

From the Grassroots to the Oireachtas: Abortion Law Reform in the Republic of Ireland

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Abstract

In 1983, voters inserted the Eighth Amendment into Ireland's constitution, equating the right to life of a fetus with that of a pregnant person. Hundreds of thousands of women were forced overseas to access basic health care and thousands more were forced underground, importing abortion pills and risking prosecution. The realities of life under the Eighth Amendment sparked a powerful feminist grassroots struggle for abortion access. This article charts the path to abortion law reform in the Republic of Ireland from the perspective of grassroots activists in the Abortion Rights Campaign (ARC). The first half highlights the national and international policy mechanisms that activists leveraged to bring Ireland's abortion regime to the point of reform, as well as the power of challenging abortion stigma to mobilize the public and politicians, culminating in a resounding vote in May 2018 to repeal the Eighth Amendment. The second half analyzes the legislation enacted in late 2018 in order to give effect to the vote. While the new law and its commitment to free abortion is a momentous step for Ireland, it also establishes a needlessly cumbersome regime that remains grounded in a criminal law framework and incorporates barriers that have no grounding in medical evidence.

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Introduction

“The state acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”

—Eighth Amendment to the Irish Constitution, 1983–2018¹

“I think it’s important for us, for society, to be aware of the kind of trauma you can put someone through by putting their humanity up for a vote.”

—Miriam Needham, abortion rights activist and playwright, 2019²

In 1983, the Irish electorate voted by referendum to change the country’s constitution to all but ban abortion by equating the life of a fetus with that of a pregnant woman. Even though abortion was already illegal, conservative forces sought to cement the ban on abortion by embedding it in the nation’s constitution.³ This decision treated women as criminals, forced to travel to England for abortion care. As the years wore on and pregnant people suffered under the burdens of shame and financial hardship imposed by the constitution, the country’s feminist activist base grew stronger and more vocal about the need for access to abortion at home. In this article, we describe abortion law reform in the Republic of Ireland from our on-the-ground perspective as members of the Abortion Rights Campaign (ARC). ARC is a grassroots, feminist, all-volunteer movement for change. From its inception, ARC has campaigned for access to abortion that is free, safe, and legal, without time limits or gatekeepers, for all who want or need it on the island of Ireland.

The first half of this article illustrates the profound damage wrought by the constitutional ban on abortion. It then examines the strategies of resistance that culminated in the successful vote to repeal the Eighth Amendment in May 2018. The second half outlines the major benefits and failings of Ireland’s new abortion law, with a particular focus on the role of grassroots organizing in the fight to repeal the Eighth Amendment. ARC recognizes that a variety of people, including girls, women, transgender people, and nonbinary people, can become pregnant and need abortion care. We

use the terms woman/women and person/people throughout this article.

Many groups played critical roles in the successful referendum. For instance, Doctors for Choice created a space for physicians who wanted to become providers. Lawyers for Choice produced incisive legal analysis, and many individual members traveled the country to speak at community meetings. The Coalition to Repeal the Eighth brought together more than 80 organizations to call for change. People who had been forced to travel abroad after learning their fetuses had serious anomalies founded Terminations for Medical Reasons; members who told their stories played a vital role in generating compassion among voters. These groups, and others that sprung up before the referendum, worked with and alongside each other. While this article focuses on the contributions of ARC, the struggle to repeal the Eighth Amendment was truly a collective one.

Histories of subjugation and strategies of resistance

Greetings from Ireland: failing to take action on abortion since 1992

The Eighth Amendment didn’t just ban abortion; it ascribed a right to life to fetuses (or “the unborn”) and equated that with the right to life of pregnant women (or “mother[s]”). Going further, the amendment promised to “defend and vindicate” this fetal right to life, ushering in an era of unprecedented harm to anyone who could become pregnant.⁴ Although abortion was already prohibited in Ireland under the 1861 Offences Against the Person Act, the Eighth Amendment went a step further, guaranteeing that a change to abortion laws could only be achieved by another referendum.

