Constitutional Issues and the Health (Regulation of Termination of Pregnancy) Act 2018

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1. Introduction

1.1. Human rights analyses of abortion regulation in Ireland focus on the European Convention of Human Rights[2] and international human rights law.[3] This is understandable because, for

[1] Thank you to Rachel Roth, Anna Carnegie, Wendy Lyon and Eoin Daly for comments on earlier drafts. This paper is based on research conducted in partnership with the Abortion Rights Campaign and funded by an ESRC Impact Acceleration Account grant awarded by the University of Birmingham.

[2] The European Convention does not have direct effect in Irish law and cannot act as a 'surrogate constitution'; *Gorry v. Minister for Justice and Equality* [2020] IRESC 55. A declaration that legislation is incompatible with the state's obligations under the ECHR does not affect that legislation's validity, operation or enforcement and any related damages paid are paid *ex gratia*. However, in interpreting legislation, the courts must, insofar as possible, do so in a manner compatible with ECHR rights. In determining the content of ECHR rights, they must take due account of the jurisprudence of the European Court of Human Rights and related bodies. See ss. 2 and 4, European Convention on Human Rights Act 2003. The Supreme Court emphasises that rights claims under the Irish constitution must be dealt with separately from claims under the ECHR, not least because the Convention does not have direct effect in Irish law. There is no expectation that Irish constitutional rights will have substantively the same content as Convention rights; *Clare County Council v McDonagh & Anor* [2022] IESC 2.

[3] Ireland is a dualist legal system. International treaties only have effect, to the extent that national law so specifies; *McD v L* [2009] IESC 8; *O'Donnell v South Dublin CC* [2015] IESC 2; *Clare County Council v McDonagh & Anor* [2022] IESC 2. However, there is a presumption that the Irish state will comply with its obligations under international law; Kavanagh v. Governor of Mountjoy Prison [2002] IESC 13, Arguments from international

decades, restrictive interpretation of the 8th Amendment made it practically impossible to imagine a constitution that protected pregnant people's rights.[4] The 2018 referendum removed the 8th Amendment from the Irish Constitution, replacing it with a general power to legislate for abortion.[5] This paper sets out some potential constitutional issues raised by the Health (Regulation of Termination of Pregnancy) Act 2018 ('the 2018 Act'). Section 1 outlines some categories of case that might come before the Irish courts. It argues that both cases of refusal of care and delayed care could generate constitutional issues. It also shows that live constitutional issues may arise even where the plaintiff ultimately accessed an abortion abroad. Last, it shows that plaintiffs may argue either (i) that an element of the Act is unconstitutional or (ii) that, while the Act is itself constitutional, healthcare providers do not always interpret it in accordance with the constitution. Section 2 discusses the constitutional rights that apply to abortion in the post-2018 constitutional order. Whereas the 'right to life of the unborn' dominated constitutional discussion of abortion pre-2018, the removal of the 8th Amendment allows us to analyse restrictions on abortion access in terms of pregnant people's rights. These include rights to bodily integrity, freedom from degrading treatment and privacy. Although these rights are not absolute, the Constitution requires that any infringements of those rights must be proportionate to any legitimate goals the Oireachtas seeks to achieve. In certain cases, the combination of time limits and criminal sanction in the Act falls short of this standard. Section 3 elaborates on the arguments developed in Section 2, applying them to five specific issues (i) fatal fetal anomaly (ii) rape (iii) risk to health (iv) abortion in early pregnancy (v) inequalities in abortion access. Section 4 counters '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, Section 5 makes some general recommendations for future Oireachtas action to vindicate pregnant people's constitutional rights.

2. The 2018 Act in Court?

2.1. No court has considered the abortion issue since the 2018 legislation came into force. We know that pregnant people, as persons under the Constitution enjoy certain rights. These include the rights to bodily integrity, privacy, and equality. The scope of these rights is unclear because while the 8th Amendment was in force, discussion of pregnant people's constitutional rights stagnated. This was because the 'right to life of the unborn' was seen to trump the competing rights of the pregnant person, except where her own right to life was in issue.[6] However, we can identify the basic substance of the post-2018 constitutional position on abortion. Removing the 8th Amendment from the constitution removed the independent

human rights law may have persuasive effect in developing the content of Irish constitutional rights; *Attorney General v Damache* [2009] IESC 81; *People (DPP) v Gormley* [2014] IESC 17.

[4] See generally Fiona de Londras and Máiréad Enright, 'The Constitution after the 8th', *Repealing the 8th* (1st edn, 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 8th 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.

[5] The new Article 40.3.3 simply says that "Provision may be made by law for the regulation of termination of pregnancy".

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

constitutional right to life of the unborn. Shortly before the referendum, in *M v Minister for Justice & Ors,*[7] the Supreme Court confirmed that the fetus had no rights other than those provided for in the 8th Amendment. With the 8th Amendment gone, the state may still consider its interests in protecting fetal life as a dimension of the common good, but fetal life is no longer the constitutional force that it once was. Now that the legislation is under review, we need to return to discussion of the pregnant person's constitutional rights, to determine their form and content.[8] Pregnancy is no longer a limit on the enjoyment of constitutional rights but provides the context in which many people will exercise those rights at key points in their lives.

2.2. In some circumstances, a pregnant person's constitutional rights may be breached where they cannot access timely abortion care under the 2018 Act. A person entitled to access an abortion under Irish law might not do so in Ireland because of (i) lawful or unlawful refusal of care (ii) negligent or deliberate failure to treat[9] or (iii) delay.[10] There is no express guarantee of access to abortion services under the Act.[11] However, even while the 8th Amendment was in force, the state recognised that denial of access to a legal abortion could constitute a serious legal wrong, particularly where it put the pregnant person's life at risk in breach of the minimal constitutional protections then available to those in need of abortion. The state offered significant and well-publicised settlements in three cases where women were entitled to access a life-saving abortion under Irish law could not to do so. Savita Halappanavar died because doctors refused her request for a timely and lawful life-saving abortion under the 8th Amendment. A hospital ethics committee denied[12] Michelle Harte an abortion in Ireland. She was required to travel for a life-preserving abortion while gravely ill with cancer, and at significant risk to her health.[13] Ms. Y was denied an abortion despite clear risk to her life and

[7] [2018] IESC 14

[8] As such, this paper focuses on constitutional law, even where related arguments are available under international instruments or under the ECHR. Constitutional rights may overlap with rights protected under these instruments. Protections offered under the Constitution may be broader or narrower than those available elsewhere. Not all of the 2018 Act's deficiencies raise clear constitutional issues. Nevertheless, they may require attention from the Oireachtas because they raise important issues of public policy, and/or issues under international or European human rights law.

[9] *State (C) v. Frawley* [1976] I.R. 365, 372

[10] See *Barry v Midlands Health* [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.

