

Noel Whelan: Bid to fix abortion law in Constitution did not work

Eighth Amendment has forced isolation and travel on thousands of pregnant Irish women

about 15 hours ago

Noel Whelan

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We are not debating the merits of the Eighth Amendment in the abstract, this time around. It has been in the Constitution for more than 35 years. We know how it played out – and it wasn't the way its proponents argued and hoped it would.

In 1983, those who opposed the amendment warned that its terms were vague and uncertain.

In the years since, our superior courts have spent many days hearing arguments about the levels of care permissible. Volumes of law reports have been filled with judicial pronouncements on the meaning of “with due regard to”, “as far as is practicable” and “unborn”. A third of the alphabet has been deployed as pseudonyms for the names of women whose crisis pregnancies became the subject of litigation.

When in 1983 lawyers opposing the Eighth Amendment warned that injunctions would be taken to stop young women travelling to have abortions abroad, they were accused of scare-mongering. In 1992, that was precisely what happened in the X case. It took a constitutional amendment to remove the risk of it happening again.

Another constitutional amendment was required to stop injunctions being taken against any publication which contained details of abortion services abroad.

Enshrine hypocrisy

The effect of both the “travel” and “information” amendments was to enshrine hypocrisy into our basic law. Now a woman may travel and know where to go – but what she travels to do remains a crime under our laws. The assistance a woman in such circumstances requires most – namely, access to her own doctors and full medical records – is still constitutionally prohibited by the Eighth Amendment.

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Many hundreds of abortions are now also happening in Irish homes. Women are importing the abortion pill and taking it without medical care and supervision.

Weeks of Dáil debates, several all-party committees and two unsuccessful referenda (in 1992 and 2002) have been wasted in efforts to restate the constitutional provision. For decades, much political energy was expended in avoiding legislating within the confines of the Eighth Amendment.

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Surely it's time to recognise that the experiment of fixing our abortion law in a couple of sentences in the Constitution hasn't worked. Both the recent Constitutional Convention and the Oireachtas Committee on the Eighth Amendment found that rewording the constitutional provision would compound confusion in the modern legal and medical environment. The No side has not come up with workable constitutional alternatives either, and content themselves with a mantra that what's there must stay.

If the purpose of the amendment in 1983 was to stop Irish abortions, that clearly hasn't worked. Irish abortions are happening. A small number happen each year in hospitals in Ireland to protect the lives of women, including

circumstances where a mother’s life is at risk from suicide.

Tens of thousands of Irish abortions have happened in England since the amendment was passed. All the Eighth Amendment has done is to force isolation and travel on thousands of pregnant Irish women.

Many hundreds of abortions are now also happening in Irish homes. Women are importing the abortion pill and taking it without medical care and supervision. The No campaigners say we unregulated medication, but the effect of so doing would be to push forced to carry to full term.



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“
Their lived experience working in a medical and legal environment shaped by the Eighth Amendment has turned them into activists

In 1983, the then attorney-general Peter Sutherland warned that the Eighth Amendment would force doctors to question whether they could treat a mother’s illness which might otherwise shorten her life expectancy, if this were to threaten the life of the foetus. It would, he warned “inhibit [doctors] in making decisions as to whether treatment should be given in a particular case”.

Striking feature

His predictions came to pass. Indeed, a striking feature of the current referendum campaign has been the number of obstetricians and gynaecologists working at the frontline, treating pregnancies with risk, who have felt the need to speak out.

Their lived experience working in a medical and legal environment shaped by the Eighth Amendment has turned them into activists. The Eighth Amendment inserts legal uncertainty into their treatment rooms and impacts their capacity to care for women. More than most, these experts realise that every pregnancy is different and that a decision to end a pregnancy is deeply personal and always carefully and painfully weighed.