This constitutional change did not happen in a vacuum. Rather, it was one of many aspects of a church-state apparatus intended to subjugate women that activists have long struggled to overcome.⁵ Since Ireland’s founding as an independent state in 1922, the Catholic Church has been a dominant political force, influencing a wide range of patriarchal social and public policies. As a practical matter, the

Eighth Amendment served to maintain this theocratic status quo. Under Ireland's Catholic-driven state ideology, a woman's primary role was that of a wife and mother. Female sexuality was shrouded in guilt, shame, and secrecy. Women who had sex outside of marriage, for example, were punished harshly. Generations of women were ostracized from wider society, incarcerated and forced to toil in Magdalene laundries—quasi-penal institutions run by nuns—the last of which did not close until 1996. These misogynistic structures have left a legacy of profound stigma around women's sexual and reproductive lives.⁶

Against the backdrop of church, state, and stigma, one factor that helped to maintain the status quo for so long is Ireland's proximity to England, where abortion is available. England is widely regarded as a "safety valve" that contributes to Ireland's low maternal mortality rate. Since 1980, more than 170,000 people are recorded as having travelled to another country—primarily England—for an abortion, often at great personal sacrifice and often through the generosity of charities like the Abortion Support Network.⁷ These figures represent only those who gave an Irish address to health care providers abroad.

The consequences of the Eighth Amendment surfaced on numerous occasions over its 35-year existence. The X Case in 1992 highlighted the Irish state's punitive stance toward pregnant people. The case centered upon a 14-year-old girl who had been raped and was prevented by the Irish High Court from leaving the country for an abortion. The Irish Supreme Court overturned this decision and deemed the girl's life to be in danger through risk of suicide. The X Case prompted a referendum that inserted into the constitution an explicit provision on freedom to travel.⁸ Such was the hypocrisy of the Irish state's attitude toward abortion: the exportation of reproductive health care was enshrined in law, while abortion at home was almost totally illegal.

As similar cases accumulated over the years, so too did frustration with the status quo. In June 2012, this frustration came to a head when an anti-choice group mounted a billboard campaign claiming "abortion tears her life apart"—referring to

the oversized image of a fetus—and insisting "there's always a better answer." These billboards unleashed a new wave of anger and organizing to combat the deeply stigmatizing message that anyone who has an abortion has done something wrong.

A number of individuals decided to organize a public meeting in July 2012. Forty women and men met in a hotel in central Dublin and began to lay the foundations for an organization that would become known as the Abortion Rights Campaign (ARC). ARC aimed to achieve free, safe, legal abortion across Ireland, with repeal of the Eighth Amendment a central goal. Because anti-choice campaigners had succeeded in making abortion a constitutional issue that could only be redressed through a referendum, activists for change would have to address abortion stigma among all potential voters in addition to persuading politicians. Knowing that stigma-busting would be crucial to their success, members decided to put the word "abortion" front and center in their new organization's name.

A critical moment in the fight for Irish abortion rights occurred with the death of Savita Halappanavar. A 31-year-old Indian immigrant living in Galway, Ireland, Halappanavar was pregnant with her first child. Doctors refused to intervene after she was diagnosed with an incomplete miscarriage at approximately 16 weeks of pregnancy. Hospital staff told her and her husband that they could not do anything to expedite the miscarriage because a fetal heartbeat was still present, and Ireland was a "Catholic country." She died of sepsis from medical mismanagement of her condition.⁹ This concrete example of the tremendous harm caused by the Eighth Amendment outraged huge numbers of individuals, who then mobilized to put mounting pressure on the government to address the problem.