[11] In some cases, the issue is not so much that care has been wrongfully and directly denied as that the pregnant person has been denied the opportunity to have her circumstances fully assessed under the 2018 Act. Pregnant individuals have some limited procedural rights once their request for an abortion has been considered under s.9 (life and health) or s.11 (fatal fetal anomaly). Anyone requesting an abortion under the Act is entitled to have their care transferred to another healthcare practitioner in the event that a 'conscientious objector' refuses to participate in an abortion. Another procedural protection is the review process under ss 13 - 17. This process becomes relevant if a doctor refuses to consider a pregnant person's request for an abortion under s. 9 or s.11 or refuses to certify her entitlement to an abortion. The doctor must inform the pregnant person of their entitlement to apply for a review of that decision. If the pregnant person requests a review, the review committee must fulfil that request within seven days of its having been convened. It must also adhere to the procedures prescribed in s. 17, including ensuring that the pregnant person or her representative can be heard by the review committee. Where these requirements are not complied with, the pregnant person is denied important process protections intended to avoid breach of constitutional rights.

[12] Case settled 2016.

[13] Case 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.

gave birth in Ireland under intensely traumatic conditions, with long-term consequences for her health.[14] The legal arguments leading to these settlements were not made public, but lawyers raised constitutional concerns in each case.

2.3. It is wrong to assume that delays are inevitably less harmful than an outright refusal of care or failure to treat. Abortion is always time sensitive. The 2018 Act does not guarantee prompt access to care. It imposes no limit on the time that a pregnant person must wait after they have requested an abortion.[15] Delay can be harmful even if the person affected eventually accesses care.[16] It may mean that, as happened in Michelle Harte's case, the pregnant person suffers uncertainty,[17] additional trauma or to avoidable additional risk to their life or health. Delay will often mean that the pregnant person cannot access a legal abortion in Ireland at all.[18] This is because the 2018 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. For instance, a doctor cannot treat a pregnant person under s. 12 (access in early pregnancy) after 12 weeks' LMP.[19] A pregnant person cannot access abortion under ss. 9 and 10 (risk to life or health) once the fetus has reached viability.

2.4. Certainly, a person unable to access a timely abortion in Ireland may travel to another jurisdiction.[20] While travel is a safety net, it does not cure a breach of constitutional rights.[21]

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[14] 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.

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

[16] See by analogy the minority judgment of Hogan J. in *N.H.V. 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 *N.H.V.* 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.

[17] In *R.R. v. Poland*, Eur. Ct. H.R. 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.

[18]Exceptionally, delay may mean that they must wait and see whether they become eligible for an abortion in Ireland under another statutory criterion. For example, a person unable to access an abortion in time before 12 weeks LMP may subsequently become eligible under the risk to health and life ground in s.9. However, proving this eligibility would, in many cases, require them to suffer a serious and avoidable deterioration in their health.

[19] S. 23. The offence applies to procedures specifically intended to end the life of the fetus – the 2018 Act preserves the 'doctrine of double effect' in life-saving cases, where the fetus dies as a result of a procedure intended to save the pregnant person.

[20] 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. However, 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; J 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.

[21] On a similar point see *NIHRC's Application* [2018] UKSC 27 *per* Kerr J. For a contrasting view on travel see Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833.

Travel disrupts continuity of care, potentially exposing affected people to further health risk.[22] Treatment will be delayed while the pregnant person makes travel arrangements and navigates a foreign healthcare system.[23] In certain cases; for instance, where the pregnant person is very ill and travel is very demanding, the expectation that they will travel may risk breaching their constitutional rights.[24] 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,[25] they can only access more expensive and burdensome forms of abortion care. Protracted delays or personal circumstances may mean that the pregnant person denied an abortion at home cannot [26] access one abroad.

2.5. A person unable to access timely care under the 2018 Act might argue that an element of the Act is unconstitutional. However, they might also make a simpler claim; that the Act was not properly interpreted or applied in the course of their care, with severe consequences for their constitutional rights. Restrictive interpretation is often a symptom of the 'chilling effects' of criminalisation,[27] and it can have a real constitutional impact. Under the 8th Amendment, the Irish courts noted that uncertainty in the abortion law, and consequent confusion among medical practitioners,[28] could undermine the secure enjoyment of constitutional rights. Irish courts have recognised the basic principle that 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.[29] 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.[30] The 2018 Act is a remedial statute; designed to address a

[22] Abortion Rights Campaign, 'SUBMISSION FOR THE REVIEW OF THE OPERATION OF THE HEALTH (REGULATION OF TERMINATION OF PREGNANCY) ACT 2018' (2022) 25 <https://www.abortionrightscampaign.ie/wp-content/uploads/2022/03/ARC_Submission-1.pdf>.

[23] 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.pd>.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>.

[24] See by analogy *Aslam v. Minister for Justice* [2011] IEHC 512; mandatory transfer of a heavily pregnant asylum seeker by sea or air, risking early labour or early delivery compromised her bodily integrity.

[25] Time limits imposed by other legal systems – for instance the 24-week time limit under Ground C in the Abortion Act 1967 in England and Wales - may also have a bearing on whether the pregnant person can access abortion abroad.

[26] See Hogan J. in *A v. MJELR* [2011] IEHC 397 [31]-[33] arguing that a right is not protected where there is no practical opportunity to avail of relevant protective choices abroad.

[27]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.

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

[29] *Buckley v. Attorney General* [1950] I.R. 67, 8; X*. A. (An Infant) v. Minister for Justice, Equality and Law Reform* [2011] IEHC 397. This principle has 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) involuntary detention (*XX v. Clinical Director of St Patricks* [2012] IEHC 224).

[30] *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

social problem. It is well established that courts should construe remedial statutes purposively, as widely and as liberally as can fairly be done without rewriting them.[31]

3. Abortion and the post-2018 Constitution

3.1. Bodily Integrity/Inhuman and Degrading Treatment

3.1.1. 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,[32] and to be protected from unjustified bodily interference and restraint.[33] This right protects against unwanted medical interventions, and is the basis for informed consent protections.[34] 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.[35] The right can apply when healthcare is criminalised or knowingly withheld, [36] and may encompass a right to help in accessing medical treatment.[37] 'Bodily integrity' refers to more than physical protection. As Hogan J. sets out in *Kinsella v. Mountjoy,*[38] 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.[39]

3.1.2. Violations of the right to bodily integrity can amount to inhuman and degrading treatment, provided the individual experiences a minimum level of severity of risk to health, or of distress or humiliation.[40] The duration of exposure to risk may also be significant. The state may argue that any degrading elements of the 2018 Act are indirectly rather than

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incompatible with the constitution. If the court determines that both potential interpretations were constitutional it will favour the one which allows the Act to stand; *East Donegal Co-operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 at 343

[31] *Bank of Ireland v. Purcell* [1989] I.R. 327 and *Gooden v. St. Otteran's Hospital* [2005] 3 I.R. 617; *O'Donnell v South Dublin* [2007] IEHC 204

[32] Public bodies such as the HSE have a statutory duty to vindicate those rights under s.42 of the IHREC Act 2014.

