

Postscript to *Repealing the 8th: Reforming Abortion Law in Ireland*
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Fiona de Londras & Mairead Enright
Birmingham Law School, University of Birmingham

The manuscript for *Repealing the 8th* was completed on November 15 2017. At the time of writing, the Joint Oireachtas Committee (JOC) on the Eighth Amendment was still holding hearings. Since then, it has published its report¹ and key party political figures have expressed support for its recommendations. Furthermore, on 29 January 2018 the Cabinet announced its intention to hold a referendum for the repeal of the 8th Amendment and its replacement with an ‘enabling provision’, unlike the options that had been considered by the Joint Committee in its recommendations.² This postscript, submitted for publication on 31 January 2018 places the proposals in our book in the context of these more recent political developments. We advise reading the book (which is available for free download [here](#) and to purchase [here](#)) before reading this postscript. We provide cross-references to the main text within.

‘Repeal and Replace’: The 36th Amendment

In December 2017, the JOC recommended that any future referendum should offer voters the opportunity to repeal the 8th Amendment.³ A majority vote in favour of so-called ‘repeal simpliciter’ would mean deleting Article 40.3.3 without replacing it with any new text. In *Repealing the 8th* we supported this outcome. We also argued that a simple repeal ensured sufficient constitutional certainty for the Oireachtas to legislate on the availability of abortion without any specific ‘enabling’ provision, especially as it already has the power to make law on abortion under Article 15 of the Constitution. However, on 29 January 2018 the Taoiseach announced that, on the advice of the Attorney General,⁴ the referendum would propose repealing Article 40.3.3 and replacing it with an ‘enabling provision’ that would affirm the legislative power of the Oireachtas, and minimise the risk that any residual unenumerated rights of the foetus would frustrate attempts to legislate for abortion. This proposed replacement is not ‘substantive’: it would not enshrine grounds for abortion or express statements of foetal rights in the Constitution. It would not immunise any future abortion legislation from judicial review. Fiona

¹ Report of the Joint Oireachtas Committee on the 8th Amendment of the Constitution (December 2017). Available at:

<http://www.oireachtas.ie/parliament/media/committees/eighthamendmentoftheconstitution/Report-of-the-Joint-Committee-on-the-Eighth-Amendment-web-version.pdf>

² Bardon S, ‘Cabinet Agrees to Summer Vote on Replacing Eighth’, *Irish Times*, 29 January 2018.

Available at <https://www.irishtimes.com/news/politics/cabinet-agrees-to-summer-vote-on-replacing-eighth-1.3372923>

³ No. 1 above, p 5-6

⁴ Department of Health, Information note on legal advice received on options for a Referendum on Article 40.3.3 of the Constitution, 30 January 2018. Available at <http://health.gov.ie/wp-content/uploads/2018/01/Info-note-on-legal-advice-received-on-options-for-a-Referendum-300118.pdf>

de Londras raised the possibility of this kind of ‘replace’ in her presentation to the JOC,⁵ and before that in her submission to the Citizens’ Assembly.⁶ However, ultimately, it was not one of the six options for constitutional reform considered by the JOC.⁷

The effect of ‘repeal and replace’ would depend on its exact wording, and this has not yet been published. We might reasonably assume that any proposed replacement provision is intended to add something to the Constitution that is not already present. However, indications so far are that it would not go much further than re-stating the Oireachtas’ existing legislative powers under Article 15.⁸ In his press conference on 29 January the Taoiseach suggested that the wording may be something like: ‘Provision may be made for the termination of pregnancy by law’. This would be a simple enabling provision. The use of this formula is not entirely without precedent: Article 42A of the Constitution (the Children’s Rights Amendment) also says that “[p]rovision shall be made by law” for adoption in certain circumstances, and for the application of best interests and welfare tests in child law proceedings. There, that formula was used to clarify that the Oireachtas could, and indeed was required to, introduce legislation on those matters. There are some differences between Article 42A and the formula suggested by the Taoiseach on 29 January. Article 42A is a complex provision covering many areas of child law. The ‘repeal and replace’ provision seems likely to be shorter and simpler. In addition, the Taoiseach used the words ‘provision *may* be made’ and not ‘provision *shall* be made’, suggesting that while ‘repeal and replace’ would confirm the Oireachtas’ power to legislate for abortion, it would not require it to introduce any particular legislation.