The government's inaction became less tenable as activists made more people aware that it had never defined the terms under which women could legally access abortion care, as instructed to do 20 years earlier in the 1992 X ruling.¹⁰ Moreover, Halappanavar's death occurred on the heels of the 2010 European Court of Human Rights ruling in

favor of three women who challenged Ireland's abortion laws (known as the ABC judgment); that court urged the state to enact legislation to broaden access to abortion.¹¹

In 2013, the Oireachtas (Irish Parliament) passed the Protection of Life During Pregnancy Act (PLDPA) after a particularly brutal campaign where anti-choice activists harassed and threatened elected officials in a way that was not common in Irish politics on issues other than abortion.¹² This new law permitted abortion in an exceedingly narrow range of cases—namely, where two doctors were willing to certify that pregnancy put the life (as opposed to the health) of a woman at “real and substantial” risk, and three doctors if the risk is the prospect of suicide. Some anti-choice voices at the time tried to convince the public that the act would permit unfettered access to abortion. In reality, the PLDPA had little practical impact, resulting in fewer than 30 sanctioned abortions per year.¹³ Moreover, the PLDPA imposed a criminal penalty of up to 14 years' imprisonment for anyone who either obtained an abortion in Ireland (for example, through obtaining safe but illegal pills), or provided an abortion outside of its parameters.

Several high-profile cases highlight the failure of the PLDPA to provide access in life-threatening situations. These include the case of Ms. Y, a pregnant asylum-seeker who had been raped in her home country and was denied an abortion in Ireland, even though doctors said she was suicidal and thus continuing the pregnancy posed a significant threat to her life. She was ultimately subjected to a forced Caesarean section to deliver the baby, as until 2019, Ireland's national consent policy denied pregnant individuals the same right to choose and refuse medical care as people who are not pregnant.¹⁴ ARC opposed the PLDPA, seeing it as a wholly inadequate response to the ban on abortion and the constitutional subordination of pregnant people. ARC went on to campaign for a referendum to repeal the Eighth Amendment and build a nationwide network of grassroots activists who could be mobilized to fight for a referendum whenever that day came.

Invisible people have invisible rights

To break down abortion stigma, ARC organized values clarification and civic engagement workshops and trained people from around the country to host these events in their communities, as well as “speak outs” where individuals could share their abortion stories. ARC adopted an unapologetically pro-choice position in public spheres. The March for Choice that we organize each year around Safe Abortion Day in September has been called “the first openly pro-choice activity” in Ireland.¹⁵ In 2012, 2,500 participants marched, and that number grew to a high of 40,000 in 2017. People wore jumpers and T-shirts emblazoned with the word REPEAL and ARC's slogan FREE SAFE LEGAL, creating visibility and fostering a sense of community among people who realized they were not alone.

One of ARC's core successes is the creation of regional networks across the country that worked tirelessly to break the silence and secrecy about abortion. The women and men in these networks set up information tables in quiet country towns and organized meetings and events, often being refused space in community gathering places because of the “contentious” nature of abortion. Regional groups' contributions were critical to the fight to repeal the Eighth Amendment, as evidenced by the extent of the yes vote across the country: 63% of people in rural areas voted yes, reflecting the national average, and the only constituency to vote against changing the constitution still voted 48% yes.¹⁶

Despite the gradual shift toward a pro-choice position among the Irish public, the government remained resistant to change on the matter of the Eighth Amendment; the ways in which it violated basic human rights was seemingly not a compelling enough argument. Fortunately, there were other influential audiences who were willing to listen—and moreover, to call on Irish legislators to act. ARC and other civil society organizations such as Amnesty International recognized that appealing to international human rights monitoring bodies could be an effective tactic to embarrass the state and press for legal and policy change. These bodies' proceedings shone a spotlight on Ireland's reproductive rights abuses and provided a formal mechanism to refute

anti-choice rhetoric about why abortion should remain illegal. They also provided advocates with opportunities to develop creative media messaging. For example, in 2014 one UN committee stated that Irish law treated people who were raped “as a vessel and nothing more.” These observations attracted national media attention and ARC capitalized with the hashtag #NotAVessel on social media. This slogan quickly gained traction, with women all over the world posting pictures of themselves proclaiming #NotAVessel.¹⁷

