
Abortions in Ireland: Reconciling a History of Restrictive Abortion Practices with the European Court of Human Rights’ Ruling in *A., B. & C. v. Ireland*

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I. INTRODUCTION

For most women seeking to end a pregnancy in Ireland, abortion in the country is illegal and difficult to obtain.¹ The law, at least in theory but less so in practice, allows women the right to an abortion only when there is a serious risk to the mother's life.² Because Ireland has some of the strictest laws in the European Union (EU) regarding abortion, thousands of women each year travel to other countries, primarily England, to end their pregnancies.³ Generally, the abortion policies in Ireland have remained unchanged because the Irish Constitution upholds rights of the unborn,⁴ and the public is slow to approve policies that favor abortion rights.⁵

Throughout Ireland's history, pro-life advocates have experienced little to no influential opposition from their pro-choice counterparts.⁶ However, in 2005, three women in Ireland known as A, B, and C sued Ireland in the European Court of Human Rights (ECHR) after they could not obtain abortions in Ireland and subsequently traveled abroad for this purpose.⁷ In their suit, the women alleged that the strict Irish laws on abortion violated Articles 8, 10, and 14 of the European Convention on Human Rights (the "Convention").⁸ The ECHR decided the case on December 16, 2010.⁹

Many commentators thought that *A., B. & C. v. Ireland* may have the same broad, policy-changing effect on abortion policies as *Roe v. Wade*¹⁰ had on U.S. abortion laws.¹¹ Despite these predictions, the

1. Shannon K. Calt, Note, *A., B. & C. v. Ireland: "Europe's Roe v. Wade"?*, 14 LEWIS & CLARK L. REV. 1189, 1190 (2010).

2. *Id.* at 1197.

3. It is estimated that, between 1980 and 2010, at least 152,061 women left Ireland and travelled abroad to obtain legal abortions. However, the numbers provided are almost certainly an underestimate because many Irish women who travel abroad refuse to give Irish addresses for confidentiality and fear of punishment. See IRISH FAMILY PLANNING ASS'N, *Abortion Statistics*, <http://bit.ly/y1xy0l> (last visited Jan. 20, 2013).

4. See Eighth Amendment to the Constitution Act, 1983 (Amendment No. 8/1983) (Ir.), available at <http://bit.ly/WxEDIz>; SOC'Y FOR THE PROT. OF UNBORN CHILDREN, BRIEFING ON A, B, AND C V. IRELAND (2009), available at <http://bit.ly/Wk61Ej>.

5. See Maureen C. McBrien, Note, *Ireland: Balancing Traditional Domestic Abortion Law with Modern Reality and International Influence*, 26 SUFFOLK TRANSNAT'L L. REV. 195, 210 (2002).

6. See Calt, *supra* note 1, at 1190-91.

7. See *A., B. & C. v. Ireland*, [2010] Eur. Ct. H.R. 2032, available at <http://bit.ly/TFq13l>.

8. *Id.* ¶ 113.

9. *A., B. & C. v. Ireland*, [2010] Eur. Ct. H.R. 2032.

10. *Roe v. Wade*, 410 U.S. 113 (1973) (refusing to allow state interference of abortion procedures prior to the end of the first trimester of pregnancy and allowing state regulation of abortions after the end of the first trimester and until the point when the fetus becomes viable).

ECHR upheld Ireland's laws that denied women the right to an abortion.¹² However, the ECHR found that Ireland violated Article 8 of the Convention¹³ because the country failed to establish a set of effective and accessible procedures for women and their doctors to determine if the women could qualify for a legal abortion under Irish law.¹⁴

Although the ruling did not have the considerable effect that many commenters thought it would,¹⁵ those violations identified by the ECHR will require Ireland to implement significant changes to comply with the decision. Ireland appears to be taking steps to comply with ECHR's decision by establishing a Human Rights Commission.¹⁶ In addition, Ireland and the United Nations' Human Rights Council have discussed some of the changes that should be made regarding abortion and reproductive rights issues during Ireland's Universal Periodic Review (UPR) of their human rights policies.¹⁷

This Comment will focus on Irish abortion law and the effect that the ruling in *A., B. & C. v. Ireland* will have on abortion policies in Ireland. Part II will provide an overview on the history of Irish abortion law, including the cases that have both shaped Ireland's restrictive laws and liberalized them. Part II will also address the statutory laws that have been drafted to be less restrictive, yet are not being fully enforced. In addition, Part II will discuss recent treaties relating to abortion that Ireland has ratified.

Part III will then examine what has taken place after the ruling in *A., B. & C. v. Ireland*, including the UPR that occurred on October 6, 2011. Part III will also analyze the changes Ireland has made since the ECHR

11. See William Saunders, *The Roe v. Wade of Europe*, NAT'L REV. ONLINE (Dec. 9, 2010, 3:27 PM), <http://bit.ly/XtDgDm> (stating that the ECHR ruling could have a similar effect in Ireland as *Roe v. Wade* had in the United States); Calt, *supra* note 1, at 1204 (referring to the case as Europe's *Roe v. Wade*); Bill Saunders, *Court Decides Roe v. Wade of Europe Abortion Case Thursday*, LIFENEWS.COM (Dec. 15, 2010, 7:11 PM), <http://bit.ly/hLpR4N> (discussing the potential effects on Ireland's abortion policies); *Human Rights Court Case Could Be Europe's Roe v. Wade*, CHRISTIAN TELEGRAPH (July 15, 2009), <http://bit.ly/2q6iiv> (same).

