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SUBMISSION TO THE JOINT OIREACHTAS COMMITTEE ON HEALTH AND CHILDREN REGARDING THE REPORT OF THE EXPERT GROUP ON THE JUDGMENT IN A, B AND C V IRELAND

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SUBMISSION TO THE JOINT OIREACHTAS COMMITTEE ON HEALTH AND CHILDREN REGARDING THE REPORT OF THE EXPERT GROUP ON THE JUDGMENT IN A, B AND C V IRELAND

Amnesty International (AI) welcomes the publication of the Report of the Expert Group on the judgment of the European Court of Human Rights in *A, B and C v Ireland* (hereinafter Expert Group Report) as a positive step towards compliance with Ireland's human rights obligations to women and girls. AI notes the Irish government's decision on 18 December 2012 to implement the Expert Group Report through a combination of legislation and regulations, rather than by regulations alone.[1] The Expert Group Report contains a number of recommendations which, if implemented, would go some way towards discharging Ireland's human rights obligations. As the Irish government now begins its deliberations on what sort of law and regulations to enact, AI is submitting this initial response to the Joint Oireachtas Committee on Health and Children to provide an early clarification that Ireland will need to take steps that go beyond the Expert Group Report recommendations to bring Ireland's law and practice into compliance with its human rights obligations towards women. The purpose of this initial response is to provide some detail of what AI believes should be within the government's consideration at this time. AI has issued an initial submission to the Minister for Health and will issue a further, more comprehensive submission to the Irish government in this regard in due course. AI also notes the Irish Human Rights Commission's consultation on this matter, and will be submitting observations to that process too.

At the outset, AI would like to take this opportunity to remind the Joint Oireachtas Committee on Health and Children that restrictive abortion laws and practices are gender-discriminatory, denying women and girls treatment which only they need.[2] Only women and girls risk physical and mental suffering or losing their lives as a result of delays in or denial of medical treatment if complications arise during pregnancy. Only women and girls are compelled to continue a medically dangerous or unwanted pregnancy or face imprisonment. Only women and girls suffer the mental anguish and physical pain of an unsafe abortion, risking their health and life in the process. The Joint Oireachtas Committee's deliberations should be undertaken in this light. In addition, while AI welcomes the consultative approach envisaged, it is vital that the government act without any unnecessary delay to enact the legal framework necessary to respect, protect and fulfil women and girls' right to legal, safe and accessible abortion.

1. ABORTION WHERE THERE IS A RISK TO LIFE OF THE WOMAN

It is important to note that the human rights dimensions of the Expert Group Report extend beyond the regional European Court of Human Rights remit. The UN Human Rights Committee in its 2008 concluding observations on Ireland "reiterate[d] its concern regarding the highly restrictive circumstances under which women can lawfully have an abortion in the State party" and recommended that Ireland "should bring its abortion laws into line with the Covenant".[3] The UN Committee Against Torture in its 2011 concluding observations on Ireland's first report stated:

"The Committee has noted the concern expressed by the European Court for Human Rights (ECtHR) about the absence of an effective and accessible domestic procedure in the State party for establishing whether some pregnancies pose a real and substantial medical risk to

the life of the mother [Case of A, B and C v. Ireland], which leads to uncertainty facing women and their medical doctors, who are also at risk of criminal investigation or punishment if their advice or treatment is deemed illegal. The Committee expresses concern at the lack of clarity cited by the ECtHR and the absence of a legal framework through which differences of opinion could be resolved. Noting the risk of criminal prosecution and imprisonment facing both the women concerned and their physicians, the Committee expresses concern that this may raise issues that constitute a breach of the Convention."[4]

The Committee recommended that Ireland "clarify the scope of legal abortion through statutory law and provide for adequate procedures to challenge differing medical opinions as well as adequate services for carrying out abortions in the State party, so that its law and practice is in conformity with the Convention [Against Torture]".

AI wishes to emphasize that the Irish government has an immediate obligation to give effect to its current legal framework on abortion, by facilitating access to abortion for women whose lives are endangered by their pregnancies. AI assumes that no legislative action will be taken that falls short of affirming the 1992 judgement of the Supreme Court in *Attorney General v X* (hereinafter *X case*)[5] or seeks to restrict lawful abortion further, as this would be impermissible from the perspective of Ireland's obligations under international human rights law as it would constitute a retrogressive step.[6]

Where the life of the woman or girl is at risk, AI considers that access to safe abortion services should be provided for in law and practice (see below for AI's views on other circumstances in which such services should be available). Furthermore, regional and international human rights and other entities have made it clear that, where abortion is legal, it must be accessible and safe. The most resounding call for this was in the consensus document that was the result of the International Conference on Population and Development in 1994, where states noted: "In circumstances where abortion is not against the law, such abortion should be safe."[7]

Amnesty International would also like to highlight the following issues as central to ways of implementing the Expert Group Report that would go the farthest to discharge Ireland's human rights obligations where the life of the woman or girl is at risk.