From 2014, ARC participated in six UN proceedings. At least twice, ARC delivered joint statements on behalf of Irish civil society organizations. In 2016, ARC was the only organization advocating for abortion access at Ireland’s examination under the Convention on the Rights of the Child. ARC’s advocacy drew on first-person accounts from members who had travelled for abortion when they were adolescents.¹⁸ During questioning, government representatives offered no reassurance on respecting adolescents’ rights.¹⁹ The committee’s concluding observations called on Ireland to “decriminalize abortion in all circumstances.”²⁰

In addition to powerful recommendations by UN treaty monitoring bodies, the UN Human Rights Committee ruled that Ireland violated the rights of individuals who had no choice but to travel to access abortion care.²¹ In one of these cases, the Committee ordered the state to compensate the individuals, and also

take steps to prevent similar violations occurring in the future. To this end the state party should amend its law on voluntary termination of pregnancy, including if necessary its constitution, to ensure compliance with the Covenant [and] take measures to ensure that health-care providers are in a position to supply full information on safe abortion services without fearing being subjected to criminal sanctions²²

Proceedings in these various fora laid bare the conflict between Irish abortion law and international human rights standards. Although many of the high-profile cases focused on tragic situations of individuals faced with fetal anomalies, numer-

ous recommendations by these bodies called for wider reform, from instructing the state to revise its abortion legislation and hold a referendum on the Eighth Amendment to calling for it to decriminalize abortion in all circumstances.²³ Without the submissions from grassroots organizations, some of these broader recommendations may never have been made.

The combination of strategies employed by ARC and other groups situated abortion in the forefront of public consciousness and moved it gradually from being a peripheral subject to an integral human rights issue. The increased profile of Ireland’s restrictive abortion laws through the combination of awareness-raising, anti-stigma, and advocacy work put pressure on the Irish government from many sides.

Time to act!

This pressure on the government eventually produced some movement. In July 2016, the Oireachtas voted to establish a Citizens Assembly—made up of 99 randomly selected individuals—to deliberate on a number of issues, including the Eighth Amendment.²⁴ The assembly effectively allowed the government to claim to be responding to the UN, but offered no recourse to those whose rights continued to be violated.

ARC was skeptical of the assembly process, viewing it largely as a political delay tactic. First and foremost, human rights should not depend on public opinion. Additionally, the assembly process had no clear objectives and was not transparent about how speakers were to be selected. A preoccupation with “balance” meant that the assembly gave equal weight to facts and falsehoods. Religious bodies and extremist organizations were given a platform to debate the morality of abortion and perpetuate myths without any basis in science. Speakers cited discredited studies claiming that abortion is bad for women’s mental health, and perpetuated abortion stigma by making comments about people killing their children.²⁵

Despite these significant flaws, ARC decided to participate in the process. We held out some hope that, when presented with the realities of abortion in

Irish people's lives, assembly members would adopt a pro-choice position. ARC submitted a paper outlining the gold standard of barrier-free access to abortion which featured 60 personal testimonies, putting the views and experiences of those directly affected by the Eighth Amendment on the public record. ARC put out an open call for stories, which were sent to a dedicated email address. These first-person accounts described navigating the hurdles to traveling abroad for medical care and importing pills to induce an abortion, among other scenarios, and complemented submissions by other pro-choice groups focused on legal and medical arguments.

Up until this point, much of the political discourse on abortion rights in Ireland had centered on exceptions, such as providing abortion in cases of fatal fetal anomalies, or rape or incest. Because assembly members were recruited on the basis that they were strictly "impartial" —one potential member was even removed for having attended a vigil for Savita Halappanavar four years before—there was understandable concern that when faced with anti-abortion propaganda in equal measure to medical and legal evidence, they would gravitate toward recommendations on the more conservative end of the spectrum. Instead, they came to recognize the need for significant changes to increase access to abortion and advocated for these in their robust slate of recommendations. Legal scholar Fiona de Londras noted at the time that, "the Citizens Assembly took [political representatives] by surprise last weekend. In truth, it took many of us by surprise."²⁶ She also argues that the assembly "created the conditions for change" in "a political system that was not generally willing to accept that women and pregnant people were sufficiently expert in the harms of the 8th Amendment" to take its cues from them.²⁷ Having spent years reluctant to deal with abortion, the government took cover under the assembly's recommendations to put forward a motion for larger-scale reform.

