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Abortion and Constitutional Rights Since 2018: Assessing the Health (Regulation of Termination of Pregnancy) Act

Máiréad Enright[1]

Introduction

Analysis of abortion rights in Ireland typically focuses on the European Convention of Human Rights and international human rights law.[2] For decades, restrictive interpretation of the Eighth Amendment made it difficult to imagine broad constitutional protection for pregnant people's rights.[3] In 2018, a referendum removed the Amendment from Constitution, replacing it with a general power to legislate for abortion.[4] The Health (Regulation of Termination of Pregnancy) Act 2018 ('the Act') represents the first exercise of that power. The Act is grounds-based, requiring everyone who accesses an abortion in Ireland to meet prescribed conditions. Abortion is available on request before 12 weeks LMP[5] but the Act imposes a mandatory three-day waiting period between initial consultation and provision of treatment.[6] After 12 weeks LMP, it requires abortion-seekers to produce evidence of exceptional pregnancy-related suffering: risk to life,[7] risk of serious harm to health,[8] or diagnosis of some fatal foetal anomalies.[9] If a pregnant person cannot meet these criteria, they cannot access an abortion unless those treating them commit a criminal offence.[10] The referendum has not yet catalysed a more creative constitutional framing of abortion-seekers' rights, and the government which steered the Act through the Oireachtas said very little about its relationship to the Constitution at the time. In this article, I suggest that the Act's constitutional status is more precarious than is commonly assumed.

This article is in five parts. First, I argue that constitutional difficulties are created both by the text of the Act itself and by established working approaches to interpretation of its provisions.

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[2] For discussion of Irish abortion law in these terms see Mairead Enright, 'Abortion in Ireland: Prospects for Rights-Centred Law Reform?' (2023) European Human Rights Law Review 323.

[3] See generally Fiona de Londras and Máiréad Enright, 'The Constitution after the 8th' in *Repealing the 8th* (Bristol University Press 2018) <https://www.jstor.org/stable/j.ctv47w44r.6> accessed 10 March 2022. For a feminist account of the rights protections that were theoretically possible under the Eighth Amendment see Ruth Fletcher, '*Attorney General v X and Others* (1992): An Imagined Feminist Judgment' <https://papers.ssrn.com/abstract=2694351> accessed 11 March 2022.

[4] The new Article simply says, 'Provision may be made by law for the regulation of termination of pregnancy.'

[5] 'LMP' indicates that the time limit is counted from the pregnant person's last menstrual period, rather than from an estimated date of conception.

[6] s 12(4).

[7] ss 9 and 10.

[8] ss 9 and 10.

[9] s 11.

[10] s 23 of the Act. The pregnant person cannot be prosecuted for procuring her own abortion.

Both refusal of care and delayed care under the Act generate constitutional issues, even where a pregnant person unable to access care in Ireland ultimately terminates the pregnancy abroad. Second, I set out the constitutional rights that apply to abortion in the post-2018 constitutional order. The 'right to life of the unborn' under the Eighth Amendment once dominated constitutional discussion of abortion. With the Amendment gone, we can reframe restrictions on abortion access in terms of pregnant people's rights, including rights to bodily integrity, freedom from degrading treatment and privacy. These rights are not absolute but infringements must be proportionate to any legitimate goals the Oireachtas seeks to achieve. In certain cases, the combined effects of time limits and criminal sanction in the Act jeopardise constitutional rights protections. In the next section, I elaborate on these arguments by applying them to four specific issues: (i) fatal foetal anomaly, (ii) sexual violence, (iii) risk to health, and (iv) abortion in early pregnancy. In the fourth section, I briefly address 'constitutional realist' arguments which emphasise that Ireland's tradition of judicial deference to the Oireachtas in matters of social policy may limit the Constitution's usefulness in abortion cases. Finally, I consider recommendations for legislative change set out in the February 2023 report of the Independent Review of the abortion legislation,[11] and evaluate whether these are sufficient to vindicate pregnant people's constitutional rights.

Constitutional Rights and Access to Abortion Care: An Overview

While the Eighth Amendment was in force, the 'right to life of the unborn' was seen to trump any competing rights, except where the pregnant person's own life was at stake.[12] No court has considered the abortion issue since the Amendment was removed from the Constitution.[13] However, we can identify the basic substance of the post-2018 constitutional position on abortion. Shortly before the referendum, in *M v Minister for Justice & Others*,[14] the Supreme Court confirmed that the foetus had no rights other than those provided for in the Amendment. It follows that removing the Amendment from the Constitution also removed the independent constitutional right to life of the unborn.[15] With the Amendment

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[11] Marie O'Shea, 'The Independent Review of the Operation of the Health (Regulation of Termination of Pregnancy) Act 2018' (Department of Health (DoH) 2023) Report <https://www.lenus.ie/handle/10147/635573> accessed 22 June 2023. The Joint Committee on Health confirmed its broad acceptance of these recommendations in December 2023; 'Joint Committee on Health Report on the Independent Review of the Operation of the Health (Regulation of Termination of Pregnancy) Act 2018' (2023) <https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_health/reports/2023/2023-12-15_report-on-the-independent-review-of-the-operation-of-the-health-regulation-of-termination-of-pregnancy-act-2018_en.pdf> accessed 17 February 2024. At the time of writing, the government has not brought forward any proposals to amend the legislation.

[12] See further Fiona De Londras and Máiréad Enright, 'The Case for Repealing the 8th' in *Repealing the 8th* (Bristol University Press 2018) 1–3 <https://www.jstor.org/stable/j.ctv47w44r.5> accessed 18 March 2022.

[13] In 2021 Pat Kiely and Rebecca Price settled a case for wrongful termination of pregnancy, which engaged the fatal foetal anomaly provisions of the Act: 'Couple Settle Case over Wrongful Termination of Pregnancy' (*BreakingNews.ie*, 23 June 2021) <https://www.breakingnews.ie/ireland/couple-settle-case-over-wrongful-termination-of-pregnancy-1146388.html> accessed 15 February 2024. In 2022, the Chief Clinical Officer of the National Women and Infants Health Programme commissioned Professor Dame Lesley Regan to review the operation of Act in cases of this kind.

[14] [2018] IESC 14.

[15] Some residues of the older legal position are still apparent in the Act. For instance, offences under s 23 of the Act apply to procedures specifically intended to end the life of the foetus, and so the Act preserves the

gone, the state may still pursue its interests in protecting foetal life as a dimension of the common good, but foetal life is no longer the constitutional force that it once was. Pregnancy, therefore, is no longer a firm limit on the enjoyment of constitutional rights but rather provides the context in which many people will exercise those rights at key points in their lives. Those rights are enjoyed as a dimension of constitutional personhood, and include the rights to bodily integrity, privacy, and equality.

Today it is clear that pregnant people's constitutional rights may be breached in a range of ways if they cannot access timely abortion care under the Act. I outline four broad kinds of breach here, discussing them in more detail in the article's next section. First, we can imagine direct challenges to the constitutionality of certain provisions of the Act. The Act clearly prohibits abortion in most circumstances, particularly after the first trimester of pregnancy, and some of these prohibitions may not pass constitutional muster. Second, we can imagine a medical negligence case where a woman is entitled to access an abortion under the Act, but her doctor fails to appreciate that the relevant standard of care in her case requires offering the opportunity to terminate the pregnancy. While the primary claim would be in medical negligence, constitutional arguments may also arise. Healthcare practitioners[16] and public bodies such as the Health Services Executive[17] are obliged to protect pregnant patients' constitutional rights.

In thehe third kind of case, a pregnant person is deliberately refused care which she is lawfully entitled to access under the Act. Issues of this kind may arise around refusals of care by medical personnel who identify as conscientious objectors. However, we should also be aware of refusals arising from restrictive interpretations or applications of provisions of the Act. In such cases, healthcare personnel believe that, even if it would otherwise be negligent to withhold abortion care, it would not be legal to provide it. Pro-choice doctors at all levels of the health service have been central to the rollout of abortion provision in Ireland, including by producing guidance on the interpretation of the legislation,[18] and adapting their practice to provide the best possible care within the limitations of the legislation.[19] However, pregnant people may also be refused legal abortion care and such refusals are often framed as a symptom of the 'chilling effects' of criminalisation.[20] Chilling effects raise clear constitutional

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'doctrine of double effect' in life-saving cases, where the foetus dies as a result of a procedure intended to save the pregnant person.

[16] *Kearney v McQuillan* [2010] 3 IR 576. Insofar as the relevant constitutional rights have horizontal effect, it is possible to foresee a constitutional case that is built, at least in part, on a doctor's unlawful refusal to treat or refer.

[17] s 42 of the IHREC Act 2014.

[18] Bianca M Stifani and others, 'Abortion Policy Implementation in Ireland: Successes and Challenges in the Establishment of Hospital-Based Services' (2022) 2 SSM – Qualitative Research in Health 100090, 4.

[19] Deirdre Niamh Duffy and others, 'Service Provider Perspectives and Experiences of the Health [Regulation of Termination of Pregnancy] Act 2018' (Department of Health (DoH) 2023) Report 57 <https://www.lenus.ie/handle/10147/635553> accessed 22 June 2023.

[20] See A Mullally and others, 'Working in the Shadows, under the Spotlight–Reflections on Lessons Learnt in the Republic of Ireland after the First 18 Months of More Liberal Abortion Care' (2020) 102 Contraception 305. Researchers have identified a range of other chilling factors, which may operate alongside or independent of the law. These include providers' fear of media publicity, concerns about colleagues' and superiors' reactions and even a desire to avoid additional workload within an already over-stretched healthcare system: O'Shea (n 11) 48, 66; Stifani and others (n 18) 5.

issues. While the Amendment was still in force, Irish courts affirmed that uncertainty in the abortion law, and consequent confusion among medical practitioners,[21] could undermine the secure enjoyment of constitutional rights, and this principle remains relevant today. In addition, before the 2018 referendum, the Health Services Executive negotiated significant and well-publicised settlements in three cases where women legally entitled to access a life-saving abortion under the Irish Constitution were not permitted to do so, in part because treating doctors interpreted the applicable law as prohibiting even life-saving abortion. Savita Halappanavar died because doctors refused her request for a timely and lawful life-saving abortion.[22] A hospital ethics committee denied Michelle Harte an abortion in Ireland. She was required to travel for a life-preserving abortion while gravely ill with cancer, at significant risk to her health.[23] Ms Y was denied an abortion despite a clear risk to her life, and gave birth in Ireland under intensely traumatic conditions, with long-term consequences for her health and that of her child.[24] We can imagine a case where a pregnant person contests her medical team's interpretation of a provision of the Act, requiring the court to clarify how the Act should be interpreted. Constitutional rights must be 'taken seriously' so that they have 'life and reality' in practice. This means that legislation must be interpreted to give effect to those rights.[25] Where two interpretations are available, and one is constitutional but the other is not, a court will presume that the Oireachtas intended the constitutional interpretation.[26]

Finally, even if care is not outright refused, it may be delayed so that a pregnant person falls outside one of the time limits provided for in the Act. For instance, a doctor cannot treat a

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[21] See *AG v X* [1992] IESC 1 per McCarthy J *obiter*; *PP v HSE* [2014] IEHC 622.