12. See *A., B. & C. v. Ireland*, [2010] Eur. Ct. H.R. 2032, ¶ 214.

13. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://bit.ly/BeAW9> [hereinafter European Convention on Human Rights].

14. *A., B. & C. v. Ireland*, [2010] Eur. Ct. H.R. 2032, ¶ 267.

15. See sources cited *supra* note 11.

16. See *New Human Rights and Equality Commission: Consultation Process*, AN RONN DLI AGUS CIRT AGUS COMHIONANNIS (DEP'T OF JUSTICE & EQUAL.), <http://bit.ly/mh8aSG> (last visited Jan. 20, 2013) [hereinafter *New Human Rights Commission*].

17. U.N. Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review, U.N. Doc. A/HRC/WG.6/12/L.7 (Oct. 10, 2011), available at <http://bit.ly/VhV4Dv> [hereinafter Hum. Rts. Council Draft Rep.].

ruling and will evaluate whether the Irish government is committed to bringing the country's laws in line with the ECHR requirements. Finally, this Comment will conclude that, based on Ireland's history and its actions since the ECHR ruling, the government will likely take an "action-on-paper" approach that implements the ECHR ruling in theory but not in a way that would allow women to obtain abortions in practice.

II. HISTORY OF ABORTION LAWS IN IRELAND

Ireland has had anti-abortion laws in place since at least 1861. In that year, Ireland adopted the Offences against the Person Act, which makes seeking or providing an abortion a felony.¹⁸ Few significant legal developments in the form of case law or statutory law occurred until 1983. Around 1983, the public sought to prevent a *Roe v. Wade*-like decision from arising in Irish courts.¹⁹

A. *Pushing for an Amendment: The 1983 Constitution*²⁰

In 1981, the Pro-Life Amendment Campaign began the push for an amendment to the Irish Constitution that would protect the right to life of the unborn.²¹ This campaign resulted in the Eighth Amendment of the Irish Constitution,²² which was enacted on October 7, 1983.²³ The amendment sought to preserve Ireland's history of protecting the unborn because, prior to 1983, the Irish Constitution was not explicit in its prohibition of abortion.²⁴ The amendment reads as follows:

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

18. Offences Against the Person Act, 1861, 24 & 25 Vict. 100, c. 100 (Eng.), available at <http://bit.ly/Xr11vn>. Sections 58 and 59 of the Act address attempts to procure abortions. *See id.* §§ 58-59. Section 58 states that any woman with child who attempts to force her own miscarriage or any other person who attempts to force another's miscarriage shall be guilty of a felony. *See id.* § 58. Section 59 states that any person who prescribes a poison or noxious thing with the intent to help a woman force a miscarriage is guilty of a misdemeanor. *See id.* § 59.

19. Amy M. Buckley, *The Primacy of Democracy over Natural Law in Irish Abortion Law: An Examination of the C Case*, 9 DUKE J. COMP. & INT'L L. 275, 281-82 (1998).

20. Eighth Amendment to the Constitution Act, 1983 (Amendment No. 8/1983) (Ir.), available at <http://bit.ly/WxEDIZ>.

21. JENNIFER E. SPRENG, ABORTION AND DIVORCE LAW IN IRELAND 87-88 (2004).

22. Eighth Amendment to the Constitution Act, 1983 (Amendment No. 8/1983) (Ir.), available at <http://bit.ly/WxEDIZ>.

23. *Id.*

24. *See* G. Diane Lee, Comment, *Ireland's Constitutional Protection of the Unborn: Is It in Danger?*, 7 TULSA J. COMP. & INT'L L. 413, 419 (2000).

respect, and, as far as practicable, by its laws to defend and vindicate that right.²⁵

Extensive litigation in the Irish High and Supreme Courts²⁶ accompanied the Eighth Amendment. Not only does the amendment provide constitutional protection for the rights of the unborn, it raises questions regarding access to information about obtaining abortions and the legality of travelling abroad for the procedure.²⁷

B. Interpreting the Eighth Amendment: Society for the Protection of the Unborn Children v. Open Door Counselling

The provisions of the Eighth Amendment were first questioned in *Society for the Protection of the Unborn Children (S.P.U.C.) v. Open Door Counselling*.²⁸ The case came before the High Court in 1988 and addressed the right of counseling and family planning agencies to provide information about obtaining legal abortions in England and in other countries.²⁹ Open Door Counselling and the Dublin Well Women Centre provided counseling on options for women seeking legal abortions.³⁰ In addition, the organizations provided travel and overseas clinic information for women who decided to leave the country to obtain abortions.³¹ S.P.U.C. filed suit against both of these organizations, seeking to enjoin them from distributing such information³² by arguing that Open Door Counselling's actions violated the Eighth Amendment of the Irish Constitution.³³

The High Court held in favor of S.P.U.C. The High Court held that the distribution of information relating to abortion violated the Eighth Amendment because it "assisted in the destruction of the right to life of

25. See Eighth Amendment to the Constitution Act, 1983 (Amendment No. 8/1983) (Ir.), available at <http://bit.ly/WxEDIz>.