However, they were not willing to embrace these recommendations entirely, and each step from the assembly onward diluted its calls for change. In 2017, an all-party Joint Oireachtas Committee considered the Citizens Assembly findings

and testimony from a range of experts. The committee produced less robust recommendations than the assembly, which organizations like ARC challenged at the time. Nonetheless, the committee did recommend that a referendum be held on removing the Eighth Amendment, and the cabinet agreed to this step in January 2018. In the time it took the Citizens Assembly and Joint Oireachtas Committee to deliberate, more than 3,000 people travelled to England or Wales to access abortion services.²⁸

ARC was one of three civil society organizations and the only grassroots group that formed Together for Yes (TfY), the official referendum campaign that launched on March 22, 2018, and concluded with the successful vote on May 25, 2018. ARC members made the decision to join the (as yet unnamed) TfY at an extraordinary general meeting in February 2018. The Coalition to Repeal the 8th and the National Women's Council of Ireland were the other founders. The TfY campaign emphasized compassion and caring for Irish women at home in Ireland, especially in such tragic situations as when a woman carrying a wanted pregnancy is told her fetus has a fatal condition. Working alongside these other civil society groups to form a coherent campaign involved ongoing negotiation and compromise over tactics and messaging.²⁹

At the outset of the referendum campaign, the government released a Draft Heads of Bill to regulate abortion (a "general scheme" of a bill that outlines major provisions but is not fully fleshed out) on the theory that people wanted to know what they were voting for if they voted to remove the Eighth Amendment from the constitution. This draft was weaker still than both proposals preceding it, reflecting behind-the-scenes political maneuvering. For example, it included a mandatory three-day waiting period, something which had been rejected by both the assembly and the committee but was widely perceived as necessary to gain the approval of the Tánaiste (Deputy Prime Minister). While campaigners were quick to see the problems in the draft bill and tried to counteract them with evidence-based discourse (such as blog posts outlining the negative impact of waiting periods), we had limited power to influence immediate

changes. All our energy was devoted to securing a yes vote. Campaigners shared an implicit assumption that we could address the problems after winning the referendum.³⁰ Some also feared that disturbing the “united front” between Together for Yes, political parties, and the government might cost success in the referendum, especially given the pervasive narrative on the part of the media, general public, and the yes campaign itself that this would be a close-won fight.

Abortion under Ireland’s new law: free, mostly safe, but still criminalized

The hard work has just begun

For four months following the referendum, several anti-choice activists filed legal challenges to the results, delaying the government’s ability to formally remove the Eighth Amendment and introduce legislation to allow for abortion services. ARC organized a meeting with other pro-choice groups to discuss the draft legislation and spent the following months developing an affirmative vision of the principles underlying good abortion law and provision: bodily autonomy, accessibility, accountability, and evidence.³¹ With these ideals as the basis, we then chose specific policy priorities to mobilize around. They included:

- free universal abortion care
- full decriminalization
- no mandatory waiting period
- no refusal of care (“conscientious objection”) and
- no vague non-medical criteria, such as “serious” risk to health.

Along with supportive politicians, ARC hoped that the strength of the 2-to-1 (66.4%) yes vote would translate into leverage to improve the government’s bill.³² When the government formally introduced its legislation, however, it reflected very few of the changes the advocacy community had put forward to improve the initial draft. Further, the government rejected virtually all amendments to improve

access during the legislative process. The rationale for rejecting them was generally some version of “we have to stick to what the people voted for.” Minister of Health Simon Harris, however, did find space to make certain changes. One welcome change he included, when the bill was introduced in September 2018, was to make abortion free. This squarely reflected ARC’s priorities, but he rejected relatively simple changes like using gender-inclusive or gender-neutral language despite a wave of grassroots and even mainstream political party support.³³ He also rejected restrictive amendments proposed by opponents of repeal.

