

**Joint Committee on Health and Children**

**Opening Statement on the Implementation of the Government Decision following the publication  
of the Expert Group Report into matters relating to A, B and C v Ireland**

**Wednesday 9 January 2013, 11:45am**

**Dr Alan Brady, Member of the Executive of the Irish Council for Civil Liberties Association**

1. The ICCL is very grateful for the opportunity to address the Committee this morning on the Implementation of the Government Decision following the Publication of the Expert Group report in the Matters relating to *A, B and C v Ireland*.

**Settled issues**

2. The ICCL is of the view that a number of issues that might otherwise occupy the Committee are well settled. First, it is important to emphasise that abortion *is legal* in Ireland. It has been legal, in certain highly-restricted circumstances, for the past twenty years. In *Attorney General v X*<sup>1</sup> the Supreme Court unambiguously affirmed that a pregnant woman's *constitutional right to life* entitles her to terminate her pregnancy if it is established as a matter of probability that there is a real and substantial risk to her life (as distinct from her health) which can only be avoided by termination of the pregnancy. The Supreme Court included the risk of suicide within the definition of real and substantial risk to life. The issue before us is therefore not the legalisation of abortion in Ireland. The issue is the need for legislation to give meaningful effect to the existing constitutional rights of pregnant women whose lives are at risk.
3. In the case of *A, B and C v Ireland*<sup>2</sup> the European Court of Human Rights ('the ECtHR') found there was a 'striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation.'<sup>3</sup> The ECtHR found that Ireland had violated Article 8 of the European Convention on Human Rights ('the Convention') by failing to provide a procedure for a woman whose life was at risk to access a lawful termination. Ireland is legally obliged to implement this judgment under Article 46 of the Convention.
4. The Government has recently received the Report of the Expert Group on the judgment in *A, B and C v Ireland* chaired by the Hon Mr Justice Sean Ryan. The Report noted that Ireland is under a legal obligation arising from the *A, B and C* case. In considering the options available to meet that obligation, the Report implicitly concluded that the most compelling way to implement the judgment in *A, B and C* in a way that is constitutionally, legally and procedurally sound is by a combination of primary or amending legislation (including repeal and replacement of sections 58 and 59 of the Offences against the Person Act 1861) coupled with regulations.

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<sup>1</sup> [1992] 1 IR 1.

<sup>2</sup> Application No.25579/05, Judgment of 16 December 2010 (2011) 53 EHRR 13.

<sup>3</sup> *ibid* at paragraph 264.

5. It follows that the Government must now, at an absolute bare minimum, give effect to the judgment in the X case through legislation, including in relation to the issue of suicidal ideation. None of this is a matter for debate.

### **Opportunity for development**

6. It is the considered view of the ICCL that the prospect of abortion law reform represents an opportunity for Ireland to move beyond the bare minimum requirement to implement the judgment in *A, B and C*. The decriminalisation of homosexuality twenty years ago was undertaken grudgingly and in response to the binding decision by the ECtHR in the case of *Norris v Ireland*.<sup>4</sup> Yet today we again find ourselves subject to unwelcome international scrutiny, this time on the issue of abortion, because we have not implemented a judgment of the ECtHR. The Oireachtas now has the opportunity proactively to pursue improvements in Ireland's human rights record and the ICCL strongly urges it to do so.
7. As Ireland's human rights watchdog, the ICCL feels obliged to point out that the State's obligations in relation to abortion under the Convention run deeper than merely implementing the judgment in *A, B and C*.
8. The most recent case law from the ECtHR on the issue of reproductive rights, as set out, *inter alia*, in the cases of *RR v Poland*<sup>5</sup> and *P and S v Poland*<sup>6</sup> indicates that Council of Europe states are obliged to ensure that the women seeking lawful terminations are not exposed to inhuman and degrading treatment contrary to Article 3 of the Convention. Applying this principle in an Irish context, it seems clear to the ICCL that the current treatment of women with pregnancies involving a defined set of fatal foetal abnormalities (i.e. where it is clear that carrying a foetus to term will not result in a viable life) potentially falls foul of Article 3 of the Convention.
9. The ICCL would suggest that provision could be made in law for the termination of such pregnancies without violating Article 40.3.3°. In the case of *D v Ireland*<sup>7</sup> the Irish Government argued before the ECtHR in that case that it was possible to interpret Article 40.3.3° as permitting termination of pregnancy in cases of fatal foetal abnormality. The ECtHR agreed that such an interpretation by the Irish Courts was possible.
10. Any residual doubts as to the future constitutionality of such provisions could be addressed by way of a reference under Article 26 of the Constitution by the President after consultation with the Council of State. It seems likely that any legislation on abortion would be subject to constitutional challenge and so this may be a prudent approach in any case.

### **Future constitutional reform**

11. The ICCL also notes that the Expert Group Report lists a number of other scenarios in which lawful terminations are available in most other European states, including in cases of rape, incest and threats to the health of the woman not amounting to a threat to her life. The ICCL accepts that the current constitutional framework prevents the development of Irish law to include such situations. The ICCL hopes to see, in the future, a referendum to change this constitutional position sufficiently to enable the introduction of a progressive and human rights based approach to protecting the lives and health of pregnant women in Ireland.

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<sup>4</sup> Application No. 10581/83, Judgment of 26 October 1988; (1991) 13 EHRR 186.

<sup>5</sup> Application No.27617/04, Judgment of 26 May 2011; (2011) 53 EHRR 31.

<sup>6</sup> Application No. 57375/08, Judgment of 30 October 2012.

<sup>7</sup> Application No. 26499/02, Decision on admissibility of 27 June 2006; (2006) 43 EHRR SE 16.

### Biographical notes

**Dr Alan Brady** is a member of the Executive of the Irish Council for Civil Liberties Association and appears before the Joint Committee primarily in that capacity. Dr Brady is an Adjunct Lecturer at the School of Law, Trinity College Dublin, where he currently lectures on Judicial Review and Human Rights. His research expertise is in the field of constitutional and human rights. Recent publications of note include *Proportionality and Deference under the UK Human Rights Act* (Cambridge University Press, 2012), *The Constitution, Gender and Reform* (National Women's Council of Ireland Working Paper, 2012) and 'Proportionality, Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of *Meadows*' (2010) 17 *Dublin University Law Journal* 136. Dr Brady is also a barrister practicing in the area of public and administrative law, with a particular focus on child law. He holds law degrees from Trinity College Dublin (LLB), the King's Inns (Barrister-at-Law) and the London School of Economics and Political Science (LLM, PhD).

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