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AMNESTY INTERNATIONAL

EUROPEAN INSTITUTIONS OFFICE

Brussels, 7 November 2014

Ref: B1635
TIGO IOR: EUR 07/11/2014
Index: EUR 29/004/2014

Dear Ms Mayer,

AMNESTY INTERNATIONAL'S SUBMISSION TO THE COUNCIL OF EUROPE COMMITTEE OF MINISTERS: *A. B. and C. v. IRELAND*, APPLICATION NO 25579/05

Please find enclosed a briefing submitted in accordance with Rule 9 (2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, and with the terms of friendly settlements adopted by the Committee of Ministers on 10 May 2006. This is with a view to assisting the Committee of Ministers in its evaluation of the general measures taken to date by the Irish Government to fulfil its obligations to implement the Grand Chamber's judgment in the case of *A. B. and C. v. Ireland.*

Yours sincerely,

Dr Nicolas J Beger
Director
Amnesty International European Institutions Office

AMNESTY INTERNATIONAL'S SUBMISSION TO THE COUNCIL OF EUROPE COMMITTEE OF MINISTERS: *A. B. and C. v. IRELAND*, APPLICATION NO 25579/05

Executive Summary

In light of Ireland's obligations under international human rights law, Amnesty International seeks to assist the Committee of Ministers in evaluating the general measures that the Irish Government has taken to date to comply with the judgment of the Grand Chamber of the European Court of Human Rights (the Court) in the case of *A. B. and C. v Ireland.*

On 16 December 2010, the Court delivered its judgment in the case of *A. B. and C. v. Ireland*, noting that "the lack of effective and accessible procedures to establish a right to an abortion under that provision [Article 40.3.3° of the Constitution] has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman's life and the reality of its practical implementation."[1] The Court ordered the Irish authorities to give effect to existing Irish law regarding abortion, and to address the lack of effective and accessible procedures to ensure the right to an abortion in cases that fall under that Article.

The Court also commented on the "chilling effect" of Ireland's criminal law provisions on abortion, which provide a significant disincentive for women to seek the medical care they need, and for doctors to provide it.

In its 29 October 2014 communication to the Committee of Ministers, the Irish Government stated that it "considers that all necessary measures have therefore been taken and the case should be closed."[2] The Government's conclusion is based on the enactment of the Protection of Life During Pregnancy Act 2013[3] (PLDPA 2013), the September 2014 issuance of a Guidance Document on the Act[4], workshops on the Act for crisis pregnancy services, and a planned informational leaflet for pregnant women and girls.

Amnesty International considers that the legal and regulatory framework designed to implement the judgment does not provide "effective and accessible procedures" in practice, and does not adequately protect "the right to respect for private and family life".[5] As noted by the Irish Government in its communication with the Committee of Ministers, the PLDPA 2013 was enacted to respond to the *A. B. and C*. judgment with the stated goal of ensuring that women and girls have a meaningful pathway to abortion within Ireland where the pregnancy poses a risk to the life of a woman or girl.

Amnesty International considers that the PLDPA 2013 takes an overly restrictive approach, including overly burdensome procedures, to providing access to abortion in cases of risk to the life of the pregnant woman or

[1] *A. B. and C. v. Ireland*, para. 264.

[2] Action Report, *A. B. and C. v. Ireland*: Information Submitted by the Government of Ireland on 29 October 2014, para. 23, https://wcd.coe.int/ViewDoc.jsp?id=2253909&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

[3] Protection of Life During Pregnancy Act 2013, Number 35 of 2013 [hereinafter PLDPA 2013].

[4] Department of Health, Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals (2014) [hereinafter Guidance Document].

[5] European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8.

girl, including the risk of suicide. While sections 58 and 59 of the Offences against the Person Act 1861 have been repealed, the PLDPA re-criminalises abortion in all other cases, with a potential penalty of 14 years imprisonment for the intentional "destruction of an unborn human life".[6]

In doing so, the Act reinforces the "chilling effect" of the criminalisation of abortion on access to lawful services, as identified by the Court. The Guidance Document to assist health professionals in implementing the PLDPA 2013 exacerbates the Act's shortcomings, and provides little practical assistance in how to assess when a pregnancy poses a "real and substantial" risk to the life of a woman or girl. This new legal and regulatory framework also does little to ensure that conscientious objection by a healthcare professional will not impede access to lawful abortion.

In view of the current situation, Amnesty International wishes to bring three key human rights concerns to the Committee of Ministers' attention:

1. How can the Irish Government guarantee that its **obligation** to provide lawful abortion for women and girls will be adequately discharged in a context where the "chilling effect" persists?