By publicly dressing down the anti-choice legislators when rejecting their amendments, Harris positioned himself as a champion for women while simultaneously endorsing anti-choice measures such as a mandatory waiting period. The health committee hearings and debates in the Dáil and Seanad (the Irish Houses of Parliament) became painful exercises in repetition, as the same appeals to evidence and human rights were rejected over and over again. The cabinet had resolved not to accept changes to the “draft” bill introduced and party discipline among the two primary political parties, Fine Gael and Fianna Fail, meant that there were not enough other members of parliament to push through rights-enhancing amendments.³⁴ Many activists had given everything they had to campaigning for a yes vote in the May referendum and were not as involved in legislative advocacy. Only a few organizations (primarily ARC, Amnesty Ireland, the Irish Family Planning Association, and Lawyers for Choice) were engaged actively. In the end, we won only one of our key priorities: free abortion services.

Ireland’s president signed the abortion bill into law on December 20, 2018, just days before the minister of health had promised abortion services would begin.³⁵ While the new law is a momentous step for Ireland, it also establishes a needlessly cumbersome system that remains grounded in a chilling criminal law framework, heavily restricts abortions after the first trimester, and erects barriers that serve no legitimate purpose.

Key features of the new law

The law and clinical guidelines establish free abortion, which is available on request or “without specific indication” for the first trimester. Ireland does not have a universal health care system and offers relatively few universal health benefits, so the government’s decision to make abortion free is especially impressive. In the run-up to the referendum, many politicians, including the Taoiseach (prime minister), said that abortion should be “safe, legal, and rare.” By the end of the legislative debates, the minister of health adopted ARC’s reasoning that abortion isn’t truly safe if it isn’t free.³⁶ Free abortion is thus a material victory and a rhetorical one.

Sorting out exactly who can access abortion care without cost has been a challenge, however. Typically, doctors are reimbursed via a patient’s Personal Public Service (PPS) number; however, not all legal residents have a PPS number—for example, students from abroad—let alone undocumented residents. Advocates for asylum seekers have asked for clarification on whether the government will provide free abortion care, and on navigating logistical challenges unique to this group, whom the government houses primarily in smaller towns and who have limited ability to travel. Residents of Northern Ireland were left out of the 2018 law, despite politicians’ promises and the fact that they can ordinarily receive medical care in the Republic.

Abortion on request during the first trimester is a narrower victory than it may at first appear. Taking all provisions together, people can access abortion without having to meet specific criteria for up to 12 weeks since the first day of their last menstrual period (LMP). They must see a doctor to certify on government-issued paperwork that their pregnancy is under the time limit, and then wait three days before returning for the abortion, which is typically administered in the form of medical abortion pills. Medical and legal experts, not to mention pro-choice activists, have consistently testified against a mandatory delay, arguing it is paternalistic and without clinical benefit.

In keeping with the World Health Organization’s good practice guidelines, the focus of Ireland’s new system is on providing care in the community,

that is, in doctors’ offices or the handful of independent women’s health clinics in Dublin. The Irish Health Service Executive (HSE) established a website and telephone line called MyOptions to help people find a provider.³⁷ The promise of this model will take time to realize. As of September 2019, more than 300 doctors had opted to provide abortion care, but about half offer care only to their own patients; only 10 of 19 maternity hospitals are providing any abortion care at all.³⁸ As expected, providers are not evenly distributed across the country, leaving people in rural areas without nearby services—a hardship given poor public transportation.

Even doctors who are eager to participate in this community-led system face limitations. The Department of Health only allows doctors to provide abortion care up to nine weeks LMP.³⁹ After that, they must refer patients to a hospital, even though health professionals can safely provide abortion care in the community well into the second trimester. In both settings, medical abortion is the norm. Indeed, the government’s rhetoric has consistently sanitized abortion care by focusing on the provision of pills. If the government committed to training and supporting doctors to provide aspiration abortion, then doctors could care for more patients in their offices, significantly expanding community-based care.