[22] Sabaratnam Arulkumaran, 'Investigation of Incident 50278 from Time of Patient's Self Referral to Hospital on the 21st of October 2012 to the Patient's Death on the 28th of October, 2012'. Her husband sued the Health Services Executive (HSE) claiming, *inter alia*, that her constitutional right to life had been breached. Caroline Crawford, 'Savita's Husband to Sue Her Doctor for Negligence' *Irish Independent* (Cork, 22 September 2013) <https://www.independent.ie/irish-news/savitas-husband-to-sue-her-doctor-for-negligence/29596560.html> accessed 15 February 2024. The case was settled in 2016; Paul Cullen and Kitty Holland, 'Husband's Action over Death of Savita Halappanavar Settled' *The Irish Times* (Dublin, 9 March 2016) <https://www.irishtimes.com/news/crime-and-law/courts/high-court/husband-s-action-over-death-of-savita-halappanavar-settled-1.2566536> accessed 15 February 2024.

[23] 'Case in Focus: Michelle Harte' (*Irish Council for Civil Liberties*) <https://www.iccl.ie/her-rights/health/michelle-harte/> accessed 15 February 2024. The case was settled 2011. Despite this settlement, and despite the subsequent passing of the Protection of Life During Pregnancy Act 2013, Aoife Mitchell Creaven was required to travel for an abortion in strikingly similar circumstances in March 2014. Her case was settled in March 2021. Vivienne Traynor, 'Husband to Use Money from Settlement for Surrogacy' <https://www.rte.ie/news/courts/2021/0304/1200994-creaven-court/> accessed 15 February 2024.

[24] Case settled 2018. Her action included a claim of unjustified, intentional or negligent infringement of and wrongful interference with or failure to vindicate her constitutional rights: Ann O'Loughlin, 'Asylum Seeker Refused Abortion Sues the State' *Irish Examiner* (Cork, 20 March 2016) <https://www.irishexaminer.com/news/arid-20388316.html> accessed 15 February 2024.

[25] *Buckley v Attorney General* [1950] IR 67, 8; *XA (An Infant) v Minister for Justice, Equality and Law Reform* [2011] IEHC 397. This principle has previously been invoked in relation to marriage (*A v MJELR* [2011] IEHC 397), rights of access to the courts (*O'Connor v Nurendale* [2010] IEHC 387) and involuntary detention (*XX v Clinical Director of St Patricks* [2012] IEHC 224).

[26] *McDonald v Bord na gCon* [1965] IR 217**.** In an interpretation case, the individual refused a timely abortion will argue that there are two or more possible interpretations of a key provision of the Act, and that a healthcare provider employed by the Health Services Executive (HSE) has adopted a restrictive interpretation which is incompatible with the Constitution.

pregnant person under s 12 (access in early pregnancy) after 12 weeks LMP. Delays may arise for many reasons, including a delay in assessing the pregnant person's entitlement to access an abortion under the Act, or a failure to transfer care to a different healthcare provider following an assertion of conscientious objection. The Act does not guarantee prompt access to care. It does not say how long a pregnant person may wait for care after they have requested an abortion.[27] This is a problem because abortion is always time-sensitive, and so delay can be harmful even if the person affected eventually accesses care. Delay may mean that the pregnant person suffers uncertainty,[28] additional trauma or avoidable additional risk to life or health. Delay often means that the pregnant person cannot access a legal abortion in Ireland at all. This is because the Act partially criminalises abortion by reference to fixed deadlines. If the pregnant person misses a statutory deadline, no doctor can treat her without risking prosecution. The pregnant person can only lawfully be treated in Ireland if she can bring herself under one of the other statutory grounds for abortion access; for instance, the risk to health and life ground under s 9. Of course, even where this is possible, proving eligibility is likely to require them to suffer a serious and unavoidable deterioration in their health, and associated infringements of constitutional rights. Certainly, a person unable to access a timely abortion in Ireland may travel to another jurisdiction[29] but, as discussed further below, while travel is a safety net, it does not cure a breach of constitutional rights.[30]

It should be clear from this discussion, therefore, that removal of the Eighth Amendment has complicated the constitutional position around abortion provision. The old constitutional prohibition concealed and minimised a diverse range of potential harms which are more visible under the new legislation. While potential violations of constitutional rights are inherent in the structure of the Act itself, they are also associated with everyday working interpretations of the Act, and with wider structural features of the Irish healthcare system. Moreover, they are relevant in cases of suboptimal or delayed abortion care, as much as in cases where care is refused. In the next section, I examine the substance of the key constitutional rights at issue when abortion care is delayed or denied.

Constitutional Rights of Pregnant People After the Eighth Amendment

In this section, I survey relevant case law on the rights to bodily integrity and freedom from inhuman and degrading treatment, the right to privacy and the right to equality. I focus on these rights, rather than on the pregnant person's right to life, which was already recognised,

[27] By contrast, some time limits are included in the review process under s 16 (which only applies to post-12-week abortions).

[28] In *RR v Poland*, ECtHR Rep 648 (2011) the European Court of Human Rights found that the 'painful uncertainty' of not knowing whether it will be possible to terminate a pregnancy following a fatal anomaly diagnosis can be degrading for the pregnant person.

[29] Statistics on people who provide Irish addresses when seeking abortion care in England and Wales indicated that some women who require abortion care are not receiving it in Ireland. Although the numbers accessing NHS abortions pre-12 weeks have declined dramatically since 2018, a significant number (198 out of 375) accessed care between 13–19 weeks. These are likely to be people who have been unable to meet the 12-week threshold: Joanna Mishtal and others, 'Policy Implementation – Access to Safe Abortion Services in Ireland Research Dissemination Report' [2021] UNDP–UNFPA–UNICEF–WHO–World Bank Special Programme of Research, Development and Research Training in Human Reproduction (HRP), Department of Sexual and Reproductive Health and Research, World Health Organization, 20 Avenue Appia 1, 36.

[30] See similarly *NIHRC's Application* [2018] UKSC 27 *per* Kerr J.

albeit in a very limited way, while the Amendment formed part of the Constitution. I also briefly consider the rights of conscientious objectors. The Irish courts have considered very few cases directly engaging the constitutional rights of pregnant people and so, in this section, it is necessary to draw analogies between the experience of abortion-seekers and the experience of others who have litigated equivalent claims before the Irish courts; often patients seeking medical treatment, but also prisoners, asylum-seekers and children in state detention. This discussion establishes the framework for discussion of the 'grounds' for abortion under the Act, set out in the next section.

Bodily Integrity and Freedom from Inhuman and Degrading Treatment

The right to bodily integrity in Irish constitutional law is not a holistic right to health. Instead, it is a robust right not to have one's health endangered by the state, and to be protected from unjustified bodily interference and restraint.[31] This right protects against unwanted medical interventions, and is the basis for informed consent protections.[32] For instance, in *HSE v B,* the High Court held that it would violate the rights to bodily integrity and dignity to submit a woman to a C–section against her will.[33] While our focus here is on denial of abortion care, we should recall that denial of that care may precipitate the imposition of other unwanted interventions, to facilitate ongoing pregnancy or birth and that these, in turn, may jeopardise the pregnant person's bodily integrity. 'Bodily integrity' refers to more than physical protection. As Hogan J sets out in *Kinsella v Mountjoy*,[34] it encompasses 'not simply the integrity of the human body, but also the integrity of the human mind and personality'. This means that, in considering this right in the context of abortion, a court should be attentive to whether the pregnant person suffers extreme mental distress as a result of denied or delayed care.[35] The right to bodily integrity can apply when healthcare is criminalised or knowingly withheld,[36] and may encompass a right to help in accessing medical treatment. [37] For instance, this right has been recognised in the case of prisoners, since they cannot arrange medical care on their own behalf. While abortion-seekers are not typically imprisoned or detained, statutory restrictions under the Act mean that they can do little, on their own, to address delays in access to care; they are dependent on the actions of others.[38] It is clear that delay

[31] The right to bodily integrity is generally considered to be an unenumerated right under Art 40.1: *Ryan v AG* [1965] IESC 1. However, courts have also located equivalent protections in a range of cases on 'the right of the person' or the right to the security of the person explicitly protected in Art 40.3.2. See discussion in David Kenny, 'Recent Developments in the Right of the Person in Article 40.3: *Fleming v Ireland and the Spectre of Unenumerated Rights*' (2013) 36 Dublin University Law Journal 322.

[32] For discussion of 'information gaps' in Irish abortion care see Abortion Rights Campaign, 'Submission for the Review of the Health (Regulation of Termination of Pregnancy) Act 2018' (2022) 28–29 <https://www.abortionrightscampaign.ie/wp-content/uploads/2022/03/ARC_Submission-1.pdf>.

[33] *HSE v B* [2016] IEHC 605 [17]. See also *Governor of a Prison v GDC* [2020] IEHC 34 (force feeding); *JM v Board of Management of St Vincent's Hospital* [2003] 1 IR 321 (blood transfusion). That right would also include the right to refuse consent to abortion: *SPUC v Grogan* [1989] IR 753, 767

[34] [2011] IEHC 235; see also O'Donnell J in *Simpson v Mountjoy* [2020] IESC 52 [10].

[35] *Sullivan v Boylan* [2012] IEHC 389 (Hogan J).

[36] *State (C) v Frawley* [1976] IR 365, 372.

[37] In *McGee v AG* [1973] IR 284, Walsh J noted *obiter* that Mrs McGee could have argued that an exception should be made to the criminal law restricting access to contraception on the basis of the risks that future pregnancies posed to her health and life.