2. How will the Irish Government ensure **effective access** to lawful abortion when the Act provides for intrusive and burdensome procedures?

3. How does the Irish Government plan to ensure access to abortion and attendant medical care in the context of **conscientious objection** for medical service providers?

In the following submission, we provide further detail on these concerns, questions the Committee may wish to ask the Irish Government, and recommendations that might discharge those concerns.

1. The Ongoing Chilling Effect of Criminalising Abortion

In its judgment, the Court noted that it considered it evident that both women and doctors in Ireland would be affected negatively by the existence of criminal law provisions on abortion, whether implemented or not, creating a "chilling effect[7]." This effect, the Court found, contributed to an environment in which a woman whose life may be threatened by her pregnancy is not able to fully exercise her right to a private life as protected under the European Convention on Human Rights[8]. Amnesty International would also like to add that the "chilling effect" also affects pregnant women and girls whose health is seriously affected by their pregnancies but whose lives are not perceived to be fatally endangered. These women may be afraid to seek, and doctors may be afraid to provide, full and accurate information about the risks associated with continuing a pregnancy.

[6] Id., sec. 22.

[7] *A. B. and C. v. Ireland*, para. 254.

[8] *A. B. and C. v. Ireland*, paras. 267 and 268.

The PLDPA 2013 and the Guidance Document do little to mitigate this "chilling effect", and provide health professionals with little actual guidance on how to protect the life of a pregnant woman or girl, placing greater emphasis on "preserving the life of the unborn as far as practicable."

The Committee of Ministers may wish to **ask** the Irish Government the following questions:

- How does the Government plan to overcome the "chilling effect" of the current legislation criminalising abortion? Does the Government have any plans, other than legislation and regulation, to overcome this "chilling effect", for example through public awareness campaigns?

- How will the Government ensure that medical service providers are not penalised for providing what they believe to be a necessary emergency abortion, even where other medical service providers may not agree that the care was life-saving?

2. The PLDPA Does Not Provide Practical Access to Lawful Abortion in Ireland

The PLDPA and implementing regulations have numerous problems resulting in lack of practical guarantees of access to lawful abortion. Firstly, the Act is vague and does not provide guidance in determining what is life-threatening for the purpose of ensuring access to lawful abortion. Secondly, the Act, which requires numerous medical professionals to agree that there is a risk to life, is intrusive and burdensome and makes access impracticable. Thirdly, the Guidance Document allows for forcing women to continue with a pregnancy even if they qualify for abortion. Lastly, the law's attempt to distinguish between life and health risks can place women's and girls' lives in danger.

a. The Act is vague, impractical, and intrusive.

The Act provides for differing amounts of consultation concerning the pregnant woman's condition that could qualify her for an abortion depending whether there is a "risk of loss of life from physical illness in emergency" where this is considered "an immediate risk of loss of the woman's life" and where there is a "risk of loss of life from physical illness" where the risk must be "real and substantial". However, little guidance is provided to healthcare professionals on making these distinctions other than a footnote noting that in cases of "real and substantial risk" the "risk does not need to be immediate or inevitable".[9] A doctor can make a determination of need without consulting another doctor only in cases of "immediate risk" to the woman's or girl's life. For a "real and substantial" risk without a perceived immediate loss of life, *a gynaecologist/obstetrician and a doctor with a speciality relevant to the woman's illness must agree that an abortion is necessary.* The requirements for accessing an abortion in cases of risk of suicide are even more cumbersome, requiring joint approval from *two psychiatrists and an obstetrician*.[10] No emergency exception exists for risk of loss of life from suicide.

Seeking second opinions, which is permitted and is considered distinct from the formal review process, can be particularly challenging in rural areas where doctors, particularly specialists, may be in short supply.

[9] Guidance Document, p. 11. In both cases, the doctor must also apply the other two parts of the three-part test—that the risk "can **only** be averted by the termination of the pregnancy" and "the doctor has, in good faith, had regard to the need to preserve unborn human life as far as practicable."

[10] The three-part test applies here as well except that the "real and substantial risk" of loss of the woman's life must be "by way of suicide."

Furthermore, there is no requirement that these clinical assessments be performed at the same time or in the same location. This means that a pregnant woman grappling with serious illness in highly time-sensitive circumstances could be forced to repeatedly seek out doctors, recount her situation, and undergo numerous physical and/or mental health assessments.