The emerging consensus is that the system works well for those who realize very quickly that they are pregnant and who do not need dating scans to assuage doctors’ fears of violating the law. For those who are past nine weeks LMP, or whose weeks since their last menstrual period needs to be verified, referrals to ultrasound providers and hospitals can be problematic, especially outside the bigger cities. Making matters worse, many home pregnancy tests give estimates of pregnancy based on conception, not LMP, leading people to think they have more time to obtain an abortion than they do. As the medical director of the Irish Family Planning Association put it, “When we get someone who thought they were eight, nine weeks, and turns out to be 11-plus, it becomes a panic to try and get them an appointment on time. It really

does; there is no other way I can describe that.³⁰

The Act mandates a review into the operations of the law after three years. This review is one of the only amendments to the legislation that won government approval. While it was frustrating to watch government officials dismiss objections by saying they could be reviewed in the future, advocates welcome the guaranteed opportunity to push for improvements.

The long shadow of criminalization

As this discussion of the new system suggests, the law is riddled with problems. While the government campaigned by promising to “trust women” and “trust doctors,” the law they crafted maintains abortion as a criminal matter, carving out specific permissible exceptions. In addition to the 12-week “early abortion” on request period, these exceptions are:

- abortion in cases of risk to life or of serious harm to the health of the pregnant woman, provided that two doctors, one being an obstetrician, certify that there is such risk, that the fetus has not reached viability and it is appropriate to carry out the abortion to avert that risk
- abortion in an emergency, that is, if there is an immediate risk to the life, or of serious harm to the health, of the pregnant woman and it is immediately necessary to carry out the abortion to avert that risk, as certified by the medical practitioner before or within three days after the termination
- abortion in cases where two medical practitioners, one being an obstetrician, certify that the fetus suffers from an abnormality that will lead to its death either before or within 28 days after birth.

Doctors who provide care outside these terms continue to risk arrest, prosecution, and a long prison sentence—just as they did when abortion was barely legal.

ARC vigorously opposed the criminal framework of the legislation. Abortion is health care and should be regulated under health statutes and codes

for medics as well as patients. While the new law takes a major step by removing criminal penalties against individuals who terminate their own pregnancies, treating abortion as a crime stigmatizes people who decide to end a pregnancy and has a chilling effect on health care providers.⁴¹

An example of the controversy over the meaning of “12 weeks” illustrates the chilling impact of criminalization. One month after the introduction of legal abortion, the CEO of Dublin’s Rotunda Maternity Hospital, Dr. Fergal Malone, explained that the hospital was limiting its early abortion service to 11 weeks LMP instead of 12, because “the legislation is written with an upper limit of 12 weeks and zero days. But there is considerable ambiguity as to whether 12 weeks means the date at which the termination starts, or the date at which the termination ends.” “Given there is a potential 14-year jail term for getting this wrong,” he continued, “I can’t put my staff in danger where there is ambiguity.”⁴²

After directing the hospital to provide care up to 12 weeks, the HSE took three more months to clarify that an abortion need not be completed by 12 weeks and zero days so long as it began by that deadline.⁴³ Should the medication fail to work, hospitals are barred from providing further treatment. This means that the person who has already jumped through all the hoops of having their pregnancy scanned and certified, waiting three days to go to the hospital for care, and then enduring a failed medical procedure, still must leave the country in order to terminate their pregnancy.⁴⁴

As Dr. Malone’s comments show, the new law is not entirely clear regarding what constitutes criminal conduct. It uses vague phrases instead of standard medical terms. The government insisted on the modifier “serious” in the framework of exceptions: abortion after 12 weeks since the last menstrual period may be provided if there is risk of “serious” harm to the health of the pregnant woman. All the medical and legal experts who participated in the various assemblies and committees urged the government against such vague, non-medical language. Indeed, within the first month of legal abortion, at least one woman and her partner went public about having to travel to England to access

abortion care when her fetus was diagnosed with life-threatening anomalies that the hospital would not certify as “fatal.”⁴⁵ The fact that Ireland was a late adopter of legal abortion should have enabled the state to learn from patient-centered, international best practices, especially given the weight of the public vote in favor of reform.