[38] See *MEO v Minister for Justice* [2011] IEHC 545, suggesting that the right to the person may be breached where the state places an individual in a situation where they are denied access to life-saving treatment, especially

in access to medical care can violate the right to bodily integrity,[39] precisely because delays may exacerbate mental distress.[40]

While travel abroad may secure access to abortion care, it may also expose a pregnant person to other violations of the right to bodily integrity. Travel disrupts continuity of care, potentially exposing affected people to further health risk.[41] Treatment will be delayed while the pregnant person makes travel arrangements and navigates a foreign healthcare system.[42] In certain cases, for instance, where the pregnant person is ill and travel is demanding, the expectation that they will travel may risk breaching their constitutional rights. The issues here resonate with those in *Aslam v Minister for Justice*,[43] where the High Court recognised that mandatory transfer of a heavily pregnant asylum-seeker by sea or air, risking early labour, could compromise her bodily integrity. Equivalent violations might be anticipated in the case of a gravely ill person denied an abortion on health grounds in Ireland, or a person denied an Irish abortion who is at risk of losing a pregnancy following a fatal foetal anomaly diagnosis. It is irrelevant that some help is available from private charities such as the Abortion Support Network; the state cannot delegate its responsibilities to them. In later pregnancy, a delay may mean that even if the pregnant person travels to another jurisdiction, they can only access more expensive and burdensome forms of abortion care. Protracted delays may mean that the pregnant person denied an abortion at home cannot access one abroad. For example, people travelling to England will need to reckon with the 24-week time limit for terminating a pregnancy on health grounds under the Abortion Act 1967, since it is much more difficult, in practical terms, to access care later in pregnancy. As Hogan J observed in *A v MJELR*, it is not enough that an opportunity to vindicate a constitutional right is available abroad in principle; it must also be genuinely accessible in practice.[44]

Violations of the right to bodily integrity can amount to inhuman and degrading treatment, provided that the individual experiences a minimum level of severity of risk to health, or of distress or humiliation.[45] The duration of exposure to risk may also be significant. Arguably, any degrading effects of the Act are indirectly rather than deliberately imposed, and older

when coupled with severe social and economic deprivation. See also *Barry v Midlands Health* [2019] IEHC 594 [67], on delay in provision of access to medication to a prisoner.

[39] See *Barry v Governor of the Midlands Prison* [2019] IEHC 594 [67], acknowledging in principle that sustained and excessive delay in provision of access to medication could breach a prisoner's constitutional rights.

[40] See by analogy the minority judgment of Hogan J in *NHV v Minister for Justice* [2016] IECA 86 [118] on the relationship between delays in the asylum system and mental health. Although the delay here was seven years, a shorter delay may have an equivalent effect in the context of abortion, because the window of time within which abortion is legally available is very short. The delay in *NHV* was 'open-ended and indefinite'. Again, the nature of pregnancy is such that a delay need not be indefinite to destroy the enjoyment of fundamental rights under the Constitution.

[41] Abortion Rights Campaign (n 32) 25.

[42] Sinead Kennedy, 'Accessing Abortion in Ireland: Meeting the Needs of Every Woman' (National Women's Council of Ireland 2021) 36 <https://www.nwci.ie/images/uploads/15572_NWC_Abortion_Paper_WEB.pdf>. Even in cases where an abortion is refused under s 11 the HSE does not arrange referrals to hospitals in Britain: ibid 56. See also the suggestion that some Irish doctors are 'wary' of providing information about accessing abortion care abroad. Abortion Rights Campaign and Lorraine Grimes, 'Too Many Barriers: Experiences of Abortion in Ireland after Repeal' (2021) 70 <https://www.abortionrightscampaign.ie/wp-content/uploads/2021/09/Too-Many-Barriers-Report_ARC1.pdf>.

[43] [2011] IEHC 512.

[44] [2011] IEHC 397 [31]–[33].

[45] *Mulligan v Governor of Portlaoise* [2010] IEHC 269; *Barry v Midlands Health* [2019] IEHC 594.

cases suggested that inhuman and degrading treatment must be inflicted with the deliberate intention to punish the sufferer by taking advantage of their vulnerability. It must be 'evil in its purposes' as well as 'evil in its consequences'.[46] More recent case law, however, imposes no such requirement.[47] Thus, the Constitution may recognise that a pregnant person may be subjected to degrading treatment, even if her medical team denied or delayed abortion care on the basis of a good-faith medical judgment, or a reasonable but erroneous interpretation of the Act.

These protections necessarily intersect with a concern for vulnerability and marginalisation. In a 'humane society', the duty to protect the right to freedom from degrading treatment, as Hogan J observes in *Connolly*, is 'most acute in the case of those who are vulnerable, marginalised and stigmatised'.[48] Where a vulnerable person, such as a child,[49] a refugee, a person living in poverty,[50] or an individual who is under the care and control of the state requires abortion access, the constitutional claim to protection from degrading treatment is even stronger. A pregnant person's underlying health conditions may also impose additional obligations on the state, particularly where these are potentially life-threatening. In *McGee v AG*[51] Walsh J insisted that, where pregnancy placed a woman's health at extraordinary risk, she would have 'a right to be assisted in her efforts to avoid putting her life in jeopardy'. The state would then have 'a positive obligation to ensure by its laws as far as is possible' that the means of preserving her life were made available to her. Vindicating a right to bodily integrity in these circumstances may mean affording access to abortion while her health is clearly at risk, even if a risk to life has not yet materialised.

Privacy

The constitutional right to privacy includes a right to autonomy or self-determination.[52] In particular, it includes a right to make informed decisions about one's own health.[53] By definition, any restriction on abortion access engages the right to privacy, because sexuality and reproduction are core and intimate dimensions of private life. In *McGee v AG*, the Supreme Court recognised that the decision to limit the size of one's family fell within the constitutional right to marital privacy. In that case, the Supreme Court was clear that the right applied irrespective of the individual's state of health; suffering is not a qualifying condition for privacy. Since *McGee* the courts have confirmed that the right to privacy applies to personal as well as marital life.[54] The Amendment was inserted into the Constitution as a

[46] *Frawley*; *Mulligan v Governor of Portlaoise* [2010] IEHC 269.
[47] It is likely to be important to demonstrate that the pregnant person has actually requested an abortion and disclosed any important personal or health circumstances to a relevant healthcare practitioner: cf *Mulligan v Governor of Portlaoise Prison* [2010] IEHC 269.
[48] *Connolly v Governor of Wheatfield Prison* [2013] IEHC 334.
[49] *SF v Director of Oberstown Children Detention Centre* [2017] IEHC 829, recognising that a child's right to bodily integrity may be violated in circumstances where an adult's may not.
[50] *MEO v Minister for Justice* [2011] IEHC 545.

[51] *McGee* [1973] IR 284, 315.

[52] O'Donnell J in *Simpson v Mountjoy* [2020] IESC 52 [10]; *Re A Ward of Court* [1995] IESC 1.
[53] *Kearney v McQuillan* [2010] 3 IR 576 (MacMenamin J).
[54] [1998] 1 ILRM 472.

deliberate check on the privacy rights enumerated in *McGee.*[55] It is not unreasonable to assume that these rights are restored because the Amendment is gone.

The constitutional right to freedom of conscience may buttress the right to privacy here. The Irish case law on this right is limited and has generally associated freedom of conscience with freedom of religion.[56] However, freedom of individual philosophical and moral conscience is also arguably part of the constitutional fabric.[57] The parental rights protected under the Constitution may also sometimes strengthen the argument from individual privacy. For example, following severe foetal anomaly diagnoses, pregnant people and their families make serious and weighty decisions in the interests of their whole families, any existing children, and the fatally compromised foetus, and these may legitimately include a decision to terminate the pregnancy.[58]

An expansive account of the relationship between privacy and self-determination would recognise that the Constitution protects individuals'[59] rights to determine the long-term shape of their lives, and to access the available resources necessary for full citizenship.[60]The Act does not fully recognise the pregnant person's moral capacity but subordinates their moral judgment to the determinative judgment of others in one of the most intimate possible areas of personal life.[61] The statutory criteria for access to abortion may be, as the Canadian Supreme Court once put it, 'entirely unrelated to [the pregnant person's] own priorities and aspirations'.[62] From this perspective, the statutory three-day waiting period under s 12 of the Act may be an especially egregious violation of the right to privacy, since it bears no connection to individual abortion-seekers' circumstances or aspirations.[63]

Proportionality

No provision or operation of the Act is illegitimate merely because it infringes the constitutional rights to privacy, bodily integrity or freedom from degrading treatment. What matters is that the infringement is disproportionate.[64] In addition, the courts will generally defer to the Oireachtas' assessment of proportionality.[65] In this section, I consider some factors which may be relevant to assessing proportionality.

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[55] See discussion in *M v Minister for Justice* [2018] IESC 14 [10–10].

[56] *McGee v Attorney General* [1974] IR 284, 291–92, 303, 326.

[57] See further *AM v Refugee Appeals Tribunal* [2014] IEHC 388 [32]–[33].

[58] See discussion of parental rights where a child is severely ill in *In the matter of JJ* [2021] IESC 1.

[59] Note that these protections generally extend to non-citizens: see *NHV v Minister for Justice* [2016] IECA 86.

[60] For an argument to this effect, see further *Gonzales v Carhart* 550 US 124 (2007) 172, Justice Ruth Bader Ginsburg dissenting.

[61] Ana Cristina González-Vélez, Carolina Melo-Arévalo and Juliana Martínez-Londoño, 'Eliminating Abortion from Criminal Law in Colombia' (2019) 21 Health and Human Rights 85. On this subordination as a dignitary harm, see Fiona de Londras, '"A Hope Raised and Then Defeated"? The Continuing Harms of Irish Abortion Law' (2020) 124 Feminist Review 33, 45. On indignity and abortion more generally, see Isabella Moore, 'Indignity in Unwanted Pregnancy: Denial of Abortion as Cruel, Inhuman and Degrading Treatment' (2019) 23(6) International Journal of Human Rights 1010. 19.

[62] *R v Morgentaler* [1988] 1 SCR 30.

[63] See Abortion Rights Campaign and Grimes (n 42) 41.

[64] See further David Kenny, 'Proportionality, the Burden of Proof and Some Signs of Reconsideration' (2014) 52 Irish Jurist 141.

[65] *O'Doherty and Waters v Minister for Health* [2022] IESC 32 [62]–[65].

Any infringement of constitutional rights through restriction and criminalisation of abortion access should be proportionate to the public policy goal sought to be achieved. The more serious the breach, the greater the justification required,[66] and here we should bear in mind that the potential risks to privacy, bodily integrity and life may be very grave. Under the Eighth Amendment, the constitutional imperative to protect the foetal right to life did most of the work for the state here. As already discussed, with the Amendment gone, the state remains entitled to pursue a policy goal of protecting foetal life, as a dimension of the common good. Other relevant policy goals include the imperative to promote safe abortion for those entitled to it, and to deter harmful practices. Whatever policy goals are invoked, the means selected to achieve them – a combination of time limits and criminal penalties – are now subject to more serious scrutiny.