“Many
hundreds of
abortions
are now also
happening in
Irish homes.
Women are
importing
the abortion
pill and
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without
medical care
and
supervision.”
Above is Dr
Rebecca
Gomperts,
medical
director of
abortion-
rights lobby
group
Women On
Web, at a
press
conference
in Dublin on
the issue of
importation

of abortion
pills.
Photograph:
Dara Mac
Dónail/The
Irish Times

Yet some of the same lawyers who urged it upon us in 1983 are still trying to tell us that it won't have the legal consequences it has already had. The newer generation of Eighth Amendment enthusiasts who join them choose to ignore 35 years of legal quagmire.

We need to delete the Eighth Amendment. It is the only way to create the constitutional space for the Oireachtas to make better abortion law.

If the law they write is subsequently overtaken by medical change or judicial interpretation, then they will be free to rewrite and improve it. Leaving the provision of our abortion law to be determined by a majority of our elected politicians makes most sense in our representative democracy.

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We tried the alternative. It didn't work.

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Oldest

Celticmary Rank 0

Same old line. How many times have Irish obstetricians raised the 8th as impediment to care at their AGMs? I keep asking this question and I suspect the answer is: NEVER. This 'concern' is manufactured to get abortion on demand into Ireland up to 12 weeks and then to 24 after seeing two doctors and this only a matter of form-filling as Dr. Peter Boylan said that the woman should decided 'the risk.' An OB and another 'practitioner'. I suspect the GP, as in the UK.

I saw Prof. McGuinness on TV... » more

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noeleenmurphy Rank 29

@J-C-S : Careful, J-C-S, she might take you up on that invitation. Then again, maybe she is already here and was part of the American-inspired wierdo group who camped outside 3 maternity hospitals with the declared intent of causing "distress". See article: <https://www.irishtimes.com/news/politics/anti-abortion-group-targets-hospitals-with-extreme-imagery-1.3480553>

4 hours ago 2 Likes

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J-C-S Rank 324

@noeleenmurphy Yes, I've encountered them outside Trinity and Belfield as well. Shades of the old Youf Defense thugs. Even the Save side have asked them to desist.

3 hours ago 1 Like

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Finfacts Rank 24

This is a clear, well-written piece on why after a generation the hypocrisy in the Constitution should be deleted. It had taken 20 years for the hypocrisy of the "Irish solution to an Irish problem" on contraceptives to be ended.

https://gateway.euro.who.int/en/indicators/hfa_586-7010-abortions-per-1000-live-births/

The calamity howlers can continue to warn about floodgates opening but the trend in much of the world is that the rate of abortions relative to live births has been falling in... » more

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AnChiarogEile Rank 0

@Finfacts Thank you for the graph, which demonstrates that until the early 1990s abortion as a primary form of birth control was very much the province of poor, ill-educated countries in eastern and south-eastern Europe where contraception was scarce and unreliable, and where people were frequently too poorly informed to use even what little there was: e.g. Ceascescu's Romania in the 1980s where birth control was officially banned, so an estimated 60% of pregnancies ended in abortion. Given... » more

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JohnHart Rank 645

A factual analysis that is well put.

11 hours ago 4 Likes

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JoeNolan Rank 127

The No campaigners do not "insist on their criminalisation for taking unregulated medication". In point of fact pro life does not support the criminalisation of women who have had abortions in Ireland. Penalties for women who have had abortions precede the Eighth Amendment and can be changed with or without it. During the PLDP Act 2013, all of the psychiatrists (even those that were pro-abortion) concurred that abortion is not a treatment for suicidal ideation in pregnancy, and to abort the... » more

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WillConqueror Rank 0

With the huge involvement of the US loonies in our campaign, is it possible that they organise and fund abortion flights from Shannon to NY? Thereby, preventing the pro-life brigade of issuing further threats to the public, that should the 8th be repealed they will fight every piece of legislation (inch by inch) at every election, by-election, it will be an issue. They also state they will bulldoze every hospital rather than allow legal terminations take place!
So much for democracy..

