

A thoroughly flawed process

The report of the three-year review of the abortion law and the extreme recommendations it contains.

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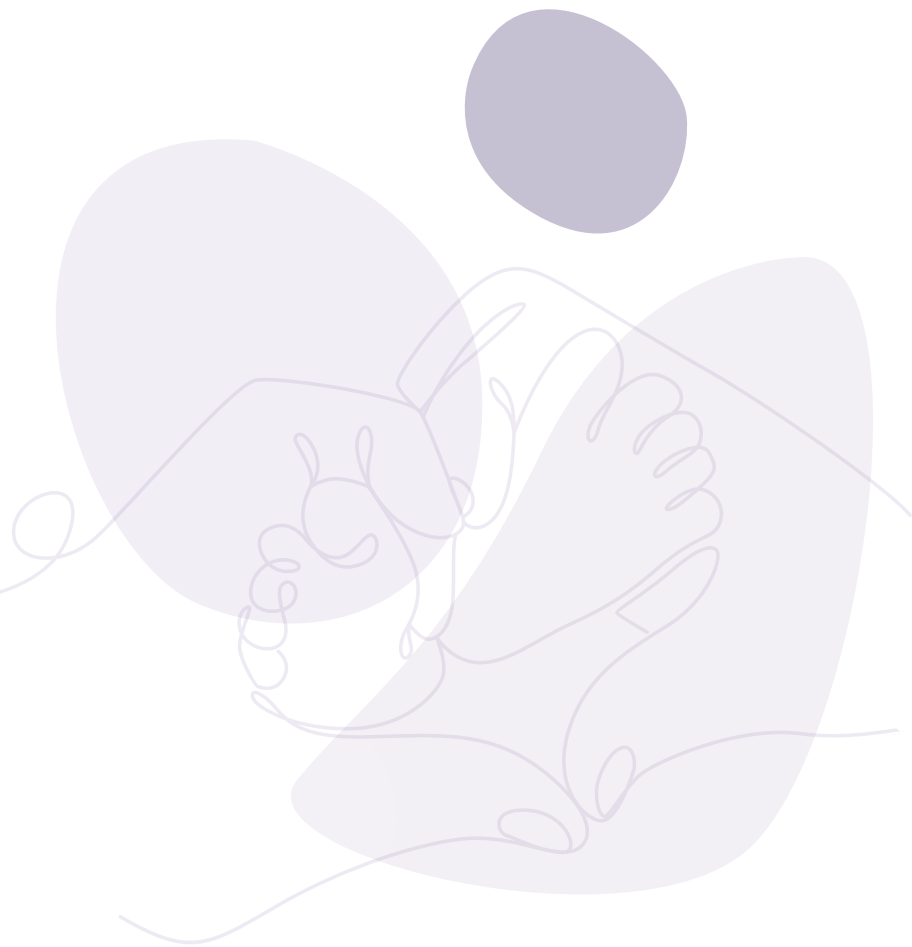


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01– Introduction

The much-anticipated Three-Year Review into Ireland’s abortion laws was released on 26th April 2023. Shortly before its release, a series of leaks to The Irish Times reported it would recommend “sweeping changes” to the abortion law. Indeed, the report recommends 10 changes to current legislation and some 60 operational changes. After its release, the Taoiseach Leo Varadkar acknowledged *“it won't be the case that the Government is going to sign-off on any legislative changes, that's not going to happen.”* Nonetheless, a huge effort is underway among activists and politicians to implement the recommendations in the report which would result in an already extreme law stripping away the last remaining protections for unborn babies. The report by barrister Marie O’Shea has been referred to the Oireachtas Joint Health Committee, where it will be considered before being sent back to the Cabinet where a final decision will be taken on whether to propose legislative changes to give effect to some or all of the recommendations in the report.

This document examines and offers criticism of the key recommendations contained in the report. It further provides much needed contextualisation on the nature of the Three-Year Review and the thoroughly flawed process behind it.

02– Background

The requirement to have a Three-Year Review into the operation of the Irish abortion law was included in the Health (Regulation of Termination of Pregnancy) Act 2018. This section of the Act did not specify the details of how this review would be conducted. In early 2021, the Minister for Health, Stephen Donnelly, began to explain that it would take a three-strand approach, which would include strands focusing on service users, service providers and a public consultation. **Although initially, Minister Donnelly claimed the research from these three strands would be analysed and collated in a report produced by the Department of Health, he then announced an “independent chair” would oversee the creation of this report.**¹

We know that in summer 2021 Minister Donnelly held a private meeting with organisations brought together by the National Women’s Council to decide on the shape of the review. The meeting to fine-tune the shape of this supposedly “independent” review was a who’s who of pro-abortion activists, including the Coalition to Repeal the Eighth, the Abortion Rights Campaign, the Irish Family Planning Association, START Doctors, and others.