During parliamentary debate, Health Minister Harris asserted that criminalization “is necessary from a policy perspective...The provisions in the Bill protect people from forced abortions or an attempt to intimidate women...It is important that the termination of pregnancy remains illegal outside the circumstances in which it is legal.”⁴⁶ Harris rested his case on advice from the attorney general; however, such advice is confidential and not shared with members of the Oireachtas, let alone the public. Lawyers for Choice and other experts countered by saying that Ireland already has laws to deal with coercion and medical wrongdoing and proposed narrowly tailored measures to address the minister’s stated concerns.⁴⁷

Criminalization emboldens opponents of legal abortion to engage in “sting operations” or malicious reporting of doctors, in turn discouraging doctors from providing care and making abortion less accessible to those who need it. While doctors and patients are required to navigate a criminal framework for abortion care, rogue agencies that promote anti-abortion myths alongside free ultrasounds operate without regulation.⁴⁸ The Irish public is still waiting for long-promised legislation to regulate such agencies.⁴⁹

Finally, Ireland’s new abortion law never uses the word “abortion.” Instead, the law concerns “termination of pregnancy,” defined as “a medical procedure which is intended to end the life of the foetus.” This troubling definition personifies fetuses, evokes a criminal offense, and stigmatizes the medical care that is supposedly being legitimized.⁵⁰ Rather than affirming women’s rights after decades of reproductive oppression, this approach perpetuates the idea that abortion is, at the least, a moral crime.

Conclusion: The fight is far from won

In this first year of legal abortion, thousands of people have accessed abortion care in Ireland (the government will publish data in June 2020). However, others continue to travel abroad, including those who miss the 12-week cutoff and those who receive a diagnosis of catastrophic but not necessarily “fatal” fetal abnormality.⁵¹ We do not yet know how many people are receiving the MyOptions announcements or how often pregnant people are being refused referrals by doctors. We also know very little about how the system is working for those whose pregnancies endanger their health.

As many predicted, the shortcomings in the new law are having their worst impact on those who have the fewest resources to overcome them. Consider young women or anyone with irregular periods who doesn’t realize right away that they are pregnant. Or consider the plight of pregnant people who miss the deadline for abortion on request but cannot travel—for lack of funds, travel documents, or control over their lives (such as young people, people with disabilities who need a travel companion but cannot afford the cost of two plane tickets, asylum seekers who are subject to strict travel limitations, or those in controlling relationships). To their credit, some doctors go above and beyond to ensure that their patients get all required appointments in time to meet the cutoff, but how much better would care be if there were no artificial deadline at all?⁵²

Despite these concerns, it is tremendously gratifying to know that on any given day, someone who is pregnant in Ireland and does not want to be has a chance to access free abortion care in their own country, and that activists had such a fundamental role in ushering in this change. ARC’s influence on public policy is reflected not only in the fact that free abortion on request is now a reality for a sizeable number of people in Ireland, but also in the discourse of policymakers. The default political position has shifted radically, as evidenced by the health minister’s acceptance that abortion is only safe when free, and by other politicians using the expression that abortion should be “free, safe, legal.”

We firmly believe that our role as activists is not to bask in the success of what Ireland has achieved so far but to keep working to make things better. We plan to monitor the law and services so that we can advocate for improvements when the government undertakes its review, and to extend solidarity to our allies globally. Our fight is not won until free, safe, legal, and local abortion is a reality for all.

Postscript

Because the law is so new, the situation in Ireland is constantly evolving, as is the situation in Northern Ireland. To keep up to date, visit our website (<https://www.abortionrightscampaign.ie/>) and follow Alliance for Choice (<http://www.allianc4choice.com/>) in the North.

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