10 hours ago 3 Likes

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AnChiarogEile Rank 0

@WillConqueror I also fear that if the 8th Amendment is repealed, the battle - for that's what it will become - will move towards "direct action". The posts a few days ago connecting the death of Alfie Evans with vaccination show the direction in which things are now moving; a sinister coalition of far-Right cranks like the Russian crackpot Pavel Stroilov for whom abortion is but one aspect of their detested "liberalism" and to be fought by whatever means are to hand. Other majority-Catholic... » more

9 hours ago 4 Likes

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oxBoD Rank 0

Whatever your position on Pro or Anti abortion - I think its clear at this stage - Bunreacht na hÉireann is not the appropriate place to tackle that law.

Time and time again we keep blundering over the 8th, what happened to Savita Halappanavar, the shocking situation where a risk to the life of the woman had to be shown before an intervention could happen, the telling of that woman that "this is a Catholic country" and then her subsequent death.

There is no doubt the 8th contributed to the... » more

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oxBoD Rank 0

The logical conclusion to voting to retain the 8th is;

1. You vote to remove the right to travel to obtain an abortion
2. You test every single woman at the airports and sea ports for pregnancy
3. You prohibit pregnant women from traveling
4. You inspect every single package in the post for abortion pills

On point #4 that's more than we do to stem Heroin importation - that's how fanciful it would be to prohibit and police abortion pills.

Absent that slide into a "Handmaid's tale" dystopia the... » more

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Cyclopswasright Rank 0

Interesting article. I remember when the Cabinet papers for 82 or 83 were released a few years ago, I was surprised to read how the issues with the wording to the constitution were predicted by the Attorney General.

I was in school when the X Case happened and I remember being told by the Head Brother at my school that hard cases make bad laws. All these years later I am of the mind that hard cases reveal bad laws.

7 hours ago 4 Likes

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KeyboardWarrior Rank 0

Excellent piece.

I take issue with the charge of hypocrisy though. That we prohibit abortion but allow women to travel to get it is no more hypocritical than allowing those suspected of procuring assisted suicide going to Switzerland.

7 hours ago 1 Like

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KeyboardWarrior Rank 0

@J-C-S I don't think it is. If you're going to have unrestricted travel between states, you'll have people moving around for goods & services due to availability in neighbouring jurisdictions.

I was recently on the ferry from Helsinki to Tallinn and a large proportion of the passengers were just there to buy cheap alcohol and then return.

Now I think we should be providing women with abortion services in this country but I don't think it's a strong argument to say the current regime is... » more

7 hours ago 0 Likes

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J-C-S Rank 324

@KeyboardWarrior For me the hypocrisy comes in when the Save side say we have no abortion here and that we are a "beacon of light" for the "less civilised" nations that do. We do have abortion, just we have outsourced it (and order it by mail) so that for me is semantics and hypocrisy.

Equally, I feel claiming we have no euthanasia here when innumerable terminally ill people are quietly let drift away with pneumonia, but still forcing those with degenerative diseases to hang on for a horrible... » more

5 hours ago 2 Likes

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PeterBedrill Rank 0

If the 8th amendment did not work, is the only alternative unrestricted abortion for the first 12 weeks and a real risk of it being available after 12 weeks (see the UK)? Hardly, and until a compromise that addresses legitimate pro-life concerns is proposed for a vote, we have no alternative but to vote No.

7 hours ago 1 Like

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GerardCurley Rank 1312

@PeterBedrill The Constitution is not the place for dealing with the issue.

It'll only be available after 12 weeks (assuming the 8th is repealed) in very specific circumstances, largely similar to the 2013 act grounds plus fatal foetal abnormalities. There' hasn't been an avalanche of cases since 2013.

The UK is not the correct benchmark for Ireland on this, Germany would be better.

6 hours ago 3 Likes

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J-C-S Rank 324

@GerardCurley Dead right, or the Netherlands. We should aim for the best legislation and support for women. The only group obsessing about the UK are the Save gang.

5 hours ago 2 Likes

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