This provision would not immunise any future abortion legislation from challenge in the courts, nor is it intended to.⁹ It may be that, even if the 8th is repealed and replaced with this proposed wording, the unborn remains a constitutionally protected subject with some rights, or at least some interests that may have a bearing on the constitutionality of any future abortion legislation.¹⁰ The risk that a court would use such rights to strike down all or some of the new

⁵ de Londras F, Opening Statement to Joint Oireachtas Committee on the Eighth Amendment of the Constitution, 27 September 2017. Available at <http://www.oireachtas.ie/parliament/media/committees/eighthamendmentoftheconstitution/Opening-Statement-by-Professor-Fiona-De-Londras.-Law-School.-Birmingham-University-270917.pdf>

⁶ Fiona de Londras, Submission to the Citizens Assembly on the 8th Amendment to the Constitution and Associated Matters, submitted 16 December 2016. Available at https://delondras.files.wordpress.com/2013/07/delondras_casubmission.pdf

⁷ All 6 are discussed in detail in Chapter 2 of *Repealing the 8th*.

⁸ Department of Health, Information note on legal advice received on options for a Referendum on Article 40.3.3 of the Constitution, 30 January 2018. Available at <http://health.gov.ie/wp-content/uploads/2018/01/Info-note-on-legal-advice-received-on-options-for-a-Referendum-300118.pdf>

⁹ Department of Health, Information note on legal advice received on options for a Referendum on Article 40.3.3 of the Constitution, 30 January 2018. Available at <http://health.gov.ie/wp-content/uploads/2018/01/Info-note-on-legal-advice-received-on-options-for-a-Referendum-300118.pdf>, para 10.

¹⁰ For discussion of unenumerated foetal rights in the Constitution see de Londras, F. and Enright M., *Repealing the 8th* (Policy Press, 2018) at pp. 27-28 and 52-53. At the time of writing *IRM v. Minister for Justice, Equality and Law Reform* [2016] IEHC 478 is under appeal to the Supreme Court. This judgment may provide some clarity on the existence of foetal rights outside of the 8th Amendment by the time the referendum is called. If a case is brought to challenge new abortion legislation after repeal, the first

abortion legislation is very slight: the legislation would enjoy the ‘presumption of constitutionality’.¹¹ However, the cabinet may think that a vote for ‘repeal and replace’ in a referendum would clearly indicate to a future Supreme Court that the electorate wanted to make space for more liberal abortion law within the constitutional order. Crucially, by the time of the referendum, draft abortion legislation will have been published, and this will help a future court to interpret the electorate’s intention in voting for (or against) ‘repeal and replace’. With the 8th removed from the Constitution, and replaced with a provision confirming the Oireachtas’ entitlement to make abortion law, we should be reasonably secure in arguing that no future court can return us to ‘square one’; to a position in which, despite a successful referendum, a future Supreme Court finds that only last-resort life-saving abortion is constitutional. So, from our perspective, a minimalist, simple ‘repeal and replace’ along the lines suggested by the Taoiseach on 29 January has much the same effect as ‘simple repeal’,¹² but it should not cause any substantive difficulties in terms of constitutional interpretation.

Provided the wording is simple, and is along the lines suggested by the Taoiseach on 29 January, people who want to see human-rights-compliant and accessible abortion law in Ireland have nothing to fear from ‘repeal and replace’. It is, of course, disappointing that any exceptional reference to abortion should remain within the constitutional text. However, ‘repeal and replace’ removes the provision which has stymied the development of women’s reproductive rights in Irish constitutional law, and does not, in our view, add anything to the constitution that might restrict those rights in unforeseen ways. After ‘repeal and replace’ new constitutional space opens up for the articulation of people’s rights in pregnancy in the ways we suggested in Chapter 3.