On 8th December 2021, Minister Donnelly formally “launched” the review at a Health Committee meeting. Although he announced at this meeting the chairperson would be selected by a public tendering process, no such advertisement inviting applications appeared on the government’s e-tenders website. Subsequently, in late January, he announced the appointment of a barrister, Marie O’Shea, as the chairperson. In reversing his commitment, the Minister stated that a small number of candidates were invited to apply for the role, *“given the expertise required for the position.”*² The eventual candidate chosen had no specific experience in this area.

Following her appointment, the chairperson went to ground for a year to produce her report in consultation with several activists and campaigning researchers. Although the purpose of the review was to objectively analyse the operation of the Act, in her final report she needlessly speculated *“whether the outcome of that referendum would have been different”* had the draft legislation included no restrictions, but she continued *“this Review highlights circumstances where the needs of classes of women are not being met.”* It was inappropriate for Ms O’Shea to shift the purpose of the review from its definition in Section 7 of the Act to instead focus on expanding abortion or to wax lyrical about people’s 2018 voting intentions.

¹ <https://www.oireachtas.ie/en/debates/question/2021-03-31/1094>

² <https://www.oireachtas.ie/en/debates/question/2022-01-25/568/>

03– Public consultation ignored

The Department of Health allowed public submissions to be made to the three-year review until 1st April 2022. Instead of openly permitting free-form submissions which would allow the public to express their views on the impact of the abortion law three years on, the Department provided a narrow template form with narrowly defined parameters. Its format asked respondents to purely assess how “effective” the Act had been and whether it had “achieved” its “objectives”. This was overly restrictive and impeded respondents who wished to draw attention for example to Ireland’s soaring abortion rate under the new law despite promises from leading politicians before the 2018 referendum that abortion would be “rare” in the event of repeal happening.

In the summary of the public consultation produced by the Department of Health for the chairperson of the review, pro-life proposals were often expressed in a disapproving way or else portrayed as being expressed without evidence. For example, the author wrote: *“Some responses highlighted unreferenced cases of failed late term abortions where pain relief is not administered, leading to distress to mother and baby.”* Far from being unreferenced, the Pro Life Campaign’s submission and many other pro-life submissions referred to research in this area by pointing explicitly to the 2020 article from University College Cork, published in the British Journal of Obstetrics and Gynaecology, **‘Fetal medicine specialists’ experiences of providing a new service of termination of pregnancy for fatal fetal anomaly: a qualitative study’**.

With regards to foetal pain relief, the author referred to the “belief” expressed in submissions that unborn children can experience pain. However, the author failed to acknowledge the scientific evidence for foetal pain relief such as the study by Stuart Derbyshire and John Bockmann which was cited in the Pro Life Campaign’s submission.³ To characterise the biological reality of foetal pain as simply a “belief” held by some is disingenuous.

It was clear that the summary document’s author treated pro-life submissions with disdain and a lack of care. This led them to jumble together the separate issues of pain relief and babies born alive, implying a category of submissions supporting the administration of pain relief in “unreferenced” cases where babies have been born alive. This was a misunderstanding of two separate issues. The actual pro-life position is that precautionary foetal pain relief should be administered in late-term abortions where an unborn child could experience pain, whilst in cases of late-term surgical abortions where the child is unexpectedly born alive then every step should be taken to provide the baby with life-saving care or palliative care.

04– Contents of the Report

The release of the report was delayed several times, without any explanation offered by the Minister for Health. Instead, he set numerous deadlines which he failed to observe. Finally, it was presented to him in early April and subsequently released to the public on 26th April 2023 – but not before it was leaked to an Irish Times journalist.

The report was often based on flawed and selective evidence, which underlined ill-thought-out recommendations which try to strip away the most basic protections set down in the abortion law. The author frequently editorialised and strayed into offering opinions and views which went far beyond the original scope of the legislative review as a mechanism to objectively report on the operation of the Act.