[33] The right to bodily integrity is generally considered to be an unenumerated right under Article 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 Article 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.

[34] For discussion of 'information gaps' in Irish abortion care see Abortion Rights Campaign (n 22) 28–29.

[35] *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

[36] 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. In the end that case was decided on a different ground.

[37] 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 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.

[38] [2011] IEHC 235; See also O'Donnell J. in *Simpson v Mountjoy* [2020] IESC 52 at [10]

[39] See also *Sullivan v. Boylan* [2012] IEHC 389 *per* Hogan J. noting that the right encompasses protection from 'acute mental distress'.

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

deliberately imposed. Older 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'.[41] More recent case law, however, imposes no such requirement.[42] Even if we accept that the Oireachtas did not pass the 2018 Act intending to humiliate women, or to aggravate stigma and shame around abortion, it clearly often has that effect.[43]

3.1.3. In a 'humane society', the duty to protect the right to freedom from degrading treatment, as Hogan J. says in *Connolly*, is 'most acute in the case of those who are vulnerable, marginalised and stigmatised'.[44] Where a vulnerable person, such as a minor,[45] a refugee, 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.

3.2. Privacy

3.2.1. The constitutional right to privacy includes a right to autonomy or self-determination.[46] In particular, it includes a right to make informed decisions about one's own health.[47] By definition, any restriction on abortion access engages the right to privacy, because sexuality and reproduction are core and intimate dimensions of private life. An expansive account of the relationship between privacy and self-determination recognises that the constitution protects individuals'[48] rights to determine the long-term shape of their lives, and to access the available resources necessary for full citizenship.[49] The state cannot lightly impose parenthood on rights-bearing citizens.

3.2.2. The 2018 Act is grounds-based. It requires everyone who accesses an abortion in Ireland to meet prescribed conditions. Before 12 weeks LMP the Act imposes a mandatory 3 day waiting period. After 12 weeks' LMP, it requires abortion-seekers to produce evidence of exceptional suffering; risk to life, health, or a diagnosis of fatal fetal anomaly. If a pregnant person cannot meet these criteria, they cannot access an abortion unless those treating them commit a criminal offence. The statutory criteria may be, as the Canadian Supreme Court once put it, 'entirely unrelated to [the pregnant person's] own priorities and aspirations.'[50]

3.2.3. The law does not fully recognise the pregnant person's moral capacity but subordinates their moral judgement to the determinative judgement of others in one of the

[41] *Frawley*; *Mulligan v. Governor of Portlaoise* [2010] IEHC 269

[42] 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

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[44] *Connolly v Governor of Wheatfield Prison* [2013] IEHC 334

[45] *S.F. 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.

[46] O'Donnell J. in *Simpson v Mountjoy* [2020] IESC 52 at [10]; *Re A Ward of Court* [1995] IESC 1

[47] *Kearney v McQuillan* [2010] 3 IR 576 per MacMenamin J.

[48] Note that these protections generally extend to non-citizens; see *N.H.V. v. Minister for Justice* [2016] IECA 86

[49] For an argument to this effect see further Gonzales v. Carhart 550 U.S. 124 (2007), 172, Justice Ruth Ginsburg dissenting.

[50] R v Morgentaler, [1988] 1 SCR 30

most intimate possible areas of personal life.[51] As such, it engages the constitutional right to privacy. 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.[52] The 8th Amendment was inserted into the Constitution as a deliberate check on the privacy rights enumerated in *McGee.*[53] It is not unreasonable to assume that these rights are restored because the Amendment is gone. The constitutional right to freedom of conscience buttresses the right to privacy here.[54] The parental rights protected under the constitution may also sometimes strengthen the argument from individual privacy. For example, following severe fetal anomaly diagnoses, pregnant people and their families make serious and weighty decisions in the interests of their whole families, their existing children, and the fatally compromised fetus.[55]

3.3. Proportionality

3.3.1. Once a litigant has established that the application of the 2018 Act has infringed their constitutional rights to privacy or freedom from degrading treatment, they must also show that the infringement is disproportionate. *Heaney v. Ireland*[56] sets out the test to be applied. The burden of showing that the *Heaney* test is not satisfied falls on the plaintiff rather than on the state.[57] There are three points here.

3.3.2. First, to be constitutional, any infringement of pregnant people's constitutional rights must be proportionate to the public policy goal sought to be achieved. The more serious the breach, the greater the justification must be.[58] Under the 8th Amendment, the constitutional imperative to protect the fetal right to life would have done most of the work for the state here. As already discussed, with the 8th Amendment gone, the state is entitled to pursue the policy goal of protecting fetal life, but that means selected to pursue that goal are now subject to deeper scrutiny. In practical terms, the state is also likely to articulate multiple policy goals as supporting the 2018 Act. These are likely to include the imperative to promote safe abortion for those who are entitled to it, and to deter unsafe or harmful practices.

3.3.3. Second, criminalisation of abortion must have a rational connection with the Oireachtas' policy objectives. It must not be arbitrary, unfair or based on irrational

[51] 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 The International Journal of Human Rights 1010. On the 3-day wait as demeaning see Abortion Rights Campaign and Grimes (n 23) 41.

[52] [1998] 1 ILRM 472

[53] See discussion in *M v. Minister for Justice* [2018] IESC 14 [10.10]

[54] See Henchy J. in *McGee.*

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

[56] *Heaney v. Ireland* [1994] 3 I.R. 59

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

[58] *Meadows v. Minister for Justice* [2010] 2 IR 701

considerations. It is irrational to seek to prevent abortion by criminalising it. Criminalisation does not achieve the policy goal of protecting fetal 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[59] or public order goal at the expense of individual rights, but that it does not achieve them at all. People still get abortions even when they are criminalised, but they happen later and under more burdensome circumstances. The state may argue that restrictions are justified 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. It is not clear that criminalising doctors produces benefits that are not already secured by the wider medical law. However, criminalisation, combined with strict time limits,[60] undermines the policy goal of ensuring that those who are legally entitled to abortion care can access it safely. At the time the 2018 Act was passed, the Oireachtas was intensely focused on 'legal certainty'; it recognised that the law confers a sense of security both on people making abortion decisions for themselves and on their doctors. Criminalisation of abortion under the 2018 Act does not promote certainty. Instead, it generates 'chilling effects';[61] discouraging willing doctors from providing lawful abortion care. 'Chilling effects' can encompass both burdensome over-compliance with the law and refusal to provide care at all. Finally, as discussed in more detail in Section 3, the time limits imposed by the Act are arbitrary,[62] compounding the unfairness of the criminal treatment of abortion under the 2018 Act.

