allowing abortion, potentially on wide grounds.

Since then, there have been various efforts to tackle the matter; the constitutional referenda in November 1992, the increased funding to various non-governmental agencies, and the Regulation of Information (Services outside State for Termination of Pregnancies) Act 1995. None of these addressed the core problem of whether abortion should be permitted or prohibited. The Pro-Life Campaign promotes the latter position, and furthermore holds that

abortion raises such fundamental questions about the nature of society and respect for life that it must be left to the electorate to decide, by way of a referendum which gives a clear choice.

PROPOSALS ON DEFINITION

Before examining the various approaches by which the law might be clarified, the Report of the Constitutional Review Group (henceforth referred to as the Review Group) raised a problem of definition, pointing out that:

> There is no definition of 'unborn' which, used as a noun, is at least odd. One would expect 'unborn human' or 'unborn human being'. Presumably, the term 'unborn child' was not chosen because of uncertainty as to when a foetus might properly be so described.[1]

The Pro-Life Campaign regards this statement with some degree of puzzlement. Article 40.3.3° is in the personal rights section of the Constitution and must therefore refer to unborn human beings. Moreover, the adjectival noun is of standard usage in the Constitution. For instance in Article 45.4.1:

> The State pledges itself to safeguard with especial care the interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.

In its discussion of Article 45.4.1, the Review Group did not suggest that the use of the adjectival nouns 'the infirm' and 'the aged' denoted any uncertainty about their humanity.[2]

The Review Group goes on to state:

'Definition is needed as to when the "unborn" acquires the protection of the law...'

and

'a definition is essential as to when pregnancy is considered to begin; the law should also specify in what circumstances a pregnancy may legitimately be terminated and by whom.'

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[1] Report of Constitutional Review Group, Dublin, 1996. Page 275.
[2] Review Group, Pages 391-4

and finally

‘If the definition of “pregnancy” did not fully cover what is envisaged by “unborn”, the definition would need to be remedied by separate legal provisions which could also deal with other complex issues, such as those associated with the treatment of infertility and *in vitro* fertilisation.’[1]

The Review Group concludes that these definitions should be introduced by way of legislation.[2]

This is a surprising recommendation as it is not within the ambit of the Legislature to define the scope of constitutional protection given to human life: that is the prerogative of the Courts. Furthermore, the Pro-Life Campaign views with grave concern any effort to limit the protection of the law so that it does not extend to all life, from conception to natural death.

The Pro-Life Campaign is of the view that the protection of the law should extend to all life from conception to natural death. Any attempt to limit this protection by way of statutory definition or otherwise is both unconstitutional and undesirable.

THE POSSIBLE APPROACHES

On the substantive issue of abortion, the Review Group considered five options:

- **a) introduce an absolute constitutional ban on abortion**
- **b) redraft the constitutional provisions to restrict the application of the X case decision**
- **c) amend Article 40.3.3º so as to legalise abortion in constitutionally defined circumstances**
- **d) revert, if possible, to the pre-1983 situation**
- **e) regulate by legislation the application of Article 40.3.3**[3]

This Submission will deal with the two primary options, ‘a’ and ‘e’. Some comments upon the

[1] Review Group, Page 275
[2] Review Group, Page 279
[3] Review Group, Page 276.

Review Group's approaches are to 'b', 'c' and 'd' are made in the appendix.

The first option, to introduce an absolute constitutional ban on abortion, is the option supported by the Pro-Life Campaign.

Of this approach, the Review Group said:

> According to a press report (*The Irish Times*, 10 September 1992), the Pro-Life Campaign considers "a complete prohibition on abortion is legally and medically practicable and poses no threat to the lives of mothers". Reference is made to "the success of medical practice in protecting the lives of mothers and their babies", and it is claimed that "a law forbidding abortion protects the unborn child against intentional attack but does not prevent the mother being fully and properly treated for any condition which may arise while she is pregnant".[1]

The Review Group goes on to state that it would not be safe to rely on such understandings, because:

> ... if a constitutional ban were imposed on abortion, a doctor would not appear to have any legal protection for intervention or treatment to save the life of the mother if it occasioned or resulted in termination of her pregnancy.[2]

The Pro-Life Campaign believes that this conclusion is unsafe, and without grounding in either the legal and medical understanding of the treatment of mothers and their unborn babies, or the medical profession's own ethical guidelines which reflect the fact that '...the necessity for abortion to preserve the life or health of the mother remains to be proved...'[3]

There is a crucial distinction, ignored by the Review Group, between those cases where the death of the unborn may result as an indirect effect of appropriate medical treatment, and cases involving the intentional killing of the unborn child. The established medical practice of over a century has always required that mothers be fully and properly cared for during pregnancy.

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[1] Review Group, Page 277
[2] Review Group, Page 277
[3] A Guide to Ethical Conduct and Behaviour and to Fitness to Practise. The Medical Council. Fourth Edition, 1994. Page 36. (Henceforth cited as 'Medical Council')

It is important to realise - and this point appears to have escaped the Review Group - that a mother is not denied the appropriate treatment because of possible but undesired and unintended consequences for her baby.