³ Derbyshire SWG and Bockmann JC, Reconsidering fetal pain, J Med Ethics 46, 3-6, 2020)

04.1– Proposal to remove three-day reflection period

Ms O’Shea cited a 2021 study from the pro-abortion START Doctors group as a justification for her proposal to do away with the three-day period of reflection before an abortion happens. The study she cited found that of a small sample of 475 women, only 11 (2%) did not return for a second consultation. Incredibly, however, the author failed to engage with the widely publicised official figures from the Health Service Executive (HSE) between 2019 and 2021 which gave a much more definitive and clearer picture of the numbers of women who went for abortion consultations and subsequently did not have an abortion. **The official figures from the HSE show that of the approximately 23,000 women who made an initial abortion appointment, 3,951 did not return for the second and final appointment after the three-day wait. The three-day reflection period is undoubtedly a major (but not the sole) factor in producing this outcome. This represents 17% of women who made a first consultation and didn’t return to have the abortion compared to the 2% figure cited in the review report.**

It is extraordinary that the author of this much-vaunted “independent” report could recommend such a drastic change as the removal of the three-day reflection period considering the basis for this proposal is partly based on an outlier study of a small sample of women, yet her report ignores the overall national evidence made publicly available by the HSE. She was pointed towards this information by thousands of submissions to the public consultation process, which was inexplicably excluded from the summary document prepared by officials at the Department of Health.

At the Oireachtas Health Committee meeting on 31st May 2023, the author of the report confirmed on the record that before recommending the scrapping of the three-day reflection period before an abortion, she never spoke to any of the nearly 3,951 women who over a three-year period went for their first abortion appointment but didn’t return for the second and final appointment after the three-day wait elapsed.

04.2– Pain Relief

Most, if not all, of the 3,000 pro-life submissions raised the issue of pain relief for babies in late term abortion and the issue of caring for babies that survived an abortion. Yet the 139-page report devoted all of three sentences to the issue of administering foetal pain relief to the unborn child in a late-term abortion scenario. This is completely disproportionate considering the attention the issue received (including legislation introduced in the Dáil) when contrasted with other issues examined in the report.

Ms O’Shea admits that, as she is not a medical practitioner, *“this issue is not within her field of competence.”* Instead of examining the research, she consulted “two foetal medical specialists and one obstetrician”, who recommended that foetal pain relief was *“not required.”* Why did she not then seek out the opinion of a medical specialist who favours the requirement of administering foetal pain relief to provide a more balanced view?

In addition to ignoring the scientific literature, she neglected to examine the experience of the administration of foetal pain relief, which is now a feature of practice in England and Wales according to the latest guidelines issued by the Royal College of Obstetricians and Gynaecologists.

04.3– Unreliable UnPAC study

The UnPAC study was commissioned by the Department of Health to inform the Three-Year Review report. **In the UnPAC study (Conlon, et al), a tiny sample of just 58 women was consulted as part of the research.**⁴ It failed to interview a single woman who made a first appointment but ultimately opted to proceed with the pregnancy. This severely undermines the credibility of this taxpayer funded research, which provided a highly one-sided and myopic view of abortion in Ireland.

⁴ <https://www.sexualwellbeing.ie/for-professionals/research/research-reports/unpac.pdf>, p. 24.

04.4– Incorrect abortion figures cited

For a report which claims to be “expert-led” and has been generously funded by the taxpayer, there can be no excuse for major factual errors contained in the report on fundamental points. For example, on page 6, the author claims that there have been “*approximately 17,820 terminations of pregnancy*” carried out in the Republic “between 1st January 2019 and 31st December 2022.”

This figure of 17,820 was calculated by adding the number of notifications received by the Minister for Health in the years 2019, 2020 and 2021 respectively. This provides a highly inaccurate picture of the total number of babies aborted in the timeframe she outlined.

She ignores the fact that approximately 2,000 abortions were unaccounted for in the notifications received in 2021. At the time, the Department of Health acknowledged it was “*reasonable to conclude that... the number of terminations of pregnancy notified to the Minister is substantially lower than the number of terminations carried out in 2021*”, and that “*approximately 6,700 termination of pregnancy second consultation claims for reimbursement were made under the Primary Care Reimbursement Scheme (PCRS).*”

The author of the report additionally failed to include data on the 2022 figures (8,876, per PCRS claims) in her total. Three months before her report was released, the Minister for Health revealed on radio that approximately 8,500 babies had been aborted in 2022. A far more accurate total is that 28,802 babies have been aborted under the 2018 Act between January 2019 and December 2022.