A) MEDICAL REGULATIONS/GUIDELINES

Firstly, the Expert Group Report reiterates, in the language of the Irish Supreme Court in the *X case*, that the appropriate standard to determine the legality of abortion in current Irish law is where there is a "real and substantial" risk to the life of the pregnant woman. This risk does not, the Report clarifies, need to be "imminent and inevitable".

The Oireachtas Committee on Health and Children should read this in light of United Nations human rights treaty body jurisprudence and comments. Thus, the Human Rights Committee has explained that the right to life should not be understood in a restrictive manner, and that states must adopt positive measures to protect this right.[8] In the Human Rights Committee decision in the case of *K.N.L.H. v. Peru* concerning an adolescent who had been denied a legal abortion, the Argentine member of the Committee noted that "[i]t is not only taking a person's life that violates article 6 [right to life] of the Covenant but also placing a person's life in grave danger, as in this case".[9]

It will be important for any guidelines developed on access to legal abortion in Ireland to reflect the fact that medicine, in this sense, is not an exact science and that any delay in the provision of abortion services may in fact contribute to a deterioration in the health situation of the pregnant woman. In this sense, guidelines should incentivize swift decision-making and access to services, and must not punish medical service providers for prioritising the health and life of their patient over seeking to intervene only where all medical providers everywhere would agree the risk was real and substantial. There cannot be any justification for allowing a situation of real and substantial risk to the pregnant woman's life to deteriorate to a situation of imminent and inevitable risk, if an effective course of medical action is known and can be taken.

B) CONSCIENTIOUS OBJECTION

Secondly, AI calls attention to the Expert Group Report's assertion that medical providers may be allowed the right to object to providing services. While the right to express one's freedom of thought, conscience, religion or belief potentially includes the right to object to personally providing certain care, this right is not unlimited and must be weighed against the various human rights of a patient needing urgent care. Amnesty International welcomes the Expert Group Report's acknowledgment that "[a] balance ought to be achieved between ensuring a patient's access to lawful medical treatment whilst also recognising an individual's conscientious objection, insofar as possible".[10] Bearing this in mind, any regulation should clarify that a review board of women's right to access treatment should never include an individual who categorically objects to the treatment in question, for any reason including personal conscience.

In this connection, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has stated, with regard to reproductive health services generally, that "if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers".[11]

The Human Rights Committee has recommended, specifically in the context of guaranteeing access to legal abortion in Poland, that the Polish government "introduce regulations to prohibit the improper use and performance of the 'conscience clause' by the medical profession".[12] Likewise, when Colombia's High Court mandated access to legal abortion in a variety of cases, the Human Rights Committee noted that "[t]he State party must ensure that health providers and medical professionals act in conformity with the ruling of the Court and do not refuse to perform legal abortions".[13] In his 2011 report to the United Nations General Assembly, the Special Rapporteur on the right to health cites inadequate regulation of conscientious objection as a legal restriction that contributes to making legal abortions inaccessible: "Conscientious objection laws create barriers to access by permitting health-care providers and ancillary personnel, such as receptionists and pharmacists, to refuse to provide abortion services, information about procedures and referrals to alternative facilities and providers."[14] He recommends that states "ensure that conscientious objection exemptions are well-defined in scope and well-regulated in use and that referrals and alternative services are available in cases where the objection is raised by a service provider".[15]

Guidelines must clarify that, in emergency situations where no referral or alternative service is available, accessible or adequate, there can be no room for conscientious objection. The right to conscientious objection is linked to the right to manifest one's freedom of thought, conscience, religion or belief, protected, for example, in article 18(3) of the International Covenant on Civil and Political Rights. This right is not absolute however, and may be subject to certain limitations as stipulated in the ICCPR. It is incumbent upon states to regulate the right to conscientious objection in the health field in such a way as to balance and protect both the health practitioner's rights and the rights of her/his patients to life, health, non-discrimination, and other rights of those potentially denied services.