3.3.4. Third, to pass constitutional muster, the criminalisation of abortion must only minimally impair pregnant people's constitutional rights.[63] Any infringement on the right must be tailored to achieving the policy objectives of protecting fetal life and deterring unsafe abortion. The Oireachtas could draw on a range of alternative and less punitive measures to protect fetal life by encouraging continued pregnancy if it wished to do so.[64] However, an Irish court will be wary of prescribing how the Oireachtas should achieve its policy.[65] What may be more important is that 2018 Act offers very little in the way of 'balance' between individual rights and public policy goals. The time limits imposed under the Act make no exceptions for

[59] 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>.

[60] 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.

[61] Abortion Rights Campaign (n 22) 12.

[62] Doctors' experience is that the 3-day waiting period does not materially impact patient decision-making Mullally and others (n 27).

[63] See similar argument in *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.

[64] See e.g. *CC v. Ireland* [2006] IESC 33 referred to Law Reform Commission proposals into account, to demonstrate the existence of less invasive alternative measures, but ultimately said that while more than one potential law would pass constitutional muster, it was not for the Court as opposed to the legislature to choose between them. The impugned provision was struck down, but not because it was not the best possible means of regulating the problem in issue. See also *Tuohy v. Courtney* [1994] 3 IR 1 at 47. 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.

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

individuals who may find it more difficult to navigate the abortion care system. The Act appears overwhelmingly concerned to restrict access to abortion. It offers pregnant people no guarantee of prompt access to care, or of help if they are refused a lawful abortion.[66] It does not criminalise only abortions that are inherently unsafe, performed by unqualified people or done without the pregnant person's consent. It imposes effective blanket bans where much less stringent restrictions are practicable. In addition, 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 constitution rights.[67] The state might argue that blanket bans avoid the need to involve its agents in determining which abortions are acceptable and which are not.[68] This argument is weakened by a range of provisions in the Act which require doctors to do precisely that.

3.4. Equality

3.4.1. The 2018 Act only applies to 'women'.[69] We might argue that certain restrictions on access to abortion violate rights to gender equality because cisgender men do not need abortions and no form of cisgender men's healthcare is subject to the same kinds of criminal restrictions habitually applied to abortion.[70] Some provisions of the 2018 Act, such as the mandatory 3-day waiting period, draw on gender stereotypes that associate femininity with indecisiveness or irrationality. Irish constitutional equality jurisprudence is underdeveloped and narrow, especially as regards substantive equality, and the courts avoid discussing equality where other constitutional approaches are available.[71] So, much less practical stress should be placed on equality arguments than on the others made in this paper.

3.4.2. In theory, of course, abortion can engage the constitutional right to equality because reproductive self-determination 'relates to [individuals] essential attributes as persons'.[72] Claims of discrimination based on sex or gender are subject to especially strict scrutiny.[73] However, the Irish constitution expressly permits the Oireachtas to 'have due regard to differences of capacity, physical and moral, and of social function.'[74] This means that the Oireachtas enjoys wide discretion to distinguish between people based on sex or gender,

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[66] 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 p. 9

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

[68] *Murphy v. Independent Radio and Television Commission* [1999] 1 IR 2 [48]

[69] S. 2 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.

[70] See the opinion of Sarah Cleveland *in Amanda Jane Mellet v Ireland*, UNHRC decision, CCPR/C/116/D/2324/2013, 9 June 2016, [13]

[71] *Murtagh Properties v Cleary* [1972] IR 330

[72] *Quinn's Supermarket v Attorney General* [1972] IR 1*; Murphy v Ireland* [2014] IESC 19

[73] *Re Employment Equality Bill 1996* [1997] 2 IR 321

[74] Article 40.1.

provided that the distinctions imposed are not 'invidious,[75] arbitrary or capricious'.[76] In *MD v. Ireland* the Supreme Court was persuaded that differences in reproductive function between adolescent girls and boys could justify disparate approaches under criminal law.[77] A court may consider that the Oireachtas is justified in applying exceptional criminal regulation to abortion, despite the consequences for gender equality, because it may take the view that it is impossible to address abortion without exposing people who have the capacity to become pregnant to distinctive burdens. A case focusing on abortion with pills in early pregnancy might have the greatest chances of success here, since it is more difficult to distinguish the practice of prescribing and dispensing pills from other everyday forms of healthcare.[78]

3.4.3. Besides basic issues of gender inequality, the 2018 Act generates well-documented problems of abortion access for minoritized groups,[79] including disabled people,[80] migrants, people living on low incomes,[81] women and gender minorities at risk of domestic violence, and adolescents.[82] Even if the legislation does not exclude these groups by name, in practice, abortion is not equally accessible to all. The time limits in the legislation are punitive. They legislation assumes a pregnant person who is aware that abortion is available in her case and knows how to access it, who has a strong awareness of their body so that they realise they are pregnant in good time, who has the resources to travel repeatedly for care if necessary and who does 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 vulnerable people receive accommodations when accessing legally available healthcare. 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.[83]

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[75] *MD v Ireland* [2012] IESC 10; *O'B v S* [1984] IR 316; *Redmond v. Minister for the Environment* [2001] IEHC 128

[76] *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.

[77] *MD v Ireland* [2012] IESC 10 (criminalising boys but not girls for underage sexual intercourse was justified because girls were at risk of pregnancy and boys were not).

[78] On the safety of self-managed abortion see 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.

[79] Individuals' circumstances may be relevant to their basic rights claim; for example, denial of access to abortion care may not amount to degrading treatment in all cases, but it may meet that threshold when coupled with severe poverty or isolation; *MEO v. Minister for Justice* [2011] IEHC 545

[80] 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.

[81] The Constitution does not include any recognised protection for socio-economic rights as such. For background see Thomas Murray, 'Economic and Social Rights in Ireland' [2021] The Oxford Handbook of Irish Politics 40.

[82] Abortion Rights Campaign (n 58) 11–14.

[83] *DX v Judge Buttimer* [2012] IEHC 175 (cited with approval in *Fleming*). This argument may be most relevant to reviews under s.16 following a negative decision under s. 9 or s. 11 of the 2018 Act. Under the 8th Amendment the state's practice was to provide some assistance with abortion travel for migrants and children in the care of the state, but it is not clear that this support was recognised as mandated by the constitution. See Ruth Fletcher, 'Peripheral Governance: Administering Transnational Health-Care Flows' (2013) 9 International Journal of Law in Context 160.