The Oireachtas should not seek pre-emptively to close off that productive constitutional space by supplementing the ‘repeal and replace’ provision with any additional text. For example, it should not suggest adding new text to the Constitution stating in abstract terms that the Oireachtas has the power to ‘balance’ the rights or interests of the pregnant person and the unborn. Such a proposal would assume that an essential opposition of pregnant people’s rights and foetal rights should remain at the heart of our constitutional order. Even if this unnecessary and false antagonism were to re-emerge in some form in judicial discourse, it does not belong in the constitutional text.¹³ We should be willing to see how the constitutional space of pregnancy develops in the absence of the 8th Amendment; to develop working interpretations over time in our everyday political and policy arguments as well as in the courts. As we suggested in *Repealing the 8th*, we could leave behind the current adversarial framework which treats the foetus as an independent rights-bearing subject at all points in pregnancy, pits it against the pregnant person, and severely restricts her rights in the process. Instead, the preservation of

question for the court would be whether ‘the unborn’ requires its own legal representation if the 8th is no longer in place, and whether activist groups have ‘standing’ to litigate on its behalf.

¹¹ p. 20, *Repealing the 8th*

¹² On constitutional certainty see pp. 29-30, *Repealing the 8th*

¹³ On the difficulties with ‘keeping abortion in the Constitution’ see pp. 24-29, *Repealing the 8th*

foetal life could be treated as an important constitutional value, which the state can protect and develop, but only without disproportionately interfering with pregnant people's rights.¹⁴

Legislative Reform

Decriminalisation

The JOC supported the Citizens' Assembly recommendation that abortion be decriminalised.¹⁵ We discuss this recommendation in Chapter 4.¹⁶ As we wrote there, it is important that no special criminal law on abortion is applied either to pregnant people or to medical professionals.¹⁷

Open Access up to 12 weeks

The JOC supported the Citizens' Assembly recommendation that abortion be available on request up to 12 weeks. We discuss this recommendation in Chapter 4.¹⁸

Health

The JOC recommended that abortion should be available on grounds of risk to the health of the woman after 12 weeks.¹⁹ We discussed a health ground in Chapter 4.²⁰ This ground would not distinguish between risks to mental and physical health or between risks to health and risks to life. The JOC recommended that legislation should not attempt to grade risks to health as more or less severe, but that risk should be assessed in a clinical context.²¹ It deferred to the Oireachtas on the question of gestational time limits, while noting that many European jurisdictions place no statutory time limit on health grounds. We made a similar recommendation in our 'model' legislation,²² noting that time limits will inevitably emerge as an aspect of medical practice. There will simply be a stage after which abortion will rarely if ever be performed, as there is in other countries where there is no upper time limit.²³ As we note below, the health ground will also be important to many pregnant people who have been raped, or who have received a diagnosis of foetal impairment. It is important that, as the JOC said, the Minister for

¹⁴ p.p. 52-56, *Repealing the 8th*.

¹⁵ Report of the Joint Oireachtas Committee on the 8th Amendment of the Constitution (December 2017), 12

¹⁶ p.p. 84-87, *Repealing the 8th*

¹⁷ p. 87, *Repealing the 8th*

¹⁸ p.p. 90-92, *Repealing the 8th*

¹⁹ Report of the Joint Oireachtas Committee on the 8th Amendment of the Constitution (December 2017), 7-8

²⁰ p.p. 94-96, *Repealing the 8th*.

²¹ p.p. 95-96, *Repealing the 8th*.

²² Chapter 5, *Repealing the 8th*

²³ p.p. 94-103, *Repealing the 8th*.

Health must develop appropriate guidelines on the operation of the health ground in consultation with the medical and midwifery professions in order to ensure meaningful access.²⁴

Rape

By enabling women to access abortion up to 12 weeks without the requirement to give reasons, the JOC's recommendations ensure abortion access for people who have been raped, without having to go through any special process of verifying the assault. We discussed the difficulties of legislating for an independent rape ground in Chapter 4.²⁵ Some people who have been raped may take longer than 12 weeks to seek access to an abortion. In such cases, it must be possible to interpret the health ground to ensure later access for those who need it.