C) INVOLVEMENT OF WOMEN IN DECISION-MAKING

Finally, the Expert Report Group indicates that, in the current legal framework in Ireland, medical professionals are necessarily the ultimate decision-makers on the termination of a pregnancy. Accordingly, the role of the woman is one restricted to giving informed consent "once a clinical decision has been made as to the appropriate treatment."[16]

International human rights standards are clear that individuals must have the main and final say in their health care.[17] The CEDAW Committee has put this in the strongest terms possible: "Decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government."[18] The UN Committee on Economic, Social and Cultural Rights has likewise noted that autonomy is key to the realisation of the right to health: "The right to health … includes the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference."[19]

2. DECRIMINALIZATION

AI recommends that international and regional human rights bodies mandated by states to give authoritative interpretations of human rights law have long emphasized that criminal sanctions for the procurement or provision of voluntary abortion information or services raise serious human rights concerns. At risk are the human rights to life, health, non-discrimination, liberty, privacy, information, security of person, and freedom from cruel, inhuman, and degrading treatment and punishment, as well as the right to decide on the number and spacing of children, to benefit from scientific progress, and to freedom of thought, conscience and religion.

In this regard, Amnesty International draws particular attention to General Recommendation 24 of the CEDAW Committee on women and health. In this General Recommendation—which should assist states in their implementation of the Convention on the Elimination of All Forms of Discrimination against Women—the CEDAW Committee affirms states' obligation to respect women's access to reproductive health services and to "refrain from obstructing action taken by women in pursuit of their health goals".[20] It explains that impermissible "barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures."[21] Abortion is clearly a medical procedure only needed by women.

The CEDAW Committee specifically recommends that "[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion".[22] This serious concern with the criminalization of abortion has been

repeated in various concluding observations with regard to numerous countries by the Human Rights Committee[23] and the Committee on Economic, Social and Cultural Right.[24]

In the Platform for Action resulting from the Fourth World Conference on Women in 1995, states committed to "consider reviewing laws containing punitive measures against women who have undergone illegal abortions".[25] The United Nations Special Rapporteur on the right to health has called for the removal of punitive sanctions against women who have had abortion, and for the full decriminalization of abortion.[26] Several studies on access to abortion in countries with partial decriminalization—such as in Ireland—have concluded that as long as abortion is generally criminalized, medical service providers will be deterred from even providing care that is legal.[27] In its ruling in the case of *A, B and C v. Ireland*, the European Court of Human Rights said it considered it "evident" that the criminal provisions on abortion "would constitute a significant chilling factor for both women and doctors in the medical consultation process" and that women would be deterred from seeking legal and necessary care, and doctors from providing it, because of this chilling effect.[28]

In the context of these repeated and forceful calls for the removal of punitive sanctions for all abortion, guaranteeing access to abortion services that have been legal (but inaccessible) in Ireland for decades is, while positive, clearly an insufficient step. Amnesty International urges the Oireachtas Committee on Health and Children and the Irish government to consider and act on the Expert Group Report in that light. The government should decriminalize abortion in all circumstances. Women and girls must not be subject to criminal sanctions for seeking or obtaining an abortion under any circumstances. While the government considers what sort of legal framework to enact in respect of access to abortion, an immediate parallel step should be decriminalization as this should not require such broad-based consultation.

3. THE RIGHT TO ACCESS ABORTION SERVICES IN OTHER CIRCUMSTANCES

AI encourages the Irish government, including the Oireachtas Committee on Health and Children, to take this opportunity to look more comprehensively at the situations in which it should provide access to safe and legal abortion services, in line with the evolving interpretation of its human rights obligations. The Oireachtas Committee on Health and Children and the government's deliberations should not be constrained by existing provisions in the Irish Constitution, Bunreacht na hÉireann, and should suggest what, if any, constitutional amendment may be required to comply with international human rights law. The CEDAW Committee, in its 2005 concluding observations on Ireland stated: "The Committee reiterates its concern about the consequences of the very restrictive abortion laws under which abortion is prohibited except where it is established as a matter of probability that there is a real and substantial risk to the life of the mother that can be averted only by the termination of her pregnancy."[29] It urged Ireland "to continue to facilitate a national dialogue on women's right to reproductive health, including on the very restrictive abortion laws".

AI encourages states to provide legal access to safe abortion services not only where the life of the woman or girl is at risk, but also where there is a grave risk to their health or where the pregnancy is the result of rape or incest. AI views access to abortion where the foetus presents malformations incompatible with life outside the uterus as a health issue. In some cases, such as with anencephalic pregnancies, the pregnant woman presents an additional risk for health complications such as polyhydramnios and increased amniotic fluid. The

adequate therapeutic indication in such cases in medical experience may be termination and certainly palliative care. In addition, Amnesty International operates within the World Health Organization's definition of health, which clarifies that "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." AI knows, from its research and experience that the emotional distress that accompanies a wanted but severely unhealthy pregnancy is such that women often desire a termination. Amnesty International believes that women's right to health in such cases can only meaningfully be upheld where doctors can legally apply a full range of therapeutic tools to address the health needs and wishes of the patient.