3.4.4. The time limits under the 2018 Act pose a different accessibility problem. We might argue that equality requires, not that people are helped to meet unfair criteria, but that those criteria are changed, so that barriers to access are lowered or even eliminated. For example, some of those excluded 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 3-day wait requirement[84] or extend the 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.[85] 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 very underdeveloped, and it is not clear that the constitution requires the Oireachtas to change the law[86] to ensure equality of access to legally available services.[87]

3.4.5. For instance, in *Fleming v. Ireland*,[88] Marie Fleming argued that the criminal law on assisted suicide[89] discriminated against her. Her health had deteriorated such that it was impossible for her to commit suicide 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 like her. The law did not directly 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 earlier in illness.[90] 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 2018 Act 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, maybe *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 law in *Fleming* was intended to protect the right to life guaranteed under the Constitution and there was no constitutional basis on which to assert a state-sanctioned right to die. A court could approach the 2018 Act differently. Unlike assisted suicide, Irish law already permits abortion in some circumstances and there is now a clear constitutional basis -in the rights to privacy and bodily integrity - 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

[84] During debates on the 2018 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 11 December 2018, Vol. 263 No. 3.

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

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

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

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

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

[90] This is an especially poor argument, which locates incapacity in Ms. Fleming's body rather than in the disabling effects of prevailing law and social norms.

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. [91]

3.4.6. A court might insist, following the approach in *Fleming*, that a person denied an abortion under s. 12 was not disadvantaged by the law, since they could theoretically have accessed an abortion earlier. Any harm the person suffered was attributable to their progressing pregnancy and not to the law itself. That argument might fail in a case where, for instance, a pregnant person only came to need an abortion in later pregnancy, following a health crisis. It may be, therefore, that in the right case a court would hear equality-based arguments centring on the Oireachtas' failure to make exceptions to the criminalisation of abortion.

3.5. The Rights of Others: Conscientious Objection[92]

3.5.1. 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. Nonetheless, healthcare practitioners bear a duty to protect their pregnant patients' constitutional rights.[93] The Oireachtas acknowledges the rights of doctors[94] who conscientiously object to providing abortion care in s.22 of the 2018 Act. 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.[95] This limitation on the objector's freedom of conscience[96] is

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[91] In *McGee,* Walsh J. wrote that one of the personal rights of a woman in Mrs. McGee's state of health would be 'a right to be assisted in her efforts to avoid putting her life in jeopardy', given the extraordinary risks that pregnancy posed to her. The state has 'a positive obligation to ensure by its laws as far as is possible' that the means of preserving her life was made available to her.

[92] It is more difficult to say anything about the constitutional position of people who seek to obstruct or deter abortion access through demonstrations and assemblies at locations where abortions are provided. The Oireachtas has not legislated to regulate this activity. The cross-party Safe Access to Termination of Pregnancy Services Bill 2021 (Bill 130 of 2021) would prohibit a range of activities within 100 metres of a location where abortion services are provided. In *Kathleen Clubb v Alice Edwards & Anor; John Graham Preston v Elizabeth Avery & Anor* [2019] HCA 11 (10 April 2019) the Australian High Court confirmed that limited statutory safe access zones struck an appropriate balance between the rights of protestors and the rights of pregnant people who needed to access healthcare facilities.

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

[94] Not all maternity hospitals currently provide the full range of legal abortion care. It is unlikely that hospitals can assert an institutional right under Article 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 Article 44.2.5. See further Ruth Fletcher, 'Conscientious Objection, Harm Reduction and Abortion Care', *Ethical and legal debates in Irish healthcare* (Manchester University Press 2016).

[95] S. 22(3).

[96] Freedom of conscience is broader than freedom of religion; *AM v. Refugee Appeals Tribunal* [2014] IEHC 388 [32].

proportionate; necessary to give 'life and reality' to the countervailing rights of the pregnant person.[97] Arguably, the statutory restriction here does not go far enough, because it contains no direct enforcement mechanism.[98] It also allows objectors to obstruct lawful access to abortion in other ways, for instance, through persuasion or conservative interpretation of the legislation- without obliging them to disclose their motivations.[99]

4. Specific Issues in the Constitutional Law of Abortion

4.1. Fatal Fetal Anomaly

4.1.1. Requiring a person to continue a pregnancy following a diagnosis of fatal fetal 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*[100] the UN Human Rights Committee clearly identified Ireland's pre-2018 abortion law as inflicting 'intense mental and physical suffering' and 'a high level of mental anguish' on pregnant people required to leave Ireland to end a pregnancy abroad following a fatal fetal anomaly diagnosis. This suffering and anguish breached their rights to privacy and to freedom from cruel and inhuman treatment. Although Ireland's abortion law no longer directly criminalises women, most of salient features of the *Mellet* and *Whelan* cases continue under the 2018 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.[101] Travel does not solve the problem. 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 fetus 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.[102]

4.1.2. Delayed care is especially likely to contribute to breaches of constitutional rights in fatal anomaly cases. People who have received a fatal diagnosis at or after 20 weeks are under significant time pressure.[103] They may need to withdraw from assessment under Irish law and travel sooner rather than later, in an effort to obtain care in the Britain before 24 weeks when it is more accessible, less expensive and less burdensome.[104] Delay inevitably exacerbates distress.

4.1.3. Section 11 of the 2018 Act regulates fatal anomaly cases using the Act's familiar combination of criminalisation and time limits. In this instance, however, the time limit relates

[97] *Article 26 and the Employment Equality Bill* [1997] IESC 6
[98] Abortion Rights Campaign (n 22) 21.
[99] It is highly unlikely that hospitals enjoy an institutional right under Article 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. See further Fletcher (n 92).
[100] 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).
[101] Abortion Rights Campaign and Grimes (n 23) 68.
[102] [2018] UKSC 27 [237-238]
[103] Numbers of people travelling to England and Wales for this reason have dropped less than expected; Mishtal and others (n 20) 36.
[104] Abortion Rights Campaign (n 22) 26.

to the fetus' prognosis rather than to the duration of the pregnancy. The Act requires doctors to predict whether a fetus diagnosed with a fatal anomaly is likely to survive for longer than 28 days after birth. If two doctors cannot make such a prediction in good faith, they cannot lawfully offer the pregnant person an abortion in Ireland. The 28-day provision is arbitrary because it does not reflect any substantive difference either in affected pregnant people's experiences, or in outcomes for the fetus.[105] The 28-day limit is not a meaningful tool for distinguishing between fatal and 'severe' anomaly or between fatal anomaly and disability. The distress associated with denial of abortion care or with travel abroad is not materially different whether doctors predict the fetus will die within a month of birth, or some weeks later. In addition, the 28-day limit in s. 11 cannot be justified as necessary to protect fetal life in the later stages of pregnancy. Even under the 8th Amendment, the courts recognised that the duty to protect fetal life was weaker, where nothing could practicably be done to ensure that the fetus was born alive. This was most starkly illustrated in *PP v. HSE*, when the High Court held that it was not permissible to expose a woman's pregnant body to futile and 'grotesque' medical interventions in an effort to keep the fetus alive as long as possible.[106] Now that the 8th Amendment is gone, the state's legitimate interest in fetal life is even more narrowly drawn. It cannot justify wide-ranging restrictions on abortion access, even where there is a slim chance that the fetus will survive for more than a month after birth.