Fatal Foetal Anomaly

The JOC supported the Citizens' Assembly recommendation that abortion be available on request, without gestational limit in cases of fatal foetal anomaly. We discuss termination for fatal foetal anomaly in Chapter 4.²⁶ The JOC did not list specific conditions which will be treated as 'fatal' since it acknowledged that, frequently, fatal foetal abnormality denotes a combination of complex conditions of varying severity. However, for the JOC, 'fatal' here means that the foetus is likely to die before, during or shortly after birth. We assume that this ground would not encompass circumstances where the foetus is likely to live for months or years once born. Thus, some pregnant people will be excluded from this ground even if their foetus' diagnosis means that it can expect to receive only 'end of life' care from birth, with no prospect of improvement.²⁷

Non-Fatal Foetal Anomaly

Unlike the Citizens' Assembly, the JOC did not recommend that abortion should be available on grounds of non-fatal foetal anomaly.²⁸ If legislation is enacted along these lines, will pregnant people who receive a diagnosis of a non-fatal anomaly be able to access an abortion in Ireland if they need one? A small number of women in that position travel to the UK for terminations each year. In practical terms, such diagnoses (if the pregnant person has decided to seek relevant tests at all²⁹) will be received after 12 weeks, when the proposed 'protected period'

²⁴ Report of the Joint Oireachtas Committee on the 8th Amendment of the Constitution (December 2017), 8

²⁵ p.p. 97-98, *Repealing the 8th*.

²⁶ p.p. 98-102, *Repealing the 8th*.

²⁷ It is worth remembering that "non-fatal" impairments is a broad category. If the fatal anomaly ground is confined to situations in which the foetus is likely to die before, during or immediately after birth, then some families whose foetuses may require end of life care soon after birth, may still be required to travel if they feel unable to continue their pregnancies. The kinds of human rights issues discussed in the *Mellet* and *Whelan* cases may also arise here; see p. 47 *Repealing the 8th*. For this reason, in our model legislation we did not distinguish between 'serious' and 'fatal' anomalies. See pp. 112-113, *Repealing the 8th*.

²⁸ Above no 1, at p 11.

²⁹ See further Rapp R, "Refusing Prenatal Diagnosis: The Meanings of Bioscience in a Multicultural World" (1998) 23(1) *Science, Technology, & Human Values* 45. On women's diverse attitudes to the

when abortion can be accessed without a requirement to give reasons will have passed. After 12 weeks, could people in this position access a legal abortion in Ireland under the health ground? The JOC's report does not consider this possibility in any depth.

A health ground could provide a route to legal termination of a pregnancy after receiving a particular diagnosis, while avoiding some of the troubling effects of enshrining a 'disability exception' in law.³⁰ Of course, the application of a health ground in this context has some flaws which are associated with grounds-based legislation as such.³¹ Under the JOC proposals, a pregnant person would be required to reduce her complex personal reasons for terminating to issues of damage to her own health. It is hard to avoid the conclusion that by opposing the foetus' future 'disabled life' to the pregnant person's presumptively healthy life, the law may reinforce a stigmatising binary in law,³² and may consolidate unhelpful political understandings of disability in terms of tragedy, suffering and catastrophe. A legislative model permitting abortion 'on request' until later in pregnancy, such as that in force in Victoria, Australia would avoid this problem, while supporting pregnant people's reproductive rights.³³ It would better reflect the reality that families sometimes face unforeseen parenting decisions, unique to them, and should be supported to reach these decisions, privately, at their own pace.³⁴

It is important to think through pregnant people's care pathways after a diagnosis of foetal impairment. The guidance provided to doctors on interpretation of the health ground would be crucial here. The threshold for access may be quite high, if pregnant people are required to demonstrate a more 'severe' risk to their health, the later in pregnancy they request a termination. We do not suggest that every diagnosis of foetal impairment automatically triggers a risk to the pregnant person's health. If the law were interpreted along these lines, then there is a danger that it will effectively reproduce the damaging effects of a 'disability ground' under another name. So, as in any case in which the health ground is invoked, the medical

experience of prenatal testing see further Rapp R, 'The Power of "Positive": Diagnosis: Medical and Maternal Discourses on Amniocentesis', in Michaelson K, ed., *Childbirth in America: Anthropological Perspectives*, (1987, South Hadley, Massachusetts: Bergin and Harvey), 30; Risøy, S. & Sirnes, T 'The decision' (2015) 10 *BioSocieties* 317; Fitzgerald R, Legge M, Park J, "Choice, Rights, and Virtue: Prenatal Testing and Styles of Moral Reasoning in Aotearoa/New Zealand" (2015) 29(3) *Med Anthropol Q* 400.

