



ABORTION LAW IN IRELAND: A PROPOSAL FOR CONSTITUTIONAL CHANGE

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'For more than 30 years the Constitution has prevented the Oireachtas from introducing evidence-based legislation on abortion in Ireland; constitutional change is urgently required.'

Professor Fiona de Londras

Article 40.3.3 of the Irish Constitution protects the right to life of 'the unborn'. Under Article 40.3.3 and the Protection of Life During Pregnancy Act 2013, abortion is permitted only where there is a real and substantial risk to the life of the pregnant person; a situation so restrictive that it has been found to violate international human rights law.

In April 2017, the Citizens' Assembly recommended removing Article 40.3.3 and replacing it with a provision that empowers the Oireachtas to legislate for abortion while taking account of any rights of the pregnant person or the foetus.

This briefing argues that the Oireachtas should endorse proposing a short, clear provision in a referendum; one that would provide that 'Nothing in this Constitution prohibits abortion as provided for by law'. It also argues that it is inadvisable to make specific reference to foetal rights in any new constitutional provision proposed in a referendum.

A BETTER BALANCE

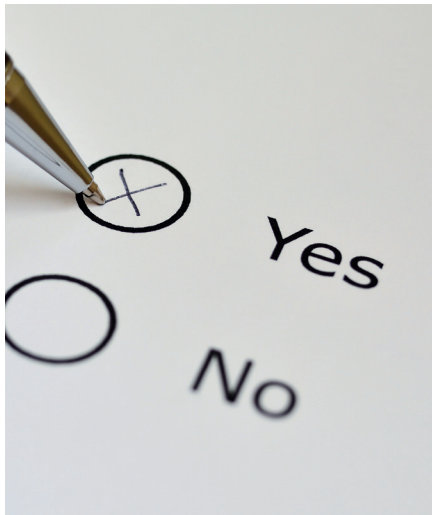
By not making express reference to foetal rights in the Constitution, a new provision could empower the Oireachtas to legislate for abortion care, protect a pregnant person's right to reproductive autonomy, and allow for legal access to abortion to be limited, in accordance with the Constitution, where the Oireachtas considers it appropriate. This can be achieved by providing that, 'Nothing in this Constitution prohibits abortion as provided for by law'.

This strikes an appropriate balance between protecting women's rights, respecting the recommendations of the Citizens' Assembly, and recognising that sustaining foetal life in pregnancy is an important social role, which should be voluntary and consensual.

This strikes a better balance between the rights of a pregnant person and the state's interest in preserving foetal life than is possible under the 8th Amendment.

It makes sure that the Constitution empowers, rather than restricts, the Oireachtas in carrying out its proper role: making law in accordance with evidence, best practice, human rights, and the will of the people.





A RIGHT TO ACCESS ABORTION WITHOUT RESTRICTION?

By not specifically mentioning foetal rights in the Constitution, the Oireachtas could legislate for abortion to the extent that it considers strikes an appropriate balance between the rights of the pregnant person and the state's interest in preserving foetal life. It would not be obliged to legislate for abortion without restrictions.

As in many other countries around the world, the right to access abortion would be anchored in rights that already exist in the Constitution, such as the right to bodily integrity, and the right to privacy. These are not absolute rights. Instead, they can be limited in law, provided the limitation is proportionate.

This means that the limitation must pursue a sufficiently important objective in a way that impairs the right as little as possible and is proportionate to the objective being sought.

Preserving foetal life is clearly an important objective that the state can pursue; creating express foetal constitutional rights is not necessary to do that.

This is how most countries around the world structure their limitations in abortion law. In this way, some limitations on access to abortion are possible (for example, gestational term limits) but these cannot impose undue burdens on a pregnant person in exercising her constitutional rights.

SPECIFYING FOETAL RIGHTS IN THE CONSTITUTION

Drawing on her research on Irish and comparative constitutional law, Professor de Londras argues that it is inadvisable to make specific reference to foetal rights in any new constitutional provision proposed in a referendum.

Embedding foetal rights in the Constitution would raise complex questions of whether 'the unborn' has any constitutional rights and, if so, what they are. Not only would these questions likely delay the repeal and replacement of the Protection of Life During Pregnancy Act 2013, but they would also lead to complex litigation.

Based on past practice in Ireland, it is reasonable to expect that any mention of 'the unborn' or foetal rights in the Constitution would lead to court cases aimed at compelling a pregnant person to remain pregnant, even if the legislation suggests they may access abortion.

It also raises the spectre of abortion legislation being struck down in future litigation on the basis that it privileges the rights of a pregnant person over the rights of a foetus.

This is clearly not in the spirit of what the Citizens' Assembly recommended. Nor does it accord with the popular desire for meaningful change in the constitutional law on abortion that is consistently indicated in opinion polls.



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