The fact that women and girls who become pregnant as a result of rape or incest can be denied access to abortion and thus potentially compelled to carry their pregnancies to full term is a violation of their human rights. The involuntary continuation of pregnancy causes untold physical and mental suffering for the woman or girl. For example, in its 2009 report on Nicaragua, the UN Committee Against Torture expressed deep concern with the general prohibition of abortion "even in cases of rape, incest or apparently life-threatening pregnancies that in many cases are the direct result of crimes of gender violence".[30] The Committee noted that "this situation … causes serious traumatic stress and a risk of long-lasting psychological problems such as anxiety and depression".

The Beijing Declaration and Platform for Action, adopted by the Fourth UN World Conference on Women on 15 September 1995, states: "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence." Rape is the ultimate denial of this right. In specific circumstances it constitutes a form of torture and other cruel, inhuman or degrading treatment.[31] In such cases, a rape victim is entitled to the fullest rehabilitation possible. Full rehabilitation must address both the continuing impact of the initial violation and its after effects, including a pregnancy which the victim may not wish to bring to term.

Any woman who has become pregnant as a result of sexual violence, including incest, must have the option of accessing safe and legal abortion as part of a range of support services, including treatment and follow-up care for physical injuries, pregnancy prevention and management, treatment for sexually transmitted infections and counseling and social support.[32] Such legal reforms must also ensure that safe abortion is accessible without unreasonable restrictions.

CONCLUSION

Amnesty International urges the Oireachtas Committee on Health and Children to take the opportunity presented by its deliberations on the Expert Group Report's recommendations to ensure that Irish law and policy on abortion is in line with Ireland's international human rights obligations to women and girls. It must go further than the path outlined in the Expert Group Report to address the European Court of Human Rights judgement in *A, B & C v. Ireland*. In view of Ireland's laudable international role in promoting gender equality, Ireland should demonstrate this commitment strongly at the domestic level too. It is important for Ireland's human rights credibility that it ensures that women's human rights are comprehensively protected in its domestic law. This is particularly so in view of Ireland's recent election to the UN Human Rights Council and its pledge to the UN before its election

to the Council that it would "play a full role in efforts to combat all forms of discrimination and to promote gender equality". In light of its recent assumption of the European Union presidency in January 2013, Ireland should ensure a progressive commitment to women's rights at home. At a minimum, Ireland must decriminalize abortion in all circumstances. Additionally it must reform legislation to provide access to abortion not only in cases where there is a risk to life of the woman or girl, but also in cases of pregnancy resulting from rape or incest and in circumstances where continuation of pregnancy would put the health of the woman or girl at risk. Any such reforms must ensure that safe abortion is accessible in practice without unreasonable restrictions. We encourage the Joint Oireachtas Committee on Health and Children to give careful and favourable consideration to the recommendations we outline in this submission.

ENDNOTES

[1] "Government decision on ABC Expert Group option", 18 December 2012 available at http://www.dohc.ie/press/releases/2012/20121218.html?lang=en, visited 19 December 2012.

[2] See UN Committee on the Elimination of All Forms of Discrimination against Women, General recommendation No. 24: Article 12 of the Convention (women and health), paras. 14 and 31 (c).

[3] Concluding Observations of the Human Rights Committee: Ireland, 30 July 2008, U.N. Doc. CCPR/C/IRL/CO/3.

[4] It further said: "The Committee appreciates the intention of the State party, as expressed during the dialogue with the Committee, to establish an expert group to address the ECtHR's ruling. The Committee is nonetheless concerned further that despite the already existing case law allowing for abortion, no legislation is in place and that this leads to serious consequences in individual cases, especially affecting minors, migrant women, and the indigent. (articles 2 and 16)"

[5] [1992] 2 I.R. 1.

[6] Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (2000), para. 48.

[7] Programme of Action of the International Conference on Population and Development, U.N. Doc. A/CONF.171/13/Rev.1 (1994), para. 8.25. Importantly, states further emphasised that "[i]n all cases, women should have access to quality services for the management of complications arising from abortion".

[8] Human Rights Committee, General Comment 6 on Article 6 (right to life) (1982), para. 5.

[9] Human Rights Committee, Views, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003/Rev.1 (2006), Appendix.

[10] Expert Group Report, p. 42.