³⁰ On a 'disability ground' and the UN Convention on the Rights of Persons with Disabilities see p. 99, *Repealing the 8th*. In *Repealing the 8th*, we considered that a 'health ground' was a more appropriate route to access to abortion in these circumstances than a simple disability exception. However, in this respect, our final draft legislation closely reflects the Citizens' Assembly recommendations and so it includes a 'serious foetal anomaly' ground in late pregnancy; pp. 112-113, *Repealing the 8th*.

³¹ See further, Center for Reproductive Rights, *Shifting the Frame*, (2017) at pp. 42-43. Available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Disability-Briefing-Paper-FINAL.pdf>

³² See further Jesudason, S and Epstein, J "The Paradox of Disability in Abortion Debates' (2011) 84 (6) *Contraception* 541-543.

³³ ss. 4-5 Abortion Law Reform Act 2008 (Victoria). Our model legislation would have achieved the same thing up to 22 weeks gestation; p. 112, *Repealing the 8th*.

³⁴ See further Termination for Medical Reasons, *Submission to the Special Oireachtas Committee on Repeal of the 8th Amendment* (2017) Available at <http://www.oireachtas.ie/parliament/media/committees/eighthamendmentoftheconstitution/TFMR-Full-Submission.pdf>

professional assessing the pregnant person's circumstances should take account of her entire health context.³⁵ This includes, not only immediate or developing risks to her health in pregnancy, but foreseeable future risks to her health arising from the demands of parenting. In making that assessment the medical professional should bear in mind that her role is to facilitate abortion decision-making and not to police it. As we suggest in our draft legislation, the pregnant person's own assessment of her health needs should be central to the decision-making process.³⁶

As we argued in the main text, the state has a responsibility to ensure pregnant people's access to high quality healthcare information, so that the decision to terminate a pregnancy is an informed one.³⁷ An understanding of reproductive justice rooted in crip theory³⁸ reminds us that decisions to terminate pregnancies are taken against the background of a broader ableist culture.³⁹ From this perspective the state should be concerned both with 'building a world with disability in it',⁴⁰ which embraces a range of bodies and range of ways of inhabiting them, as much as with securing pregnant people's opportunities to make their own reproductive decisions. That means, first, that we must ensure that on receipt of a diagnosis, the pregnant person also has access to non-directive counselling, which provides comprehensive, evidence-based information. This counselling should not simply provide her with a de-contextualised, medicalised list of symptoms. It should be designed to enable her to interpret the diagnosis and place it in its full social context, bearing in mind that what societies have considered to be intolerable differences and impairments have varied from time to time and from place to place.⁴¹ Counselling should directly challenge relevant prevailing stigma around disability.⁴² Doctors and midwives may also need to receive additional training in order to support such counselling. Although we did not put this recommendation on a statutory footing in our draft legislation, there may be a good argument for doing so in future.⁴³ This is not least because the decision to

³⁵ See the discussion of 'Rethinking the doctor patient relationship' on p. 72 *et seq*, *Repealing the 8th*.

³⁶ Section 4 of the proposed legislative text contained in Chapter 5, *Repealing the 8th*.

³⁷ See discussion of 'Decisional security' at p 62 *et seq* in *Repealing the 8th*.

³⁸ Crip theory is a body of radical theory that aims to resist the cultural and political dominance of able-bodied heteronormativity.

³⁹ See further Jarman, M. "Relations of Abortion: Crip Approaches to Reproductive Justice" (2015) 27(1) *Feminist Formations* 46-66.

⁴⁰ Garland Thomson R, 'Building a world with disability in it', in Waldschmidt, Berressem & Ingwesen (eds), *Culture--Theory--Disability: Encounters between Disability Studies and Cultural Studies* (2017; Transcript), at p 51.