We should also consider whether criminalisation of abortion is rationally connected to those policy objectives; whether it is arbitrary, unfair or based on irrational considerations. Arguably, it is irrational to seek to prevent abortion by criminalising it, because criminalisation does not achieve the policy goal of protecting foetal life by substantially reducing the number of abortions taking place within Ireland or accessed by Irish residents. It is not merely that criminalisation achieves any retributive, deterrent or public-order goal at the expense of individual rights,[67] but that it does not achieve them at all.[68] People still access abortion despite criminalisation, just as they did under the Amendment, but later in pregnancy and under more burdensome circumstances. These restrictions may be inspired by another policy goal;that of ensuring that where abortions happen, and especially where they happen in late pregnancy, they are done safely and by professionals. However, it is not clear that criminalising doctors generates safety benefits that are not already secured by the wider medical law. On the other hand, criminalisation, combined with strict time limits,[69] undermines the policy goal of ensuring that those legally entitled to abortion care can access it safely. At the time the Act was passed, the Oireachtas emphasised 'legal certainty' as a key objective of new abortion law; it recognised that well-drafted abortion law can confer a sense of security both on people making abortion decisions for themselves and on their doctors. However, criminalisation of abortion under the Act has not promoted certainty. Instead, it has amplified ambiguity in the law, generating 'chilling effects',[70] encompassing both burdensome over-compliance with the law and refusal to provide care, at all, or to the full extent permitted by law. Finally, the Act imposes arbitrary time limits,[71] which are unrelated

[66] *Meadows v Minister for Justice* [2010] 2 IR 701.
[67] See further Fiona de Londras and others, 'The Impact of Criminalisation on Abortion-Related Outcomes: A Synthesis of Legal and Health Evidence' (2022) 7 BMJ Global Health e010409.
[68] Abortion Rights Campaign, 'Joint Submission from Abortion Rights Campaign (ARC), Abortion Support Network (ASN) and Termination for Medical Reasons (TFMR) for the 39th Session of the UPR Working Group' (Abortion Rights Campaign 2021) 5 <https://www.upr-info.org/sites/default/files/document/ireland/session_39_-_may_2021/js3_upr39_irl_e_main.pdf>.
[69] For a broader discussion of time limits and abortion law see Joanna N Erdman, 'Theorizing Time in Abortion Law and Human Rights' (2017) 19 Health and Human Rights 29.
[70] Abortion Rights Campaign (n 32) 12.
[71] Doctors' experience is that the three-day waiting period does not materially impact patient decision-making: Mullally and others (n 20).

to any therapeutic considerations. Thus, they compound the unfairness of criminalisation of abortion under the Act.

We should also ask whether the current criminalisation of abortion impacts as little as possible on pregnant people's constitutional rights. In other words, any infringement on those rights must be tailored to achieving the policy objectives of protecting foetal life and deterring unsafe abortion. Certainly, the Oireachtas could draw on a range of alternative and less punitive social measures to protect foetal life by encouraging continued pregnancy, if it wished to do so.[72] However, the Constitution allows the Oireachtas a great deal of latitude in selecting means to achieve its policy ends.[73] Criminalisation of abortion, in itself, is probably legitimately within the Oireachtas' toolkit. The more serious difficulty is that the Act appears overwhelmingly concerned to restrict access to abortion and offers little by way of 'balance' between individual rights and public-policy goals. There are three key points here. First, the time limits imposed under the Act make no exceptions for individuals who may find it more difficult to navigate the abortion care system. The Act offers pregnant people no countervailing guarantee of prompt access to care, or of effective help for those refused a lawful abortion.[74] Second, the law does not criminalise only those abortions that are inherently unsafe, performed by unqualified people or done without the pregnant person's consent. Third, a pregnant person who falls short of the legislative criteria in only a minor way – for instance, by missing the 12-week deadline under s 12 by just one day – can be denied abortion access with all of the severe personal and health consequences that that entails, and with no other effective means of vindicating her affected constitutional rights.[75] The state might argue that extensive prohibitions avoid the need to involve its agents in determining which abortions are acceptable and which are not.[76] This argument is weakened by a range of provisions in the Act which require doctors to do precisely that; for instance by evaluating the severity of risks to health (s 9), or the likelihood that a foetus will die within 28 days of birth (s 11).

Equality

The Act only applies to 'women'.[77] We might argue that certain restrictions on access to abortion violate rights to gender equality because no form of cisgender men's healthcare is subject to the kinds of criminal restrictions habitually applied to abortion.[78] Some of the Act's

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[72] See eg *CC v Ireland* [2006] IESC 33; *Tuohy v Courtney* [1994] 3 IR 1 [47]. But see also *McGee* [1973] IR 284 per Walsh J, stating that in order to justify criminalisation of contraception, the state would have to show that all its other resources 'had proved or were likely to prove incapable' to achieve its legitimate aims. For discussion of alternative means of protecting unborn life, see Reva B Siegel, 'ProChoiceLife: Asking Who Protects Life and How – And Why It Matters' in 'Law and Politics Symposium: The Future of the U.S. Constitution' (2018) 93 Indiana Law Journal 207.

[73] See eg *MD v Ireland* [2012] IESC 10; *Murphy v Independent Radio and Television Commission* [1999] 1 IR 2.

[74] See similar argument in Center for Reproductive Rights Interveners' Submissions *In the Matter of an Application by Sarah Jane Ewart for Judicial Review* (18 January 2019) 9.

[75] cf *Murphy v Independent Radio and Television Commission* [1999] 1 IR 2 [47].

[76] ibid [48].

[77] Section 2 of the Act defines 'woman' as a 'female person of any age'. As a matter of statutory interpretation, this should include trans and non-binary people who require abortion care.

[78] On this point see the opinion of Sarah Cleveland in *Amanda Jane Mellet v Ireland*, UNHRC decision, CCPR/C/116/D/2324/2013 (9 June 2016) [13].

provisions, such as the mandatory three-day waiting period under s 12, draw on stereotypes of women as inherently indecisive or irrational.
Irish constitutional equality jurisprudence is underdeveloped, especially as regards substantive equality, and the courts avoid discussing it where other constitutional approaches are available.[79] In theory, of course, abortion engages the constitutional right to equality because reproductive self-determination 'relates to [individuals'] essential attributes as persons'.[80] Discrimination claims based on sex or gender are subject to especially strict scrutiny.[81] However, the Constitution expressly permits the Oireachtas to 'have due regard to differences of capacity, physical and moral, and of social function'.[82] This means that the Oireachtas enjoys wide discretion to distinguish between people based on sex or gender, provided that the distinctions imposed are not 'invidious, arbitrary or capricious'.[83] Differences in reproductive capacity may be assumed to produce unavoidable and natural differences in social function. For example, in *MD v Ireland* the Supreme Court was persuaded that such differences could justify disparate approaches under criminal law; the state could be justified in criminalising boys, but not girls, who engaged in underage sexual intercourse because girls could get pregnant and boys could not.[84] It may follow, therefore, that the Oireachtas is justified in applying exceptional criminal regulation to abortion, despite the consequences for gender equality, because it is impossible to address abortion without exposing people who have the biological capacity to become pregnant to distinctive burdens. However, it should be possible to distinguish between the criminalisation of abortion in general, and the more fine-grained regulation of abortion practice. For instance, an equality argument in a case focusing on the criminal regulation of abortion with pills in early pregnancy might have a greater chances of success, since it is more difficult to distinguish the practices of prescribing, dispensing and taking 'abortion pills' (mifepristone and misoprostol) from those applied to other medications which might be used by both men and women.[85]

Besides basic issues of gender inequality, the Act generates well-documented problems of abortion access for minoritised groups, including disabled people,[86] migrants, people living in poverty,[87] people at risk of domestic violence, and adolescents.[88] Even if the legislation does not exclude these groups by name, in practice, abortion is not equally accessible to them. The time limits in the legislation are punitive. The legislation assumes a pregnant person who has a strong awareness of their body so that they realise they are pregnant in good time; are aware that they are eligible for an abortion; know how to access it or can find out quickly;

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[79] *Murtagh Properties v Cleary* [1972] IR 330.
[80] *Quinn's Supermarket v Attorney General* [1972] IR 1; *Murphy v Ireland* [2014] IESC 19.
[81] *Re Employment Equality Bill 1996* [1997] 2 IR 321.
[82] Art 40.1.
[83] *MD v Ireland* [2012] IESC 10; *O'B v S* [1984] IR 316; *Redmond v Minister for the Environment* [2001] IEHC 128. *Dillane v Ireland* [1980] 1 ILRM 67**.** This is a more demanding test than the ordinary proportionality test discussed above, but see *Dokie v DPP* [2010] IEHC 110 applying the ordinary proportionality test to an equality claim.
[84] *MD v Ireland* [2012] IESC 10.
[85] See further Joanna N Erdman, Kinga Jelinska and Susan Yanow, 'Understandings of Self-Managed Abortion as Health Inequity, Harm Reduction and Social Change' (2018) 26 Reproductive Health Matters 13.
[86] For a discussion of constitutional equality law and disability, see Shivaun Quinlivan and Lucy-Ann Buckley, 'Reasonable Accommodation in Irish Constitutional Law: Two Steps Forward and One Step Back – Or Simply Out of Step?' (2021) 72 Northern Ireland Legal Quarterly 61.
[87] The Constitution does not include any recognised protection for socio-economic rights as such. See further Thomas Murray, 'Economic and Social Rights in Ireland' [2021] The Oxford Handbook of Irish Politics 40.
[88] Abortion Rights Campaign (n 67) 11–14.

have the resources to travel repeatedly for care if necessary and do not require much help to organise appointments, interact with doctors, or make and implement healthcare decisions. In theory, the Constitution may require state agents to ensure that people who may lack any of these characteristics – young girls, some disabled people, newcomers to Ireland or people living in poverty – receive accommodations when accessing legally available healthcare. Certainly, while the Amendment was in force, state agencies provided some limited assistance with abortion travel for migrants and children in state care, but it is not clear that this support was always recognised as mandated by the Constitution, or indeed, that it was sufficient to vindicate affected people's rights.[89] However, the case law on this point is very limited and has tended to concentrate on access to the courts rather than on broader access to state-funded services.[90]

The time limits under the Act pose a different equality problem. Arguably, equality requires not that people are helped to meet unfair criteria, but that those criteria are changed, so that barriers to abortion access are lowered or even eliminated. For example, some of those excluded under the provisions for access to abortion in early pregnancy under s 12 could be accommodated by a more expansive interpretation of s 9 (the health ground). Others would be better served if doctors could suspend the three-day wait requirement under s 12[91] or extend that section's 12-week time limit, or if both provisions were removed from the Act altogether. The Constitution allows the Oireachtas to make exceptions or special accommodations for minoritized groups in its legislation.[92] For example, the Oireachtas could extend the 12-week time limit under s 12 to facilitate abortion access by minors because they may take longer to realise that they are pregnant and to disclose their pregnancies to others. Here again, we run into the limitations of Irish constitutional equality law. The constitutional jurisprudence on indirect discrimination is underdeveloped, and it is not clear that the Constitution requires the Oireachtas to change the law[93] to ensure equality of access to legally available services.[94]

Fleming v Ireland is a case in point.[95] Marie Fleming argued that the criminal law on assisted suicide[96] discriminated against her. Her health had deteriorated so that it was impossible for her to end her life on her own, and the law criminalised anyone who would help her. The Supreme Court held that the law did not violate her right to freedom from discrimination simply because it made no exception for people in her position. The law did not directly

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[89] See Ruth Fletcher, 'Peripheral Governance: Administering Transnational Health-Care Flows' (2013) 9 International Journal of Law in Context 160. See also *A and B v Eastern Health Board* [1997] IEHC 176 affirming that, while the Constitution protected a right to travel, there was no positive right, as such, to access an abortion abroad.