[11] CEDAW Committee, General Recommendation 24 on women and health (1999), para. 11.

[12] Human Rights Committee, concluding observations on Poland, U.N. Doc. CCPR/C/POL/CO/6, para. 12.

[13] Human Rights Committee, concluding observations on Colombia, U.N. Doc. CCPR/C/COL/CO/6, para. 19.

[14] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. A/66/254, para. 24.

[15] Ibid., para 65(m).

[16] Expert Group Report, p. 19.

[17] There may be narrow limitations to this principle where an individual is temporarily or permanently unable to make decisions for herself or himself.

[18] CEDAW Committee, General Recommendation 21 on Equality in Marriage and Family Relations (1994), para. 22.

[19] Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (2000), para. 8.

[20] CEDAW Committee, General Recommendation 24, Women and Health (Article 12), U.N. Doc. No. A/54/38/Rev.1 (1999) (hereinafter General Recommendation 24), para. 14.

[21] Ibid., para. 14.

[22] Ibid., para. 31(c).

[23] See e.g. Human Rights Committee, concluding observations on Ireland, U.N. Doc. CCPR/C/IRL/CO/3 (2008), para. 13; the Philippines (advanced unedited version), U.N. Doc. CCPR/C/PHL/CO/4 (2012), para. 13; Dominican Republic, U.N. Doc. CCPR/C/DOM/CO/5 (2012), para. 15; Guatemala, U.N. Doc. .CCPR/C/GTM/CO/3 (2012), para. 20; Jamaica, U.N. Doc. CCPR/C/JAM/CO/3 (2011) para. 14; Kazakhstan, U.N. Doc. CCPR/C/KAZ/CO/1 (2011), para. 11; El Salvador, U.N. Doc. CCPR/C/SLV/CO/6 (2010), para. 10; Poland, U.N. Doc. CCPR/C/POL/CO/6 (2010), para. 12; Cameroon, U.N. Doc. CCPR/C/CMR/CO/4 (2010), para. 13; and Mexico, U.N. Doc. CCPR/C/MEX/CO/5 (2010), para. 10. Similar calls have been made in many other concluding observations dating further back.

[24] See e.g. CESCR, concluding observations on Ecuador, U.N. Doc. E/C.12/ECU/CO/3 (Advanced unedited version) (2012), para. 29; Peru, U.N. Doc. E/C.12/PER/CO/2-4 (2012), para. 21; Chile, U.N. Doc. E/C.12/1/Add.105 (2004), para. 25 and Kuwait, U.N. Doc. E/C.12/1/Add.98 (2004), para. 43. The Committee on Economic Social and Cultural Rights has made repeatedly calls for states to facilitate access to abortion, including by legalizing the procedure, lowering the cost of abortions, and implementing broad-ranging policies to prevent unwanted pregnancies.

[25] Platform for Action of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995), para. 106k.

[26] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. E/CN.4/2004/49 (2004), para. 30; and Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. A/66/254, para. 65(h).

[27] Human Rights Watch, A State of Isolation: Access to Abortion for Women in Ireland,January 2010; Human Rights Watch, The Second Assault: Obstructing Access to Abortion after Rape in Mexico, March 2006.

[28] European Court of Human Rights, Case of A, B and C v. Ireland, Judgement of 16 December 2010, para 254.

[29] CEDAW concluding observations on Ireland's combined fourth and fifth periodic report, U.N. Doc. CEDAW/C/IRL/4-5.

[30] Committee Against Torture, Concluding Observations on Nicaragua, 10 June 2009, U.N. Doc. CAT/C/NIC/CO/1, para. 16.

[31] "It is widely recognized, including by former Special Rapporteurs on torture and by regional jurisprudence, that rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials." (Report of the UN Special Rapporteur on torture, Manfred Nowak, to the 7th Session of the Human Rights Council, U.N. Doc. A/HRC/7/3 15 January 2008, paragraph 34.) The Special Rapporteur on torture has also recognized domestic violence as one of the

"forms of violence that may constitute torture or cruel, inhuman and degrading treatment" (id, paragraph 44) and elaborated on different manifestations of state acquiescence in domestic violence (id, paragraph 46). He has further drawn attention to the feeling of protection from social stigmatization which victims of sexual violence in Guatemala have reported when the crime is defined as torture rather than rape, forced impregnation or sexual slavery (id, paragraph 66).

[32] WHO, Guidelines for medico-legal care for victims of sexual violence, http://www.who.int/violence_injury_prevention/publications/violence/med_leg_guidelines/en/index.html, visited 19 December 2012.

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