⁴¹ See further Asch A, Wasserman D. "Where is the sin in synecdoche? Prenatal testing and the parent-child relationship" in *Quality of life and human difference: Genetic testing, health care, and disability* (New York, NY: Cambridge University Press; 2005) pp. 172–216. On the challenges of providing appropriate information to prospective parents see further Isabelle Ville, Véronique Mirlesse, "Prenatal diagnosis: From policy to practice. Two distinct ways of managing prognostic uncertainty and anticipating disability in Brazil and in France" (2015) 141 *Social Science & Medicine*, 19-26.

⁴² See for example HSE, *Informing Families* www.informingfamilies.ie

⁴³ Kafer, A, *Feminist, Queer, Crip* (Indiana University Press, 2013) 167-168. For an example of legislation along these lines see the 'Prenatally and Postnatally Diagnosed Conditions Awareness Act' (United States Public Law 110–374). Available at https://www.law.cornell.edu/topn/prenatally_and_postnatally_diagnosed_conditions_awareness_act. For details of the practice in Germany, where abortion can be accessed under the health ground in cases of

terminate may be a difficult and emotional one, and the pregnant person may need support and assistance. The state also bears a responsibility to provide all social, health and economic supports necessary to encourage pregnant people to continue wanted pregnancies after a diagnosis of foetal impairment. These obligations to do reproductive justice include properly resourcing the care of children and adults with significant long-term health needs, whether those needs are diagnosable prenatally or after birth.⁴⁴ However, even if the state takes these responsibilities seriously, it is not absolved of its duty to facilitate abortion access for people who need it.

Socio-economic grounds

The JOC rejected the Assembly's recommendation that abortion should be available on socio-economic grounds between 12 and 22 weeks gestation. We discuss the good reasons for the Assembly's original recommendation in Chapter 4.⁴⁵ As Senator Lynn Ruane has noted,⁴⁶ socio-economic status is not static. A person who feels able to continue a pregnancy at first may require a termination later in pregnancy; for example if she is bereaved, if family relationships collapse, if she becomes homeless, or if an existing child of the family becomes seriously ill and requires long-term care. Women in this position may not be able to wait for their circumstances to change, and may be required to continue to travel under the JOC's recommendations. The JOC rejected Senator Ruane's proposal that "termination of pregnancy should be lawful on socio-economic grounds determined by the woman in consultation with a doctor in accordance with best practice".⁴⁷ A pregnant person's socioeconomic circumstances should not be ignored if she seeks an abortion under the health ground. Rather, as we argued in Chapter 4, the pregnant person's health must be assessed holistically in context, and her own assessment of current and future risks to her health must be taken seriously.⁴⁸

Beyond Grounds for Abortion

The JOC recommendations focus on grounds rather than on the mechanics of ensuring that pregnant people can access abortions to which they are entitled under legislation. The JOC adopted the ancillary recommendations of the Citizens Assembly in full. We discuss crucial considerations for ensuring access in Chapter 4. As we have repeatedly stressed, deferring to medical practice does not solve the problem of ensuring access to abortion. The grounds supported by the JOC are, necessarily, flexible standards and not rigid rules. Malleable language, such as "risk to health" can be interpreted restrictively and often opportunistically to diminish women's access to healthcare. It is important to pay attention to the guidelines which

severe diagnosis of foetal impairment see Federal Ministry for Family Affairs, *Pregnancy Counselling* (2014) 16-17. Available at <https://www.bmfsfj.de/blob/95278/356f87878e2f128eb9aa85c1451430fb/schwangerschaftsberatung---218-englisch-data.pdf>.

⁴⁴ This, of course, is a struggle with resonances well beyond the abortion debate.

⁴⁵ p.p. 96-97, *Repealing the 8th*.

⁴⁶ Joint Oireachtas Committee, 13 December 2017

⁴⁷ Above no 1 at p 26.

⁴⁸ p.p. 94-96, *Repealing the 8th*.

will accompany our new abortion legislation once they are published, and to the content of any training programmes designed for medical professionals working under the new abortion legislation.

Conclusion

Under the JOC's recommendations, abortion would be available on request up to 12 weeks, and thereafter on grounds of fatal foetal abnormality, risk to health or risk to life. We can expect the Oireachtas to publish draft legislation along these lines before a referendum takes place in summer of 2018.