[90] *DX v Judge Buttimer* [2012] IEHC 175 (cited with approval in *Fleming v Ireland* [2013] IESC 19). This argument may be most relevant to reviews under s 16 following a negative decision under ss 9 or 11 of the Act.

[91] During debates on the Act Health Minister Simon Harris suggested that the 'emergency' provisions under s 10 would allow doctors to exercise their discretion to treat a pregnant person where, for example, her health or life was at risk from intimate partner violence. There is no evidence that the Act has been interpreted in this way in practice; Seanad Deb 11 December 2018, vol 263, col 3.

[92] *Fleming v Ireland* [2013] IESC 19 [136].

[93] See Ben Mitchell, 'Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law' (2015) 53 Irish Jurist 36, 49.

[94] *Draper v AG* [1984] IR 277.

[95] *Fleming v Ireland* [2013] IESC 19.

[96] Criminal Law (Suicide) Act 1993 (the Act which decriminalised suicide in Ireland).

discriminate against disabled people. It was addressed, not to Ms Fleming, but to her potential assistant. The Court even suggested that it was not the law but Ms Fleming's disability that caused her difficulty, and that she could have escaped the strictures of the law if she had acted to take her own life while she was still well enough to do so. Denham J said that the constitutional protection of equality did not 'extend to categorise as unequal the differential indirect effects on a person of an objectively neutral law addressed to persons other than that person'. As with the law disputed in *Fleming*, the abortion legislation does not directly discriminate against any category of pregnant person and the criminal dimension of the law is addressed, not to pregnant people, but to those who would assist them. That said, perhaps *Fleming* would have been decided differently if the Supreme Court had accepted that the law in that case had some impact on one of Ms Fleming's fundamental rights. The Court held that the disputed law in *Fleming* was intended to protect the constitutional right to life and that there was no constitutional basis on which to assert a state-sanctioned right to die. A court could approach the abortion law differently. Unlike assisted suicide, the abortion legislation already permits abortion in some circumstances and there is now a clear constitutional basis – in the rights to privacy and bodily integrity as discussed above – for a claim to access abortion in a range of circumstances not currently provided for by statute. The pregnant person's case may be strongest where their health or life is at risk; here, their equality claim would intersect with the state's duty to safeguard life and preserve citizens from violations of their bodily integrity. Following *Fleming*, it might be argued that a person denied an abortion 2 has not been disadvantaged by the law, since, theoretically at least, they could have sought an abortion earlier in pregnancy. On this argumentny harm suffered would be attributable to the progressing pregnancy and not to the law itself, just as Ms. Fleming's suffering was attributed to her disability. That argument would be weaker in a case where a pregnant person only came to need an abortion in later pregnancy, following a health crisis or a diagnosis of fatal foetal anomaly.

The Rights of Those Who Object to Abortion

A doctor may refuse to treat a pregnant person, not because he believes the law forbids him to provide care in the circumstances, but because he is morally opposed to abortion. Section 22 of the Act acknowledges the rights of such 'conscientious objectors'.[97] The Act provides that while nobody can compel a healthcare practitioner to take part in a non-emergency abortion themselves, they are under a statutory obligation to make alternative arrangements for that patient's care.[98] This limitation on the objector's freedom of conscience is proportionate; necessary to give 'life and reality' to the countervailing rights of the pregnant person.[99] Indeed, it is arguable that the statutory restriction here does not go far enough,

[97] It is highly unlikely that hospitals can assert an institutional right under Art 44.2.5° of the Constitution to refuse to provide abortion care where this conflicts with their ethos, but the question has yet to be considered by an Irish court. Provision of state-funded maternal healthcare within an independent hospital does not fall squarely within the zone of religious denominational autonomy protected by Art 44.2.5°. See further Ruth Fletcher, 'Conscientious Objection, Harm Reduction and Abortion Care' in *Ethical and Legal Debates in Irish Healthcare* (Manchester University Press 2016).
[98] s 22(3). See further Desmond Ryan and others, 'Conscientious Objection in an Uncertain Time: New Challenges in Ireland' (2023) 14 Religions 1145.
[99] *Article 26 and the Employment Equality Bill* [1997] IESC 6.

because it contains no direct enforcement mechanism[100]; a doctor who refuses to promptly transfer care to a willing colleague is not punished.[101] Objectors may also obstruct lawful access to abortion in other ways – for instance, through persuasion or conservative interpretation of the legislation or refusal to co-operate with colleagues – without obliging them to disclose their motivations.[102]

Specific Issues in the Constitutional Law of Abortion

In this section, I use the constitutional arguments set out above to analyse the statutory 'grounds' for abortion access under the Act. I explore specific potential breaches of constitutional rights arising under each ground.[103]

Fatal Foetal Anomaly

Section 11 of the Act regulates fatal anomaly cases using a familiar combination of criminalisation and time limits. In this instance, however, the time limit relates to the foetus' prognosis rather than to the duration of the pregnancy. The Act requires two doctors to certify that the foetus is likely to die before, or within 28 days of, birth. If they cannot make that prediction in good faith, they cannot lawfully offer the pregnant person an abortion in Ireland. Many women are continuing to travel to access abortion following diagnosis of a fatal foetal abnormality because doctors caring for them cannot adequately determine when the baby, if born alive, will die.[104]

A denial of abortion access following a diagnosis of fatal foetal anomaly can breach the constitutional right to freedom from degrading treatment. Arguments to this effect have succeeded in other legal forums. In *Mellet* and *Whelan*[105] the UN Human Rights Committee identified Ireland's pre-2018 abortion law with the infliction of 'intense mental and physical suffering' and 'a high level of mental anguish' on pregnant people required to leave Ireland

[100] Abortion Rights Campaign and Grimes (n 42) 55; Abortion Rights Campaign (n 32) 21.

[101] s 22 of the Act. Catherine Conlon, Kate Antosik-Parsons and Éadaoin Butler, 'Unplanned Pregnancy and Abortion Care (UnPAC) Study' (2022) 14 <http://www.tara.tcd.ie/bitstream/handle/2262/101813/Unplanned%20Pregnancy%20and%20Abortion%20Care%20UnPAC%20Study%20Conlon,%20Antosik-Parsons%20and%20Butler%202022.pdf?sequence=1>. O'Shea (n 11) 14.

[102] The Oireachtas has also been solicitous of the constitutional rights of people who seek to obstruct or impede abortion access through interventions and assemblies at locations where abortions are provided. The Health (Termination of Pregnancy) (Safe Access Zones) Bill 2023 passed its second stage just before Christmas 2023. It would criminalise a range of activities within 100 metres of the entrance to a location where abortion services are provided. The Bill would protect protesters' rights to freedom of expression, assembly and religion in three ways. The spatial restrictions in the Bill allow for protest at a range of other locations. Under s 3(2), protest is specifically permitted outside the Oireachtas, and within houses of worship located within 100 metres of a relevant healthcare facility. Section 4(1) of the Bill further provides that gardaí may warn individuals engaged in prohibited conduct, giving them the opportunity to desist without risking arrest.

[103] For more detailed analysis of case studies drawing on documented experiences under the 2018 Act, see Mairead Enright, 'Constitutional Analysis of the Health (Regulation of Termination of Pregnancy) Act 2018: Identifying Rights Violations and Suggesting Possible Legislative Reforms' [2023] Constitutional Analysis of the Health (Regulation of Termination of Pregnancy) Act 2018.

[104] O'Shea (n 11) 67.

[105] UN Human Rights Committee, *Mellet v Ireland*, UN Doc No CCPR/C/116/D/2324/2013 (2016). See also UN Human Rights Committee, *Whelan v Ireland*, UN Doc No CCPR/C/119/D/2425/2014 (2017).

to end a pregnancy abroad following a fatal foetal anomaly diagnosis. Although Ireland's abortion law no longer directly criminalises women, most of salient features of *Mellet* and *Whelan* continue under the Act. They include ruptures in continuity of healthcare, the requirement to navigate an unfamiliar health service, and the requirement to seek care abroad without the support of trusted doctors, family, and friends.[106] Women denied care in Ireland after a foetal anomaly diagnosis describe depending on charitable support to fund treatment and travel,[107] separation from family and friends,[108] and difficulty in repatriating their babies' remains.[109] These issues can all have a serious impact on a family's ability to frame and grieve their loss.[110] In *NIHRC's Application* Kerr LJ, dissenting, held that a pregnant person is 'plainly humiliated' if she is required, against her wishes, to carry a foetus who is doomed to die. Kerr LJ confirmed that this distress is exacerbated, not eased, if the only way to end the pregnancy is to travel to a foreign jurisdiction without the support of friends and family.[111] Some women who travelled after 2018 reported a sense of stigma or shame associated with being told that they did not qualify for care in Ireland.[112] People who receive a fatal diagnosis at or after 20 weeks are under significant time pressure.[113] They may need to withdraw from assessment under Irish law and travel sooner rather than later, in an effort to obtain care in the UK before 24 weeks when it is more accessible, less expensive and less burdensome.[114]

The 28-day provision in s 11 is arbitrary because it does not reflect any substantive difference either in outcomes for the foetus or in affected pregnant people's experiences. It is not a meaningful tool for distinguishing between fatal and 'severe' anomaly.[115] From the perspective of the pregnant person, the distress associated with denial of abortion care or with travel abroad is not materially different whether doctors predict the foetus will die within a month of birth, or some weeks later. In addition, the 28-day limit in s 11 cannot always be justified as necessary to protect foetal life in the later stages of pregnancy. Even under the Amendment, the courts recognised that the duty to protect foetal life was weaker where nothing could practicably be done to ensure that the foetus was born alive. This was most starkly illustrated in *PP v HSE*, where the High Court held that it was not permissible to expose a brain-dead pregnant woman's body to futile and 'grotesque' medical interventions in an effort to keep the foetus alive as long as possible.[116] With the Amendment gone, the state's legitimate interest in foetal life is even more narrowly drawn. It is not obvious that it