Treatments directed at protecting the life of the mother, and not involving any direct attack on her unborn child, are and always have been ethically and legally proper even though the loss of her child may follow as an unsought and unwelcome side effect. Irish medical practice has it that '... it is unethical always to withhold treatment beneficial to a pregnant woman, by reason of her pregnancy'.[1]

Thus, Irish law and the ethical guidelines of the Medical Council recognise the difference between induced abortion - the direct and intentional killing of the unborn - and damage to or even the death of unborn babies arising indirectly from medical treatment. This principle was not changed by the passage of the 1983 Amendment, any more than it would change if another prohibition on induced abortion were to be inserted in the Constitution.

In treating pregnant women, doctors know that all treatments have side effects. In selecting a treatment for any patient, the doctor must have regard - not alone to the desired effects - but also to the undesired side-effects. Pregnancy presents a near unique situation for any doctor, who is then required to deal with two patients simultaneously. Here the effects on the unborn child must also be taken into consideration. However, the fact that a woman is pregnant is not a ground for refusing her appropriate treatment. Although concerns for foetal well-being may alter therapeutic approaches, in serious or life-threatening conditions, therapy should not be modified in such a way as to compromise the goal of treatment.

Where, however, there are two treatments for any given condition in the mother - and both are of comparative therapeutic efficacy - there is an obligation to use that which is least harmful to both the mother and her unborn child. The function of medicine is to preserve life and relieve suffering. It is not the function of doctors to kill: an obvious point but one that would have been well remembered by the authors of this report.

In effect, Ireland without abortion is one of the safest countries for pregnant women. While not attempting to minimise in any way the death of any woman during pregnancy or childbirth, it is abundantly clear - and this is reflected in international reports - Ireland has one

[1] Medical Council. Page 36.

of the best records in the world,[1] which is reflected in our maternal mortality rates. The latest independent research states:

> The Republic of Ireland is unusual in the developed world in that termination of pregnancy is not available. This does not appear to have influenced these figures significantly, the maternal mortality rate due to obstetric causes being half that of the nearest European neighbour, i.e. England and Wales.[2]

This research is consonant with the major review of maternal deaths carried out in the National Maternity Hospital, Dublin in 1982, before the enactment of the Eighth Amendment. That study found that over a ten year period there were 21 maternal deaths and a total of 74,317 births. In each case the cause of death was analysed and the conclusion was that the availability of induced abortion would not, in any way, have reduced the number of maternal deaths over the study period.[3]

It might be thought that the rate of maternal death in Ireland is artificially low because of the number of Irish women who travel to Britain each year for abortions. This is not the case. Analysis of the British statistics is unequivocal. For whatever reason Irish women have recourse to abortion in England - which has one of the most liberal abortion regimes in Europe - a risk to the mother's life or health is not one of them. There is no evidence that women travel in order to obtain treatment for life-threatening conditions which could not be treated here in Ireland because of the non-availability of abortion. [1]

The Review Group's contention that a complete ban on abortion would prevent the mother being fully and properly treated for any condition which may arise while she is pregnant represents a major departure from the present legal and medical understanding of the matter, and is not supported by Irish maternal mortality statistics.

The position of the Pro-Life Campaign is simple and clear. Irish medical practice has no difficulty in distinguishing between abortion and medical treatment for the mother. Irish obstetricians make the distinction every day in the hospitals. They do not carry out

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[1] 1994, 1995. *The Progress of Nations*. UNICEF, New York.
[2] *Maternal Mortality in the Irish Republic, 1989-1991.* Jenkins DM, Carr C, Stanley J, O'Dwyer T. Irish Medical Journal, July/ August 1996, Volume 89, Number 4.
[3] *Therapeutic Abortion: The Medical Argument.* Murphy J, O'Driscoll K. Irish Medical Journal, 75: 306-6, 1982.

abortions, since they recognise that the Supreme Court was mistaken, legally and medically, in its holding in the X decision. The Irish electorate should be given the democratic choice, in a referendum, to restore full protection to the unborn, consistent with contemporary medical practice.

Option 'e', to 'regulate by legislation the application of Article 40.3.3', is the preferred option of the Constitutional Review Group.

> Relying on legislation alone would avoid the uncertainties surrounding a referendum but the legislation would have to conform to the principles of the X case decision and be within the ambit of Article 40.3.3^{o} generally.[2]

This statement forms the basis of the Group's recommendations and contains two points which cannot be left unchallenged.

1. '...the uncertainties surrounding a referendum..'. Every popular vote is subject to uncertainties, because it is never clear which way the electorate will vote. Thus 'uncertainty' is an integral part of the democratic system; to suggest that such uncertainties should be avoided is tantamount to saying that, since the electorate cannot be trusted to vote in a predictable or reliable manner, it is better to leave major decisions to the Legislature.