4.1.4. Besides challenging the constitutionality of the 28-day limit, an individual denied an abortion on fatal fetal anomaly grounds might argue that s. 11 should be interpreted more expansively to guarantee pregnant people's relevant rights. S.11 has created a significant interpretive burden for doctors willing to provide care.[107] 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 fetus that is *likely to lead to the death of the fetus*[108] either before or within 28 days of birth. The legislation does not specify the degree of likelihood, but there is some evidence that in practice many doctors will require something approaching certainty[109] before certifying that a patient is eligible for abortion under s.11. Available evidence suggests[110] that s. 11 is not interpreted consistently across hospitals.[111] Although the Act

[105] 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.

[106] [2014] IEHC 622.

[107] See discussion in S Power, S Meaney and K 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.

[108] Emphasis mine.

[109] This is, of course, 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 pre-requisite for a good faith decision.

[110] Abortion Rights Campaign (n 58) 7.

[111] We should recall that the 2018 Act is criminal law. The vagueness of some provisions of the 2018 Act gives cause for concern. 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. The 2018 Act, in some respects, leaves it to doctors to determine when abortion is or is not criminalised. The statutory requirement that two doctors take decisions under s. 9 and s. 11 together is an insufficient safeguard if the Oireachtas has not clearly articulated the standards they are expected to apply.

provides that only two doctors need to decide together[112], it is common for larger multi-disciplinary teams to decide s.11 (fatal fetal anomaly) cases on a group consensus basis. This is an example of a 'chilling effect' under the law—doctors engage in over-compliance in order to avoid criminalisation.[113] This 'chilling effect' imposes resource burdens as fetal medicine units are seen to require access to a range of additional expertise and testing facilities in order to make good faith efforts to comply with the Act. These behaviours suggest a very strict reading of what certifying doctors are required to do in order to demonstrate the 'reasonableness'[114] of their decision. It means that, in practice, a pregnant person who is legally entitled to an abortion in Ireland on fatal anomaly grounds may be denied that abortion even where two appropriate doctors are available and willing to certify based on their reasonable good faith opinions.

4.2. Rape

4.2.1. The 2018 Act does not include a specific 'rape' provision. The Oireachtas assumed that a person who has been raped will access an abortion 'on request' before 12 weeks' LMP, under s. 12.[115] 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.[116] The basis for an equivalent position is also visible in Irish constitutional law. In *DPP v. Tiernan*[117] 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 possibility of a distressing birth on the victim. Finlay CJ clearly recognised that a deeply unwanted pregnancy continued the original violation of the rape. A clear violation of the right to freedom from degrading treatment arises where the 2018 Act does not provide effectively for people pregnant through rape to access an abortion after 12 weeks' LMP. The Oireachtas has a legitimate interest in ensuring that victims of sexual crime can access abortion without undue procedural burdens.[118] In practice, the 2018 Act prevents that interest from being achieved.

These deficiencies in the 2018 Act could demonstrably. lead to 'subjective, arbitrary and inconsistent application of [criminal law]' which represents the very antithesis of' the constitutional commitment to equality before the law. In addition to the impact on abortion access, the 2018 Act poses a special risk to doctors at risk of prosecution, whose constitutional rights to equality before the law and to liberty are clearly in issue. 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 2018 Act.

[112] It is worth noting that the Protection of Life During Pregnancy Act 2013, which legislated for life-saving abortion access under the 8th Amendment only required shared decision-making by a two or three doctors, depending on the applicable ground for abortion. There is no principled reason why the 2018 Act should be more demanding.

[113] Reliance on multi-disciplinary teams may be appropriate and useful to inform certification under the Act, but the ultimate decision to certify should be taken by two doctors, without regard to consensus across the wider team.

[114] Mishtal and others (n 20) 30.

[115] Abortion Rights Campaign (n 22) 18.

[116] 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).

[117] [1988] IR 250

[118] Joint Oireachtas Committee on the 8th Amendment of the Constitution, 'Report of the Joint Committee on the Eighth Amendment of the Constitution' [2.23].

4.3. Health

4.3.1. S. 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 fetus 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'.[119] 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.[120] The number of abortions provided in Ireland on grounds of risk to life or health after 12 weeks in 2019 was very low (24).[121] A higher number of abortions were provided on those grounds in almost every year in which the Protection of Life During Pregnancy Act 2013 was in force.[122] That highly restrictive Act -which gave effect to the interpretation of the 8th Amendment in the *X* case - only permitted abortion where necessary, as a last resort, to save the woman's life. The lower number of abortions performed on health grounds since 2018 might be partially explained on the basis that the old law required delayed treatment; a woman could not obtain an abortion on physical or mental health grounds unless she was at death's door. Under the 2018 Act, in theory, where a risk to life is predicted in early pregnancy, doctors can offer an abortion before the woman's health deteriorates. However, it is still likely that this figure represents some denial of access to abortion. The statistics published by government[123] do not distinguish between s. 9 abortions performed on grounds of risk to life, and those performed on grounds of risk to health. They cannot tell us whether abortion is accessible on health grounds when health risks materialise after 12 weeks LMP at all.

4.3.2. The evidence nevertheless suggests that s. 9 is not available as a safety net where a person's health is foreseeably at risk, but their life is not. This means that s.9 is not available in cases of rape or in cases of fetal abnormality not deemed to meet the restrictive test in s. 11, where the pregnant person's mental health is at risk. This likely shows that the risk of arrest and prosecution has had a 'chilling effect' on interpretation of the legislation within the healthcare system.

4.3.3. Section 9 is not primarily a time-based restriction, though an abortion cannot be offered on this ground after fetal 'viability'.[124] Nevertheless, if s.9 only applies in a few life-saving cases, it can be considered an unjust reinforcement of 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, it forces those whose health is already at clear risk to wait until their health deteriorates, potentially jeopardising

[119] 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

[120] See discussion in Abortion Rights Campaign and Grimes (n 23) 56.

[121] Kennedy (n 23) 29.

[122] Abortion Rights Campaign (n 22) 18.