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[106] Abortion Rights Campaign and Grimes (n 42) 68.
[107] Conlon, Antosik-Parsons and Butler (n 100) 172.
[108] Abortion Rights Campaign and Grimes (n 42) 68; Conlon, Antosik-Parsons and Butler (n 100) 173.
[109] Conlon, Antosik-Parsons and Butler (n 100) 178–79.
[110] ibid 177.
[111] [2018] UKSC 27 [237]–[238].
[112] Conlon, Antosik-Parsons and Butler (n 100) 173.
[113] Numbers of people travelling to England and Wales for this reason have dropped less than expected; Mishtal and others (n 29) 36. On challenges in accessing ultrasound anomaly scans, see Niall Tierney, Martina Healy and Barry Lyons, 'Changes in Abortion Legislation and Admissions to Paediatric Intensive Care in Ireland' [2023] 19(1) Clinical Ethics 47
[114] Abortion Rights Campaign and Grimes (n 42) 26; Conlon, Antosik-Parsons and Butler (n 100) 149.
[115] See Stacey Power, Sarah Meaney and Keelin O'Donoghue, 'The Incidence of Fatal Fetal Anomalies Associated with Perinatal Mortality in Ireland' (2020) 40 Prenatal Diagnosis 549. Only half of 939 cases between 2011 and 2016 where congenital anomaly was identified as the cause of perinatal death could come within the scope of s 11.
[116] [2014] IEHC 622.

can justify wide-ranging restrictions on abortion access following a fatal anomaly diagnosis, even where there is a slim chance that the foetus will survive for more than a month after birth.

Besides challenging the constitutionality of the 28-day limit, an individual denied an abortion on fatal foetal anomaly grounds might argue that s 11 should be interpreted more expansively to guarantee pregnant people's relevant rights. Section 11 has created a significant interpretive burden for doctors willing to provide care.[117] It requires two doctors to certify that they are of the reasonable opinion formed in good faith that there is 'present a condition affecting the foetus that is likely to lead to the death of the foetus' either before or within 28 days of birth. Prospective quality of life is irrelevant. The legislation does not specify the degree of likelihood, but there is some evidence that in practice many doctors will require something approaching certainty[118] before certifying that a patient is eligible for abortion under s 11. Available evidence suggests[119] that s 11 is not always interpreted consistently across hospitals. Although the Act provides that only two doctors need to decide together, it is common for larger multi-disciplinary teams to decide these cases on a group consensus basis.[120] These behaviours suggest a very strict working interpretation of what certifying doctors are required to do in order to demonstrate the 'reasonableness' of their decision.[121] This is an example of a 'chilling effect' under the law because doctors engage in over-compliance in order to avoid criminalisation.[122] This 'chilling effect' also imposes resource burdens because foetal medicine units are seen to require access to a range of additional expertise and testing facilities in order comply with the Act.[123] In practice, it also means that a pregnant person who is legally entitled to an abortion in Ireland on fatal foetal anomaly grounds may be denied that abortion, and suffer associated breaches of constitutional rights, even where two appropriate doctors are available and willing to certify based on their reasonable good faith opinions.

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[117] Conlon, Antosik-Parsons and Butler (n 100) 33. See discussion in Stacey Power, Sara Meaney and Keelin O'Donoghue, 'Fetal Medicine Specialist Experiences of Providing a New Service of Termination of Pregnancy for Fatal Fetal Anomaly: A Qualitative Study' (2021) 128 BJOG: An International Journal of Obstetrics & Gynaecology 676.

[118] This is a skewed approach to 'good faith'. Discussing 'good faith' in the context of abortion in the foundational case of *R v Bourne* [1938] 3 All ER 615, Lord Macnaghten explained that in some cases 'only the result can prove whether the diagnosis was right or wrong, whether the anticipation was right or wrong', but the doctor 'can only base his decision on knowledge and experience', and on consultation with another appropriate doctor. Certainty is not a prerequisite for a good-faith decision.

[119] Abortion Rights Campaign (n 67) 7.

[120] Such teams can also be a site of tension between willing providers and non-providing colleagues: O'Shea (n 11) 66; Duffy and others (n 19) 61.

[121] Mishtal and others (n 29) 30.

[122] Duffy and others (n 19) 58.

[123] We should recall that the Act is criminal law, which exposes doctors to some risk of prosecution. In *McInerney v DPP* [2014] IEHC 181 Hogan J noted that, where the Oireachtas fails to articulate clear standards for the 'fair, consistent and even-handed' application of criminal law, it falls to others to fill in the gap. Ambiguities in the Act could lead to 'subjective, arbitrary and inconsistent application of [criminal law]' undermining the constitutional commitment to equality before the law. Even if the provisions of ss 9 and 11 are not so hopelessly vague as to be 'manifestly unconstitutional', doctors and pregnant people have a reasonable expectation of clarity in the application of the Act.

Sexual Violence

The Act does not include a specific 'sexual violence' provision. The Oireachtas assumed that a person who has been raped would access an abortion 'on request' before 12 weeks LMP under s 12.[124] A person who cannot access an abortion even though she is pregnant because of rape is undoubtedly exposed to degrading treatment. This principle is well established under international human rights law.[125] The basis for an equivalent position is also visible in Irish constitutional law. In *DPP v Tiernan*[126] Finlay CJ wrote that rape was a 'gross attack upon the human dignity and the bodily integrity of a woman and a violation of her human and constitutional rights', including because rape could impose the possibility of a distressing pregnancy and birth on the victim. Finlay CJ clearly recognised that a deeply unwanted pregnancy continued the original violation of the rape. The Oireachtas also has a legitimate interest in ensuring that victims of sexual crime can access abortion without undue procedural burdens.[127] In practice, the Act prevents that interest from being achieved. At a minimum, the legislation should allow for extension of the s 12 time limit in cases where a pregnancy is related to rape or other sexual coercion.

Risks to Health

Abortion should be available in Ireland in cases where continuing a pregnancy places a woman's health at risk of serious harm, but in practice this ground is rarely used.[128] Section 9 requires two doctors to certify that they are of the reasonable opinion formed in good faith that the pregnant person is a risk of 'serious harm' to their health, that the foetus has not reached viability and that it is 'appropriate to terminate the pregnancy in order to avert the risk'. 'Serious harm' to health is not defined. Neither is 'appropriate'.[129] Although it is not clear that 'serious' means 'permanent' or 'life-threatening', so few abortions are performed under s 9 as to suggest that it is being interpreted in this way.[130] The number of abortions provided in Ireland on grounds of risk to life or health after 12 weeks in 2022 was very low – 26.[131] An equivalent number of abortions were provided in almost every year in which the Protection of Life During Pregnancy Act 2013 was in force.[132] That highly restrictive legislation, which gave effect to the interpretation of the Amendment in the *X* case, only permitted abortion where necessary, as a last resort, to save the woman's life. The statistics published by government do not distinguish between s 9 abortions performed on grounds of risk to life,

[124] Abortion Rights Campaign (n 32) 18.

[125] Discussed in UN Human Rights Committee, *Mellet v Ireland*, UN Doc No CCPR/C/116/D/2324/2013 (2016). See also UN Human Rights Committee, *Whelan v Ireland*, UN Doc No CCPR/C/119/D/2425/2014 (2017).

[126] [1988] IR 250.

[127] Joint Oireachtas Committee on the Eighth Amendment of the Constitution, 'Report of the Joint Committee on the Eighth Amendment of the Constitution' [2.23].

[128] No women treated under the health ground were interviewed for the Report: Conlon, Antosik-Parsons and Butler (n 100) 126.

[129] See also IOG Clinical Guidance at <https://rcpi-live-cdn.s3.amazonaws.com/wp-content/uploads/2019/05/FINAL-DRAFT-TOP-GUIDANCE-RISK-TO-LIFE-OR-HEALTH-OF-A-PREGNANT-WOMAN-220519-FOR-CIRCULATION.pdf>.

[130] See discussion in Abortion Rights Campaign and Grimes (n 42) 56.

[131] Kennedy (n 42) 29.

[132] Abortion Rights Campaign (n 32) 18.

and those performed on grounds of risk to health.[133] They cannot tell us whether abortion is accessible when serious health risks materialise after 12 weeks LMP, or whether pregnant people are required to wait until it is clear that continuing pregnancy will pose a risk to life. It may be that low numbers of terminations under s 9 reflect the availability of abortion on request in earlier pregnancy. However, these statistics nevertheless suggest that s 9 is not available as a safety net where abortion is sought after 12 weeks LMP and the pregnant person's health is foreseeably at risk, but their life is not. This would also mean that s 9 abortions are not available in cases of rape or in cases of foetal abnormality not deemed to meet the restrictive test in s 11, even where the pregnant person's mental health is at risk of serious harm. As with s 11 it is likely that the risk of arrest and prosecution has had a 'chilling effect' on interpretation of the legislation within the healthcare system. There is some suggestion that risk to life and risk to health are being conflated in practice[134] or even that some doctors may not understand how the law in this area has changed.[135]

Section 9 should also be understood as reinforcing the 12-week time limit under s 12. After 12 weeks LMP, most pregnant people who need an abortion in Ireland are entirely abandoned by the law, regardless of their circumstances. Alternatively, s 9 forces those whose health is already at clear risk to wait until their life is in jeopardy or until they are exposed to avoidable permanent or long-term health consequences. If that is the case, then s 9 of the Act mirrors the old position under the Amendment, whereby people were denied an abortion in earlier pregnancy, even if a risk to life was foreseeable, and required to wait until they were almost at death's door. As such, severe violations of the rights to bodily integrity and freedom from inhuman and degrading treatment may flow from the narrow application of s 9.