2. '...the legislation would have to confirm to the principles of the X case decision...' This analysis is quite correct, and must mean that any legislation would have to permit the creation of a domestic abortion regime. Yet this was clearly not the intention of the people in 1983 and would be contrary to what the Review Group recognised to be 'strong opposition to any extensive legalisation of abortion in the State.'[3]

Despite the acknowledgement that 'legislation would have to conform to the principles of the X case decision'[4], the Review Group suggests that a time-limitation be imposed to prevent a viable foetus being aborted in circumstances permitted by the X case. This inconsistency in the Review Group's arguments is in itself a matter of concern; moreover the contention that

[1] *Abortion Statistics, England and Wales, Series AB, 1974-1994.* Office of Population, Censuses and Surveys, HMSO, London.
[2] Review Group, Page 279
[3] Review Group, Page 277
[4] Review Group, Page 279

the Legislature could limit the scope of a constitutional interpretation of the Supreme Court is simply a legal nonsense.

The Review Group notes that legislation could 'require written certification by appropriate medical specialists of "real and substantial risk to the life of the mother"'.[1] This is presumably an effort to reduce the number of abortions that would take place under the proposed legislation. Yet the foreign experience is that any abortion law, no matter how superficially restrictive in some areas is used to create a legal culture of abortion on demand. (And the Pro-Life Campaign notes again that legislation under the terms of the X decision would have to be broad, rather than restrictive, if it is to give scope to the decision).

The Review Group concludes:

> While in principle the major issues discussed above should be tackled by constitutional amendment, there is no consensus as to what that amendment should be and no certainty of success for any referendum proposal for substantive constitutional change in relation to this subsection.
>
> The Review Group, therefore, favours, as the only practical possibility at present, the introduction of legislation covering such matters as definitions, protection for appropriate medical intervention, certifications of 'real and substantial risk to the life of the mother' and a time-limit on lawful termination of pregnancy.[1]

The Pro-Life Campaign agrees that, in principle, the abortion issue should be tackled by constitutional amendment. It also agrees with the somewhat obvious observation that there is no consensus as to what the amendment should be and no certainty of success for any referendum. It would be a bizarre situation indeed if there were to be a total consensus on abortion, or indeed a certainty of success for any constitutional referendum. None of this means that a national abortion debate, taking place at the most fundamental level of the Constitution, is impractical. The strength of our democratic system lies in its ability to confront difficult issues and reach a mature decision which will, by virtue of having such a direct mandate from the people, be infinitely more acceptable than a judicial or legislative decision.

[1] Review Group, Page 279

The Pro-Life Campaign, therefore, rejects the proposal of the Review Group to legislate to allow abortion and stands by the alternative approach of a referendum to allow the electorate to constitutionally prohibit abortion.

APPENDIX

Comments upon the Review Group's proposals 'b', 'c' and 'd'.

b) redraft the constitutional provisions to restrict the application of the X case decision

The Review Group notes the failure of this approach in 1992. The Pro-Life Campaign agrees with this analysis.

c) amend Article 40.3.3^{o} so as to legalise abortion in constitutionally defined circumstances

The Review Group draws attention to the fact that there 'appears to be strong opposition to any extensive legalisation of abortion in the State.' The Pro-Life Campaign endorses this view. Concerning the Group's assertion that 'There might be some disposition to concede limited permissibility in extreme cases, such, perhaps, as those of rape, incest or other grave circumstances', the PLC draws attention to the 1995 survey by the Institute of Advertising Practitioners in Ireland which put opposition to abortion in all circumstances at 52% of the electorate.[2]

(Another poll, conducted by Irish Marketing Surveys for the Pro-Life Campaign in May, 1993 asked a representative sample of the electorate whether, their personal opinions on abortion aside, they felt that a constitutional referendum was the way to deal with the issue. 60% were in favour of a referendum, 28% opposed.)

d) revert, if possible, to the pre-1983 situation

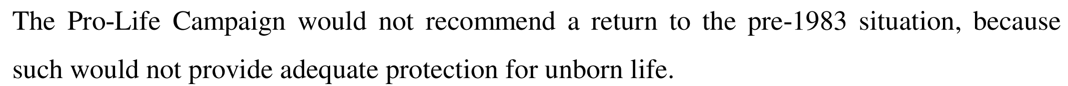
The Review Group comments that the experience since the 1983 Amendment was 'a lesson in

[1] Review Group, Page 279
[2] It might be expected that this figure would rise during a referendum campaign; the same survey indicated that opposition to divorce was 28%!

the wisdom of leaving well enough alone...'

This viewpoint is contested by the Pro-Life Campaign. That the Amendment was not upheld by the Supreme Court in the X decision can as easily be construed as a criticism of that decision rather than of the Amendment itself. And it is fair to say that without the constitutional protection for unborn life throughout the 1980's, the situation in Ireland might now be very different.

The Pro-Life Campaign would not recommend a return to the pre-1983 situation, because such would not provide adequate protection for unborn life.



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