[123] 'Second Annual Report on Notifications in Accordance with the Health (Regulation of Termination of Pregnancy) Act 2018' <https://www.gov.ie/en/press-release/1135f-second-annual-report-on-notifications-in-accordance-with-the-health-regulation-of-termination-of-pregnancy-act-2018/> accessed 11 March 2022.

[124] On difficulties with 'viability' as a time limit in abortion law see Elizabeth Chloe Romanis, 'Is "Viability" Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States' (2020) 7 Journal of Law and the Biosciences lsaa059.

their life or exposing them to avoidable permanent or long-term consequences for their health. If that is the case, then s. 9 of the Act mirrors the old position under the 8th Amendment, whereby people were denied an abortion in earlier pregnancy, and required to wait until they were almost at death's door. As such, severe rights violations may flow from the narrow application of s.9.

4.4. Abortion in early pregnancy

4.4.1. Two time-based restrictions govern abortion in early pregnancy. 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.[125] Fetal age is two weeks behind the gestational age, calculated using LMP. This time limit is strict (12 weeks + 0 days).[126] It applies even to cases of failed early medical abortion.[127] Early medical abortion has a 2% failure rate[128] and access to early surgical abortion in Ireland is very limited.[129] If a pregnant person is treated under s. 12 before the 12-week period has elapsed, and the abortion fails, the 12-week deadline cannot be extended.[130] This is the case even though the failed abortion is not the pregnant person's fault.[131] The strict 12-week period is entirely arbitrary; it has no rational connection to medical practice.[132] Since the time limit comes with criminal penalties, it is also affected by chilling effects. For instance, pregnant people considered to be close to 9 weeks' LMP are often referred for ultrasounds[133] to determine gestation, even though this is not required by law and can impose additional delays in accessing treatment.[134] In addition, from 9 weeks LMP, pregnant people are only treated in hospital rather than in the community.[135] This generates obvious burdens for pregnant people, including the risk of delay because only 10 maternity hospitals currently provide the

[125] S. 12(5) 2018 Act.

[126] Crowley, P. (2019) Letter to Minister for Health, Simon Harris T.D. re. Report on Health (Regulation of Termination of Pregnancy) Act 2018 Reviews sought in 2019. https://www.hse.ie/eng/about/who/qid/resourcespublications/annual-report-on-notifications-under-the-healthregulation- of-termination-of-pregnancy-act-2018.pdf ; See also Institute of Obstetricians and Gynaecologists (2018) 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

[127] The Abortion Support Network reported 25 such cases in 2020; Abortion Rights Campaign (n 58) 6.In all cases, treatment was commenced prior to the 12-week cut off under s. 12. The numbers of affected people may be higher – not all those affected contact ASN, and ASN does not require clients to disclose their circumstances.

[128] ibid 7. This risk could be managed by offering surgical terminations.

[129] Abortion Rights Campaign (n 22) 30.

[130] Mishtal and others (n 20) 29–30. Abortion Rights Campaign (n 22) 22.

[131] Kennedy (n 23) 20.

[132] It is worth noting that a majority of participants in the Citizens' Assembly, which devised the basic structure of what would become the 2018 Act, would have preferred a law that provided for abortion 'with no restriction as to reasons' up to 22 weeks' gestation/LMP (44%) or without regard to time limits (8%). 48% would have permitted abortion on request up to 12 weeks' gestation. 50% would have permitted abortion up to 22 weeks on socio-economic grounds. These proposals did not attract the support of the Joint Oireachtas Committee on the 8th Amendment. See Mary Laffoy, 'First Report and Recommendations of the Citizens' Assembly: The Eighth Amendment of the Constitution' [2017] An Thionól Saoránach; Constitution (n 116).

[133] See *Baby O v. Minister for Justice* [2002] IESC 44 *per* 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.

[134] Mishtal and others (n 20) 15.Kennedy (n 23) 21.Abortion Rights Campaign and Grimes (n 23) 38. On difficulties with the quality and reliability of scans see Abortion Rights Campaign (n 22) 35–36.

[135] Mishtal and others (n 20) 15.

full range of legal abortion care. It also generates burdens for primary care providers, who may need to work under extreme pressure to ensure a hospital appointment for a person approaching the 12-week limit.[136]

4.4.2. Second, s. 12 also imposes a 3-day wait requirement. This provision 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.[137] It leads to delays in abortion access, which may expose pregnant people to unnecessary risk.[138] The mandatory waiting period necessitates two doctors' appointments, which burdens people who need to travel long distances to a primary doctor or to a hospital. A 3-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.[139]

4.4.3. 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 degrading treatment.[140] 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'[141] to use a safe medication or device - can be asserted outside marriage. There are strong parallels between the contraceptives at the centre of *McGee* and early medical abortion. Sale and importation of contraception were criminalised in 1972, but its use was not forbidden. In the same way 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.[142] Unlike in *McGee*, pregnant people who have abortions are not criminalised, but their doctors are.[143] In some ways, this worsens their situation by comparison with Mrs. McGee. Mrs. McGee made her decision

[136] Kennedy (n 23) 38.

[137] Abortion Rights Campaign (n 22) 13.

[138] The 3-day provision also compounds delays which do not derive from the Act itself. These arise from (i) the need to travel within Ireland to access abortion if services are not available locally (ii) making an appointment with a local GP only to find that they do not provide (iii) very limited MyOptions service on the weekends (iv) the requirement to produce government identification, such as a PPS number (v) slow or ambiguous referral pathways from GPs to hospital providers. All of these factors intensify equality concerns.

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

[140] 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 fetal diagnosis deemed 'not fatal enough' but discovered after 12 weeks might take issue with ss.9 and 11.

[141] *per* Henchy J.

[142] S. 23(3) of the 2018 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.

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

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 2018 Act. 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 affected 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,[144] fear, and concern for the fate of those assisting her.

4.4.4. Almost fifty 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. A court may well decide 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. 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.