Abortion in Early Pregnancy

Two time-based restrictions govern abortion in early pregnancy. The first is the rigid 12-week LMP limit under s 12. 'LMP' indicates that the time limit is counted from the pregnant person's last menstrual period, rather than from an estimated date of conception.[136] Foetal age is two weeks behind the gestational age calculated using LMP. This time limit is strict (12 weeks + 0 days).[137] The strict 12-week period is entirely arbitrary; it has no rational connection to medical practice. It applies even to cases of failed early medical abortion.[138] Early medical abortion has a 2 per cent failure rate[139] and access to early surgical abortion in Ireland is very limited.[140] If a pregnant person is treated under s 12 before the 12-week period has elapsed,

[133] Department of Health, 'Notifications in Accordance with Section 20 of the Health (Regulation of Termination of Pregnancy) Act' (2023) <https://www.gov.ie/pdf/?file=https://assets.gov.ie/280111/ebd82a23-8b39-408d-960d-a2e8358b196f.pdf#page=null> accessed 17 February 2024.
[134] O'Shea (n 11) 8.
[135] Duffy and others (n 19) 74.
[136] s 12(5).
[137] Institute of Obstetricians and Gynaecologists, *Interim Clinical Guidelines: Termination of Pregnancy under 12 Weeks* (December 2018) <https://rcpi-live-cdn.s3.amazonaws.com/wp-content/uploads/2018/12/FINALINTERIM- CLINICAL-GUIDANCE-TOP-12WEEKS.pdf>.
[138] The Abortion Support Network reported 25 such cases in 2020: Abortion Rights Campaign (n 67) 6. In all cases, treatment was commenced prior to the 12-week cut off under s 12.
[139] ibid 7. This risk could be managed by offering surgical terminations.
[140] Abortion Rights Campaign (n 32) 30.

and the abortion fails, the 12-week deadline cannot be extended.[141] This is the case even though the failed abortion is not the pregnant person's fault.[142] Those refused care in early pregnancy are likely to face further suffering. A woman refused care at a few days past the 12-week limit may take weeks to arrange treatment abroad, if she can even travel at all. So, a refusal in Ireland at 12 weeks may become a more difficult and expensive termination at 20 weeks elsewhere,[143] or a continued unwanted pregnancy at home.

Since the time limit triggers potential criminal penalties, it also produces chilling effects. For instance, pregnant people considered to be close to 10 weeks LMP are often referred for ultrasounds[144] to determine gestation, even though this is not required by law and can impose additional delays in accessing treatment.[145] In addition, as a matter of policy, from 10 weeks LMP, pregnant people are only treated in hospital rather than in the community.[146] This generates obvious burdens for primary care providers, who may need to work under pressure to ensure a hospital appointment for a person approaching the 12-week limit.[147]

Section 12 also imposes a three-day wait requirement. This waiting period is unique to abortion care. It has no therapeutic justification and reflects a paternalistic impulse to ensure that women seeking abortion on request have properly considered their decision.[148] It directly engages the right to privacy because it is rooted in the assumption that pregnant people cannot make reliable abortion decisions in their own time. It is also inappropriate given the time-sensitivity of early access to medical abortion.[149] It leads to delays in abortion access, which may expose pregnant people to unnecessary risk. The mandatory waiting period necessitates two doctors' appointments, which compounds existing burdens on those – for instance, teenagers, homeless people or disabled people – who may already struggle to keep multiple appointments.[150] A three-day delay may also mean that they cannot access an abortion in Ireland within 12 weeks and face further delays until they can arrange and pay for travel and treatment abroad.[151]

Since the s 9 health ground is interpreted so restrictively, s 12 is the only legal route to abortion for a range of pregnant people in extremely demanding circumstances. As such, delays or denials of care after 12 weeks may lead to breaches of the right to freedom from

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[141] Duffy and others (n 19) 57.

[142] Kennedy (n 42) 20.

[143] Mary Donnelly and Claire Murray, 'Early Medical Abortion Care in Ireland: Conscientious Provision and the Role of Law' (26 May 2023) 13 <https://papers.ssrn.com/abstract=4460644> accessed 22 June 2023.

[144] See *Baby O v Minister for Justice* [2002] IESC 44 (Keane CJ) acknowledging *obiter* that pregnancy-related testing can engage the constitutional right to privacy, and that compulsory pregnancy testing would be a gross violation of that right.

[145] Abortion Rights Campaign and Grimes (n 42) 38; Mishtal and others (n 29) 15; Kennedy (n 42) 21. On difficulties with the quality and reliability of scans, see Abortion Rights Campaign (n 32) 35–36.

[146] Conlon, Antosik-Parsons and Butler (n 100) 1; Mishtal and others (n 29) 15.

[147] Kennedy (n 42) 38.

[148] Acknowledged in O'Shea (n 11) 86.

[149] Abortion Rights Campaign (n 32) 13.

[150] O'Shea (n 11) 17.

[151] Simon Cobbin & Co, *Report of the Trustees and Financial Statements for the Year Ended 31st December 2020 for Abortion Support Network* (2021) <https://www.asn.org.uk/wp-content/uploads/2021/06/Abortion-Support-Network-final-signed-accounts-2020.pdf>.

degrading treatment.[152] Even outside of such cases, it is possible that the time-based criminal provisions under s 12 are unconstitutional as unjustified breaches of the right to privacy. In *McGee*, the Supreme Court found that a law criminalising the importation of contraceptives was unconstitutional as a breach of the right to marital privacy. Today, the same right – to assert sexual and reproductive self-determination by pursuing an 'informed and conscientious wish'[153] to use a safe medication or device – can be asserted outside of marriage. There are strong parallels between the contraceptives at the centre of *McGee* and the pills used for early medical abortion. Sale and importation of contraception were criminalised at the time of the *McGee* decision but its use was not. Similarly, in Ireland today, it is a crime to assist someone else to have an abortion outside the terms of the Act, but it is not illegal to use pills to self-induce abortion, even if it may be difficult to acquire them in practice.[154] Unlike in *McGee*, pregnant people who have abortions are not criminalised, but their doctors are.[155] In some ways, this worsens their situation by comparison with Mrs McGee. Mrs McGee made her decision under medical advice, but a woman who needs an abortion after 12 weeks LMP is denied access to meaningful medical help by s 23 of the Act which criminalises that assistance in most circumstances. In addition, by criminalising doctors, the Act arguably exposes women to some of the same harms of criminalisation considered in *McGee*. For example, if a doctor were prosecuted for performing an illegal abortion, the private life of the pregnant person would also be affected by the associated police investigation, and potentially by court proceedings, even if she did not desire the prosecution and even if the case were never made public. If a pregnant person accesses abortion illegally – for instance, using pills – she is vulnerable to many of the burdens that were typical of the pre-2018 abortion experience: secrecy,[156] fear, and concern for the fate of those assisting her.

Almost 50 years ago, the Supreme Court in *McGee* was clear that rights to access contraception did not extend in the same way to ending a pregnancy, but the people have since determined, by a resounding majority vote in the 2018 referendum, that abortion is constitutionally permissible in principle. It may be that the state is entitled in principle to restrict access to abortion later in a viable pregnancy. It is less likely that early pregnancy is sacrosanct. In the right case, a court might be persuaded that an early medical abortion at 14 weeks LMP, for example, falls within the zone of privacy protected by the Constitution. The strength of this case is likely to depend on the court's interpretation of other elements of the Act: for example, a 12-week LMP time limit may seem more reasonable if there are meaningful routes to access after 12 weeks, such as under the s 9 health ground.

Judicial Deference and Constitutional Rights

[152] Such a case, however, would be likely to engage other sections of the Act rather than focusing on s 12 on its own. A claimant who had been raped, for example, would also take issue with the inaccessibility of abortion on health grounds under s 9. A claimant with a foetal diagnosis deemed 'not fatal enough' but discovered after 12 weeks might take issue with ss 9 and 11.

[153] *per* Henchy J.

[154] s 23(3) of the Act. On access to abortion by telemedicine since 2018 see Sierou Bras and others, 'Accessing Abortion Outside Jurisdiction Following Legalisation of Abortion in the Republic of Ireland' (2021) 47 BMJ Sexual & Reproductive Health 200.

[155] Doctors were not criminalised under the impugned law in *McGee* unless they were themselves involved in sale or importation of contraceptives.

[156] de Londras (n 61) 44.

I have argued that the Act, and the systems of care that have grown up around it, clearly engage some of the fundamental rights protections under the Constitution. However, the Oireachtas has tended to shy away from articulating its own account of the constitutional position on abortion, and so it may be that it will fall to individual litigants to develop arguments for legislative reform in the superior courts. In practice Irish courts have been reluctant to interfere with legislation governing contested social issues,[157] especially those with significant resource implications.[158] However, no important issue of judicial overreach or practicability would arise if an individual challenged an element of the Act following denied or delayed abortion care. The Oireachtas has not entirely failed to legislate for abortion, and so the courts would not be asked to create a body of new legal principles from scratch.[159] In addition, since an overwhelming majority of the electorate voted in a referendum to facilitate legislation of this kind, abortion is no longer as controversial as it once was.

Cases could be brought some time after an instance of denied or delayed abortion care,[160] and a successful claim could result in an award of damages.[161] An individual case could also have wider consequences for future abortion regulation.[162] An Irish court may well respond favourably to a case which, rather than arguing that the Act should provide for additional grounds, simply seeks to ensure that the existing legislative grounds effectively vindicate constitutional rights. Similarly, a court may welcome arguments that are narrow enough that the primary effect of any relief would be to ensure access to existing services for one individual[163] or a few people who may be at risk of a breach of a fundamental right or rights, so that any resource implications are 'commutative' rather than 'distributive'.[164] A case seeking to strike down, or make exceptions to, the time limit provision in s 12 might have the most extensive consequences. However, existing statistics suggest that unmet need for abortion in early pregnancy numbers in the hundreds rather than the thousands.[165] Unmet need on health grounds or in cases of fatal foetal anomaly is even lower.

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[157] *Ryan v AG* [1965] IR 294.

[158] *Lowth v Minister for Social Welfare* [1998] 4 IR 321. See *CA v Minister for Justice* [2014] IEHC 532; the court may make an order compelling expenditure if that is the only way to vindicate the right in issue.

[159] See *MD v An t-Ard Chlaraitheoir* [2014] IESC 60.

[160] There is no reason to assume that Irish law cannot recognise that wrongful denial of abortion leading to birth – whether high risk or not – is a compensatable harm. For example, in cases of failed sterilisation attributable to negligence, the Irish courts have found a right to compensation for the pain, suffering and inconvenience of unwanted childbirth: *Ahern v Moore* [2013] IEHC 72. In *Byrne v Ryan* [2007] IEHC 207, Kelly J acknowledged that pregnancy can cause pain, sickness and distress even though it is neither an illness nor a disease.

[161] See *W v Ireland (No 2)* [1997] 2 IR 41. In practice damages are likely to be derived from a parallel negligence action. On tort as a vehicle for protecting constitutional rights, see *Carr v Olas* [2012] IEHC 59. In the rare circumstances where damages for an action at common law do not provide an effective remedy, damages may be available for breach of constitutional rights: *Blehein v Minister for Health and Children* [2018] IESC 40.

[162] This is possible in a case where a litigant is no longer affected by the Act because they are no longer pregnant or because their pregnancy is too far advanced for the Act to apply. See by analogy *NHV v Minister for Justice* [2018] 1 IR 246.