The situation is exacerbated for women who want to formally contest the denial of certification for a lawful abortion. A denial does not trigger an automatic formal review; a woman or girl in the midst of a serious health crisis (or a person acting on her behalf) must submit a written application. She must then be examined again by *two additional doctors in cases of physical illness* or *three additional doctors in cases of risk of suicide*.[11]

A woman seeking an abortion in case of physical illness could be forced to *see up to six or seven health professionals:* the referring health professional, the obstetrician and specialist, two second opinions, and a two-doctor review panel. Amnesty International considers this process highly cumbersome and problematic. It provides for an overly intrusive scrutiny of the pregnant woman, and could delay access to abortion and care needed to address her health concerns, further exacerbating her life-threatening condition. Amnesty International considers that the Act and Guidance are actually perpetuating what they are supposed to eliminate.

It is arguable, that where feasible, women who can travel to Great Britain or elsewhere will opt to do so rather than subject themselves to such an intrusive and uncertain process. Furthermore, it is unclear whether a woman who has been certified for a lawful abortion will actually receive the requested procedure, or be forced to carry the pregnancy to viability and then undergo an early delivery.

b. The Guidance Document allows forcing women who qualify for an abortion to continue with a pregnancy

Even when a woman qualifies for a legal abortion, her treatment may be subject to further scrutiny and assessment. While the PLDPA 2013 makes no reference to gestational age or viability, the Guidance Document states that treating clinicians will need to factor in the viability of the pregnancy in determining what care would be most appropriate, including the possibility of prolonging a pregnancy until early delivery is possible.[12] This approach appears to have been recently employed in the case of 'Ms. Y', a young asylum-seeking survivor of rape who requested an abortion because she was suicidal, but instead was given a Caesarean section once the foetus reached viability. The handling of Ms. Y's care is currently the subject of two separate reviews by the Health Service Executive.[13]

Forcing a woman whose life is at risk to remain pregnant until the foetus reaches viability defies the exact purpose for which the legislation was enacted and, contrary to the Government's claim, does not satisfy the Court's judgment. Moreover, it can have serious implications for a woman's or girl's life and physical and

[11] Health professionals involved in earlier assessments of the pregnant woman or girl are not eligible to serve on the review panel.

[12] The Guidance states: "The clinicians responsible for her care will need to use their clinical judgment as to the most appropriate procedure to be carried out, in cognisance of the constitutional protection afforded to the unborn, i.e. a medical or surgical termination or an early delivery by induction or Caesarean section. Following certification, if the pregnancy is approaching viability, it is recommended that a multi-disciplinary discussion takes place to ascertain the most appropriate clinical management of the case." Guidance Document, para. 6.4.

[13] Irish Times, *Ms. Y may refuse to take part in abortion inquiry over report leak*, Sept. 24, 2014 http://www.irishtimes.com/news/social-affairs/ms-y-may-refuse-to-take-part-in-abortion-inquiry-over-report-leak-1.1939265.

mental health. Amnesty International considers forcing a woman or girl whose life is in danger to continue with a pregnancy until viability would constitute inhuman and degrading treatment.

c. The Act's distinction between life and health can place women's and girls' lives at greater risk

As noted above, current Irish law allows for abortion only where there is a "real and substantial" risk to the life of the pregnant woman or girl. This language should be read in light of the status and scope of the right to life under international law, as explained by United Nations' (UN) and regional bodies' jurisprudence. The UN 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. Law and practice must incentivise 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 that the risk to life was real and substantial.

The PLDPA 2013 and the accompanying Guidance Document draw a false distinction between risk to life and risk to health of the pregnant woman or girl.[14] It is not possible in medical science to definitively distinguish between a risk to health and a risk to life. The legal and regulatory framework does not reflect the fact that medical assistance should be provided promptly, and that any delay in providing abortion services could contribute to the deterioration of the health of the pregnant woman or girl.[15]

The Committee of Ministers may wish to **ask** the Irish Government the following questions:

- How does the Government plan to ensure that those women and girls who are entitled, by law, to a lawful abortion always have access to swift, adequate, and quality abortion care?

- How will the Government ensure that the requirements for numerous consultations do not harm women nor delay, or in any other way hinder, women's access to lawful abortion?

The Committee of Ministers may further wish to **recommend** to the Irish Government to:

- Take measures to ensure that in law and in practice, abortion is accessible and women are not hindered from accessing lawful abortions by burdensome consultations and panel reviews

- Respect the wishes and needs of the pregnant woman or girl who has qualified for a lawful abortion and do not in any way coerce and force women to continue with a pregnancy in these circumstances.