5. Judicial Deference and Constitutional Rights

5.1. This paper has argued that the 2018 Act, and the systems of care that have grown up around it, clearly engage some of the fundamental rights protections under the Constitution. However, any successful constitutional claim will depend on demonstrating that the restrictions imposed by the 2018 Act represent a disproportionate interference with those rights. Hogan J. has written that:

> It was never the intention of the drafters of the Constitution that these fundamental right guarantees would be reduced to pure platitudinous statements of benevolent good will which could readily be overborne once any attempt to take these rights seriously was likely to prove inconvenient or might thwart policy choices made by the Oireachtas or the Government. The object instead was to ensure that, subject to the ultimate decision of the People via the referendum process, the substance and core of certain fundamental rights of the individual should be placed beyond the reach of majority vote in the Oireachtas. This objective was, after all, as the Preamble to the Constitution declares, to secure the dignity and freedom of the individual as befits a democratic society governed by the rule of law. These are objectives which soar above the exigencies of public administration, the fine calculations of the legislative and the executive branches or the vagaries of public opinion.[145]

[144] de Londras (n 51) 44.
[145] *N.H.V. v. Minister for Justice* [2016] IECA 86 [118]

5.2. In practice Irish courts have been reluctant to interfere with legislation governing contested social issues,[146] especially those with significant resource implications.[147] However, no important issue of judicial overreach or practicability arises if an individual challenges an element of the 2018 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.[148] In addition, 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. An Irish court may well respond favourably to a case which, rather than arguing that the 2018 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 or a few people who (depending on the circumstances) may be at risk of a breach of a fundamental right or rights, so that any resource implications are 'commutative' rather than 'distributive'.[149] With ss. 9, 10 and 11 abortions, in particular, the wider implications are easily contained. The number of annual cases in which individuals are entitled to these abortions is extremely small. Where a legal abortion is still available, the litigant may ask for a prohibitory injunction preventing prosecution of a doctor or doctors willing to provide the care. A mandatory injunction is also possible where, for instance, the HSE is aware of a severe and ongoing breach of constitutional rights and has not taken practicable steps to address it.[150] A case seeking to strike down, or make exceptions to, the time limit provision in s. 12 might have more expansive consequences. However, existing statistics suggest that 'unmet need' for abortion in early pregnancy numbers in the hundreds rather than the thousands.

5.3. A successful claim brought some time after denied or delayed abortion care[151] could result in an award of damages.[152] However, given the time-specific nature of abortion rights, it is to be

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

[147] *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.

[148] See discussion in *MD v. An t-Ard Chlaraitheoir* [2014] IESC 60

[149] See distinction in *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181.

[150] On this point see *O'Donnell v South Dublin County Council* [2015] IESC 28 per 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 2018 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.

[151] 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.

[152] 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. However, it is entirely possible to imagine cases, to which the state may be a party, in which there is no negligence, and treatment has been delayed or denied only because it was deemed illegal to offer it. 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.

hoped[153] that, 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,[154] if that abortion was otherwise deemed permissible within the Act.[155] An individual case could also have wider consequences for regulating abortion.[156] Declaratory relief is important here.[157]

5.4. Certainly, the 2018 Act enjoys the presumption of constitutionality. This means that a court will 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 2018 Act is immune from constitutional challenge.[158] If a court does strike down part of the Act as unconstitutional, it cannot directly prescribe how those provisions should be replaced. A court may, however, urge the Oireachtas to legislate to fill a gap in existing legislation where that gap leads to breaches of constitutional rights.[159] It may 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.[160]

6. Conclusion/Recommendations

6.1. Historically, pregnant people rarely tested Ireland's abortion law in the domestic courts. The Oireachtas should not require them to do so now. It should remedy defects in the regulatory regime established by the 2018 Act without requiring individuals and families to go to court while in personal crisis or following enormous personal loss.[161] If the Oireachtas does not do so, the state should not rule out a successful constitutional claim in the future. In any event, the Oireachtas should not think of the constitution only in terms of litigation risk. The Oireachtas enjoys significant autonomy in setting policy priorities.[162] The review of the 2018 Act is an opportunity for the Oireachtas to amend the legislation to ensure the maximum protection of constitutional and human rights.

[153] See, however, the discussion of 'mootness' and pregnant litigants in submissions in *D v Ireland* App No 26499/02 (27 June 2006) [69]-[73] and [76]-[80]. See generally on mootness *Lofinmakin v. Minister for Justice* [2013] IESC 49.

[154] Since damages would not be an adequate remedy.

[155] 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].

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

[157] This scenario would leave it to the respondent to find an appropriate solution.

[158] The President did not refer it to the Supreme Court under Article 26 before he signed it into law.

[159] 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

[160] Including by calling a referendum.

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

[162] *Fleming v. Ireland* [2013] IESC 19, [96]; *MD v. Ireland* [2012] 1 I.R. 697 at 719

6.2. Some issues identified in this paper can be solved, at least temporarily, without amending the legislation. Guidance on interpretation of the legislation would suffice. This was made clear at the height of the COVID-19[163] crisis when the government facilitated telemedicine services[164] by clarifying that the 'having examined' provision in s. 12 did not require physical examination. Similar guidance could redress conservative interpretation of other sections. Guidance could clarify that s. 11 does not require a certifying doctor to be certain that the fetus will die before or within 28 days of birth, but only requires a 'likelihood' or high probability of death. Guidance could also clarify that 'serious harm' to health under s.9 does not equate to permanent, life-threatening or disabling harm.

6.3. In some cases, the legislation should be amended to ensure accountability where pregnant people's statutory entitlements are not fulfilled. At present, the 2018 Act offers very little in the way of procedural certainty, and delayed care is very common. No 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 sub-standard review, or were blocked by an uncooperative conscientious objector.[165] 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 2018 Act to include clear and enforceable statutory entitlements to timely and effective care.

6.4. Arbitrary time limits, including the 12-week limit under s. 12, may need to be revisited or removed. Even if time limits remain in place, the Oireachtas should make statutory exceptions for categories of individual who are more likely to suffer severely where time limits are enforced. Provision of abortion care should also be fully decriminalised, or relevant criminal offences radically narrowed, to address the pervasive impact of 'chilling effects'.

6.5. As de Londras has written,[166] the 2018 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. Based on the 2018 Act, with all of its restrictions and silences, we can assume either that the Oireachtas does not believe that pregnant people have many significant constitutional rights at all[167] 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 paper, I have tried to suggest how the space of pregnant people's constitutional rights might be filled. I have tried to stay as close as possible to established

[163]Kennedy (n 23) 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.

[164] Abortion Rights Campaign (n 22) 27.

[165] See discussion of refusal to refer in Abortion Rights Campaign and Grimes (n 23) 55. In P. And S. v. Poland. Application 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.

[166] de Londras (n 51) 42.

[167] ibid 45.

precedent and to a plausibly mainstream approach to constitutional interpretation. Feminists and reproductive rights activists may, therefore, be disappointed by the limited nature of the arguments advanced here. After all, the referendum to repeal the 8th Amendment was promised to be a watershed moment in Irish constitutional history.

6.6. The 8th Amendment was just one element of a cramped and conservative constitutional structure that still constrains the development of reproductive rights. This paper's most useful contribution may be to highlight how little traditional constitutional law offers to people who need abortions and, indeed, to anyone who is pregnant or can become pregnant in Ireland. In the end, the demand to 'take abortion out of the Constitution' has not gone far enough to ensure 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.[168] It has also heard demands for enhanced constitutional protection of socio-economic rights.[169] If the promise of the 2018 referendum is to be fulfilled, the Oireachtas must urgently articulate and commit to a new constitutional agenda for Ireland's pregnant people.

[168] 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)

[169] 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.