[163] cf *State (C) v Frawley* [1976] IR 365, 372.

[164] See distinction in *O'Reilly v Limerick Corporation* [1989] ILRM 181.

[165] For instance, In 2019, 5 per cent of abortion-seekers presenting for care with the Irish Family Planning Association (IFPA) were close to or just over the 12-week limit. Irish Family Planning Association, 'Submission to the Review of the Health (Regulation of Termination of Pregnancy) Act 2018' (2022) 16 <https://www.ifpa.ie/app/uploads/2022/05/Submission-to-the-Review-of-the-operation-of-the-Health-Regulation-of-Termination-of-Pregnancy-Act-2018.pdf>.

We could also imagine a case in which a legal abortion has been refused but could still be provided in time. Then, the litigant might ask for a prohibitory injunction preventing prosecution of a doctor or doctors willing to provide the care. A mandatory injunction would also be possible where, for instance, the Health Services Executive became aware of a severe and ongoing breach of constitutional rights and did not take practicable steps to address it.[166] Given the time-bound nature of abortion rights, it is to be hoped that,[167] in the right case, a court would grant mandatory relief in the form of an urgent injunction enabling an individual pregnant person to access an abortion[168] if that abortion was otherwise deemed permissible within the Act.[169] Declaratory relief, leaving it to the respondent to develop an appropriate solution, is also a possibility here.[170]

Certainly, the Act enjoys the presumption of constitutionality. This means that a court would try to avoid striking down any part of the Act where it is possible instead to interpret it in accordance with the Constitution and attribute any breach of constitutional rights to how the Act has been applied in practice. That said, no provision of the Act is immune from constitutional challenge.[171] If a court did strike down part of the Act as unconstitutional, it could not directly prescribe how those provisions should be replaced. A court could, however, urge the Oireachtas to legislate to fill a gap in existing legislation where that gap leads to breaches of constitutional rights.[172] It could also strike down sections of the legislation, leaving it to the Oireachtas to determine how best to fill the resulting gap in a way that fulfils the Constitution's demands.[173]

<u>Prospects for Change?</u>

Historically, pregnant people rarely tested Ireland's abortion law in the domestic courts. The Oireachtas should not require them to do so now. In any event, the Oireachtas should not think of the constitution only in terms of litigation risk. It should proactively remedy defects

[166] On this point, see *O'Donnell v South Dublin County Council* [2015] IESC 28 (McMenamin J): 'If, in an exceptional case such as this, statutory powers are given to assist in the realisation of constitutionally protected rights or values, and if powers are given to relieve from the effects of deprivation of such constitutionally protected rights, and if there are no reasons, constitutional or otherwise, why such statutory powers should not be exercised, then I think such powers may be seen as being mandatory.' It is, in my view, immaterial that the powers in the Act are exercised by individual doctors rather than by an organ of the state. However, this may be one reason to prefer a prohibitory injunction rather than a mandatory injunction.
[167] See, however, the discussion of 'mootness' and pregnant litigants in submissions in *D v Ireland* App No 26499/02 (27 June 2006) [69]–[73], [76]–[80]; and more broadly *Lofinmakin v Minister for Justice* [2013] IESC 49.
[168] Since damages would not be an adequate remedy.
[169] This is more likely in an interpretation case, where the entitlement to access a lawful abortion is already established. A court is unlikely to make *ad hoc* exceptions to the prevailing law. On this point see *Fleming* [115].
[170] This scenario would leave it to the respondent to find an appropriate solution.
[171] The President did not refer it to the Supreme Court under Art 26 before he signed it into law.
[172] See discussion by Hogan J in *G v District Justice Murphy* [2011] IEHC 445 [34]–[47]. For cases in which the Oireachtas had entirely failed to legislate on a pressing issue of reproductive rights, see *AG v X* [1992] IESC 1; *Roche v Roche* [2009] IESC 82; *MR and DR v An t-Ard Chláraitheoir* [2014] IESC 60. For discussion of circumstances in which a court may give the Oireachtas the opportunity to act before fashioning a remedy, see *Persona v Minister for Public Enterprise* [2017] IESC 27.
[173] Including by calling a referendum.

in the regulatory regime established by the Act without requiring individuals and families to go to court while in personal crisis or following enormous personal loss.[174]

Some issues identified in this article can be solved, at least temporarily, without amending the legislation. Improved ministerial or clinical guidance on interpretation of the legislation would suffice. This was made clear at the height of the COVID–19[175] crisis when the government facilitated telemedicine services[176] by clarifying that the 'having examined' provision in s 12 did not require in-person physical examination. Similar guidance could redress conservative interpretation of other sections. Guidance could clarify, for instance, that s 11 does not require a certifying doctor to be certain that the foetus will die before or within 28 days of birth, but only that they are more likely to die than not. Guidance could also clarify that 'serious harm' to health under s 9 does not equate to permanent, life-threatening or disabling harm. The report of the Independent Review has made recommendations to this effect.[177] However, it fell short of recommending that provision of abortion care should be fully decriminalised, or relevant criminal offences radically narrowed. It is not clear that guidance alone could undo the pervasive impact of 'chilling effects'. A more effective solution may lie in a 2023 Private Members Bill[178] introduced by Bríd Smith TD of People Before Profit. The Bill would amend the Act, including by decriminalising abortion and extending the foetal anomaly ground to cases where the baby, if born alive, is predicted to die within a year of birth.

The legislation should also be amended to ensure accountability where pregnant people's statutory entitlements are not fulfilled. At present, the Act offers very little procedural certainty, and delayed care is very common. No statutory remedy is available to an individual who could show that they were entitled in principle to a s 9 or s 11 abortion but were prevented from accessing it because they were not informed of their right to a review, received a substandard review, or were blocked by an uncooperative conscientious objector.[179] In each of these cases – reviews and transfers following conscientious objection – the Oireachtas inserted specific, albeit weak, protections into the Act, but it is very difficult to impose accountability for non-compliance. Given the real risk of breach of the right to bodily integrity or freedom from inhuman and degrading treatment arising from delay, the Oireachtas should amend the Act to include clear and enforceable statutory entitlements to timely and effective care.

Arbitrary time limits, including the 12-week limit for abortion access in early pregnancy, should be revisited or removed. The Independent Review has advised reframing the three-

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[174] See similar argument in Amy Krauss, 'Legal Guerilla: Jurisdiction, Time, and Abortion Access in Mexico City' (2021) 17 Revista Direito GV e2139, 7.

[175] Kennedy (n 42) 24. Alison Spillane and others, 'Early Abortion Care during the COVID-19 Public Health Emergency in Ireland: Implications for Law, Policy, and Service Delivery' (2021) 154 International Journal of Gynecology & Obstetrics 379; Kennedy (n 42) 24.

[176] Abortion Rights Campaign (n 32) 27.

[177] O'Shea (n 11) 21, 67.

[178] Health (Regulation of Termination of Pregnancy) (Amendment) Bill 2022.

[179] See discussion of refusal to refer in Abortion Rights Campaign and Grimes (n 42) 55. In *P and S v Poland* App no 57375/08 ECHR (2012) the European Court of Human Rights found that refusal to refer a girl who had been raped to a willing abortion provider could contribute to a breach of the right to freedom from inhuman and degrading treatment under Article 3 ECHR.

day mandatory waiting period under s 12 as a statutory entitlement, which individuals could exercise or not. The Report also suggests that the 12-week time limit could be extended in a few exceptional circumstances, where a woman has 'timed out' before care was provided or completed.[180] This would cover failed treatment,[181] delays caused by the three-day wait if retained, or delays within the healthcare system. As drafted, however, it would not address obstacles to accessing timely care associated with structural inequalities.[182] Arguably, therefore, more extensive amendments are necessary. The time limit could be removed or extended, or the Oireachtas could make statutory exceptions for categories of individual who are more likely to suffer severely where time limits are enforced. Bríd Smith's Private Members' Bill would abolish the three-day waiting period, decriminalise any involvement in performing an abortion and remove the 12-week time limit for accessing abortion on request.[183]

As de Londras has written,[184] the Act betrays some uncertainty about pregnant people's status under Irish law. They are no longer criminalised as they once were. However, the Oireachtas has not clarified their status as rights-bearers or explored their post-2018 position within the Constitution. Given the Act's restrictions and silences, we can assume either that the Oireachtas does not believe that pregnant people have many significant constitutional rights at all[185] or, more plausibly, that the Oireachtas is leaving it to other constitutional actors, including litigants and judges, to figure out what those rights might be. In this article, I have tried to suggest how the space of pregnant people's constitutional rights might be filled, while staying as close as possible to a plausibly mainstream approach to constitutional interpretation. Reproductive justice activists may, therefore, be disappointed by the limited nature of the arguments advanced here. After all, the referendum to repeal the Amendment was promised to be a watershed moment in Irish constitutional history.

The Amendment was just one element of a cramped and conservative constitutional structure that still constrains the development of reproductive rights. This article's most useful contribution may be to highlight how little traditional constitutional analysis offers to people who need abortions. In the end, the demand to 'take abortion out of the Constitution' has not ensured a measure of reproductive justice for Ireland's pregnant people. Irish constitutional law focuses on protecting only against the most severe state-imposed harms, using negative rights provisions rather than positive guarantees of services and resources. In the past, the Oireachtas has heard proposals for referendums to insert a free-standing right to bodily integrity and a limited positive right to health into the Constitution.[186] It has also heard demands for enhanced constitutional protection of socio-

[180] O'Shea (n 11) 25.
[181] Joint Oireachtas Health Committee, 31 May 2023. For an example case, see Donnelly and Murray (n 142) 14.
[182] See in Dyuti Chakravarty and others, 'Restrictive Points of Entry into Abortion Care in Ireland: A Qualitative Study of Expectations and Experiences with the Service' (2023) 31 Sexual and Reproductive Health Matters 2215567.
[183] Health (Regulation of Termination of Pregnancy) (Amendment) Bill 2022.
[184] de Londras (n 61) 42.
[185] ibid 45.
[186] Thirty-fourth Amendment of the Constitution (Right to Personal Autonomy and Bodily Integrity) Bill 2014 (Bill 105 of 2014); Thirty-Ninth Amendment of the Constitution (Right to Health) Bill 2019 (Bill 92 of 2019).

economic rights.[187] If the promise of the 2018 referendum is to be fulfilled, the Oireachtas must urgently articulate and commit to a new constitutional agenda for pregnant people.

[187] Constitutional Convention, 'Eighth Report of the Convention on the Constitution: Economic, Social and Cultural Rights' (March 2014) <https://www.constitution.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4>.