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[14] The Guidance Document restates the interpretation of Article 40.3.3 by the Supreme Court in *Attorney General v X*: "The Supreme Court held that if it were established as a matter of probability that there was a real and substantial risk to the life, as distinct from the health, of the mother and that the real and substantial risk could only be averted by the termination of the pregnancy, such a termination is lawful." Guidance Document, para. 1.1.

[15] The health risks arising from a relatively minor infection, for example, can quickly become life-threatening, depending on the overall health of the patient, contextual issues such as access to medicine and trained care, and many other factors. The PLDPA 2013 and the Guidance further fail to weigh longer-term risks to life, such as deteriorating health leading to early demise, which might be associated with carrying a pregnancy to term despite serious health complications. Such illnesses include heart and vascular diseases, pulmonary diseases, kidney diseases, oncological, neurological, gynaecological, obstetric and genetic conditions. Pregnancy may also exacerbate existing conditions such as for example epilepsy, diabetes, cardiac disease, auto-immune conditions and severe mental illness.

3. Conscientious Objection

The PLDPA 2013 and the accompanying Guidance Document guarantee the right to conscientiously object to providing abortions. However, the law does not define **conscientious objection for medical service providers** in a manner that ensures women and girls will be able to obtain lawful abortions. 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. The Court held in *P. and S. v. Poland* that "states are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation."[16]

Article 17(1) of the PLDPA states that "nothing in this Act shall be construed as obliging any medical practitioner, nurse, or midwife to carry out or assist in carrying out, any medical procedure [...] to which he or she has a conscientious objection." Neither the Act nor the Guidance Document clearly define "assistance", nor do they ensure the availability and accessibility of health professionals who are willing and able to provide such services. A vague provision calls upon healthcare professionals exercising conscientious objection to "arrange for the transfer of care of the pregnant woman concerned as may be necessary to enable the woman to avail of the medical procedure concerned." [17] However, there is nothing outlining the specific steps that a healthcare professional must take to discharge this obligation.

Although both documents specify that health professionals cannot exercise conscientious objection where the woman's life is at immediate risk, the distinction between "immediate" and "real and substantial" risk remains unclear and could provide significant leeway for health professionals to avoid meeting their obligations to their pregnant patients.

Additionally, the PLDPA 2013 and the Guidance Document do not explicitly debar medical practitioners with objections to abortion from serving on the formal review panel which reviews initial decisions about whether a woman qualifies for a lawful abortion. This failure to exclude medical practitioners with objections to abortion is of particular concern since the decision of the review panel must be unanimous.

The Committee of Ministers may wish to **ask** the Irish Government the following questions:

- How does the Government ensure, or plan to ensure, oversight and implementation of the existing law governing conscientious objection, so as to ensure that women's and girls' access to lawful abortion is not jeopardised by medical service providers who refuse to provide this care on grounds of conscience?

- How does the Government plan to ensure that review panels actually provide a meaningful opportunity for a woman to have her case reviewed, given that currently it is possible that members appointed to the review panel could hold objections to abortion?

[16] *P. and S. v. Poland* (App. No. 5735/08), para. 106.

[17] PLDPA 2013, sec. 17(3).

- How does the Government plan to guarantee that those medical providers who do provide abortions are not subjected to punitive actions in their workplace, including, for example, being passed over for promotion?

The Committee may also wish to **recommend** to the Irish Government that it takes the following steps at the very least:

- Preclude objections in the provision of information, including prenatal diagnostic information or any information on the status of the woman's health or the status of her pregnancy, which may lead a patient to undergo an abortion (which some may find objectionable)

- Preclude medical providers who object to abortion from involvement in certification or review panels

- Prioritise women's and girls' access to health care services over conscientious objection, so that, where no timely referral or alternative service is available, accessible, or adequate, there can be no room for medical service providers to opt out of providing abortion and related medical care

- 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.

Conclusion

Amnesty International urges the Committee of Ministers to take into account the fact that Ireland, for over 20 years, has refused to enact legislation and regulations that would *effectively* guarantee women and girls access to those abortion services which are in fact legal. This is evidenced by continued concerns raised by UN Treaty Monitoring Bodies, including most recently in July 2014, by the UN Human Rights Committee, which monitors state compliance with the UN International Covenant on Civil and Political Rights.[18]

For the reasons outlined above, Amnesty International does not consider the PDLPA 2013 and the Guidance Document to satisfy the Court's judgment in this case, and thus urges the Committee to continue to monitor the implementation of *A. B. and C. v. Ireland* until the judgment is fully implemented.

[18] UN Human Rights Committee, Concluding Observations to Ireland (2014) CCPR/C/IRL/CO/4, para. 9.