04.5– Freedom of Conscience

The report recommends forcing the eight remaining maternity hospitals in Ireland currently not carrying out abortions to start doing so. Minister Donnelly has stated that work is already underway to bring this about. Eroding freedom of conscience protections for healthcare workers is a dominant theme in the report.

The report recommends introducing a statutory obligation on healthcare workers to refrain from providing ‘misinformation’ to women accessing abortion. Who would adjudicate on what constitutes misleading information? Would informing women about peer-reviewed medical research documenting the adverse effects of abortion on women be deemed misinformation? Would the lie claiming that abortion is ‘healthcare’ be given a green light and protective cover from the proposed new legal framework? Legal abortion up-to-birth for any reason could only succeed in an environment where all opposing voices are silenced. Wittingly or unwittingly, that’s how this particular recommendation made its way into the final draft. This demonstrates how extreme and unbalanced the report is.

The report is also awash with references to the need for “*values clarification workshops*” to be introduced across the healthcare sector and in education settings to force healthcare workers to accept and embrace the new abortion regime in operation. Freedom of conscience is a core right of citizens who have every right not to be subjected to pro-abortion workshops which seek to undermine their deep respect for authentic human rights and the right to life. It’s worth noting that it would never be accepted if doctors were forced to attend workshops which affirmed the right to life of the unborn child. Yet somehow, in the name of tolerance and freedom, it’s now deemed acceptable by some to coerce people to violate their conscience simply to affirm the strongly held ideological stances of those currently in power. It would be more accurate and honest to call them “*re-education camps*” rather than the more benign sounding “*values clarification workshops*”.

During her appearance before the Health Committee on 31st May, Ms O’Shea acknowledged that she agrees it would be acceptable to discriminate against new entrants into the medical profession if they wanted to exercise their legal right to conscientiously object to performing abortions. She explained that this is acceptable “to meet the needs of the service.”

In Section 19.2 of the report, Ms O’Shea acknowledges how some believe freedom of conscience protections need to be expanded beyond just doctors and nurses to other medical professionals. This is a key point, but the author simply states it without considering it further as part of her recommendations.

04.6– Decriminalisation

The report advocates removing criminal liability for medical practitioners by amending Section 23 of the Act. This severely undermines the effectiveness of the Act to ensure abortions are not performed beyond the gestational limits set in Sections 9-12. Decriminalisation could have the impact of converting the 2018 Act into mere guidelines, whereby abortions can be performed up to nine months of pregnancy with legal impunity. The suggestion that abortions at this late stage simply do not occur is false, as tragically seen in the June 2023 Baby Lily case in England.

Whilst the report does not go as far as advocating full decriminalisation, its author acknowledged that the World Health Organisation supports a full decriminalisation of abortion. Elsewhere, she leans on the WHO’s extreme views as authoritative. In the report, she also agreed with the characterisation of the criminalisation of abortion as potentially “stigmatising”.

The legislation which passed at second stage in the Dáil on 31st May, the authors of which rhetorically leaned heavily on the Three-Year Review’s recommendations, would have the impact of removing all criminal sanctions for anyone who performs an abortion (defined in the Act as the intentional ending of the life of a foetus). The consequences of this would be wide-ranging. It would allow unscrupulous individuals (without medical training) to legally perform late-term abortions in a private capacity.

05– Conclusion

This document touches on some of the most egregious flaws and shortcomings in the report of the Three-Year Review of the abortion law. Ms O’Shea’s report drew upon flawed research, incomplete data, and unreliable evidence produced by campaigning groups which underpinned its extreme recommendations. Fundamental errors (such as the underestimation of the abortion rate by 40% and the ignoring of official HSE data whilst promoting outlier findings) raise concerns about whether the report was even subjected to normal academic scrutiny.

The Minister for Health has serious questions to answer and cannot simply hide behind the fig-leaf that this review was “independent” and “expert-led”. The Government must be cautioned against running with the recommendations contained in the review report, not simply because it would be a breach of promises from 2018, but because its recommendations are based on a review process which has been deeply flawed from the beginning.

The Government needs to go back to the drawing board and make room for other voices to be heard, instead of proceeding down the road of giving effect to recommendations that are politically driven rather than evidence based. The failure of the Government to ensure any fairness or balance in the process to date guarantees that abortion will be a major issue come the next election.

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