26. See, e.g., Soc'y for Protection of Unborn Children Ir. Ltd. (S.P.U.C.) v. Open Door Counselling Ltd., [1988] I.R. 593 (H. Ct.) (Ir.) (addressing the right of counselling agencies to provide information about obtaining legal abortions abroad); S.P.U.C. v. Open Door Counselling Ltd., [1989] I.R. 618 (S.C.) (Ir.) (affirming the High Court's ruling that counselling groups could not be enjoined from distributing informational pamphlets and counselling women on obtaining abortions abroad); Att'y Gen. v. X and Others, [1992] 1 I.R. 1 (S.C.) (Ir.) (debating whether the risk of suicide due to pregnancy was considered a risk to the mother's life such that an abortion would be legal).

27. See S.P.U.C., [1988] I.R. 593 (H. Ct.) (Ir.).

28. *Id.*

29. *Id.*

30. *Id.* at 600-01.

31. *Id.*

32. *Id.* at 600.

33. *Id.*

the unborn, a right found to be ‘fundamental,’ and therefore superior to the rights of privacy, association, and freedom of expression.”³⁴

The High Court enjoined both clinics from distributing further information.³⁵ Both clinics appealed to the Irish Supreme Court, but the Supreme Court affirmed the ruling.³⁶ The Supreme Court found that the fundamental right to life of the unborn child was paramount to other competing rights and refused to allow the clinics to provide information about obtaining abortions outside of Ireland.³⁷ This case was the first of many that involve the recently enacted Eighth Amendment.

C. *Abortion Revisited: Attorney General v. X*³⁸

Now viewed as a landmark case in Ireland’s history on abortion matters, *Attorney General v. X* was the next major decision involving the Eighth Amendment.³⁹ X was a 14-year-old girl who became pregnant after she was raped.⁴⁰ During X’s pregnancy, she became extremely depressed and contemplated suicide.⁴¹ Her family sought a legal abortion under the Eighth Amendment.⁴²

The Irish High Court determined that the right to life of the mother and the unborn child were on equal grounds and issued an injunction against the girl obtaining the abortion.⁴³ However, the Irish Supreme Court took a more liberal reading of the Eighth Amendment. The Court stated: “If it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by termination of the pregnancy, such termination is permissible.”⁴⁴

The Court determined that the risk of suicide was sufficient to place the right to life of the mother over that of the unborn child.⁴⁵ Consequently, the Supreme Court overturned the High Court’s injunction and, in doing so, provided a more liberalized interpretation of the Eighth Amendment.

34. Buckley, *supra* note 19, at 283.

35. S.P.U.C. v. Open Door Counselling, [1988] I.R. 593 (H. Ct.) (Ir.).

36. S.P.U.C. v. Open Door Counselling, [1989] I.R. 618 (S.C.) (Ir.).

37. *Id.*

38. Att’y Gen. v. X and Others, [1992] 1 I.R. 1 (S.C.) (Ir.), *available at* <http://bit.ly/wvu0Xa>.

39. *Id.*

40. *See id.* ¶¶ 2-3.

41. *See id.* ¶ 40.

42. *See* Eighth Amendment to the Constitution Act, 1983 (Amendment No. 8/1983) (Ir.), *available at* <http://bit.ly/WxEDIz>.

43. Att’y Gen. v. X and Others, [1992] No. 846P (H. Ct.) (Ir.).

44. [1992] 1 I.R. 1, ¶ 37 (S.C.) (Ir.).

45. *See id.* ¶¶ 44-45.

D. *Continuing the Challenge: Open Door Counselling v. Ireland*⁴⁶

As *Attorney General v. X* was proceeding through the Irish Court system, Open Door Counselling appealed its case against S.P.U.C. to the ECHR.⁴⁷ Open Door Counselling challenged the injunction against providing information to women seeking legal abortions overseas.⁴⁸ Open Door brought its suit under Articles 8,⁴⁹ 10,⁵⁰ and 14⁵¹ of the European Convention of Human Rights. The ECHR decided the case only on the freedom of expression argument under Article 10,⁵² finding it unnecessary to decide the arguments under Articles 8 and 14. ECHR stated, in regards to the freedom of expression argument, that “[t]he only issue to be addressed is whether the restrictions on the freedom to impart and receive information contained in the relevant part of the injunction are necessary in a democratic society for the legitimate aim of the protection of morals.”⁵³

The ECHR concluded that, by restricting speech that encouraged abortions, the government was also restricting speech that provided information but did not encourage abortions.⁵⁴ Furthermore, the Court determined that restricting information was not effective in deterring abortions and only led women to rely on less reliable sources to obtain abortions that were legal in other jurisdictions.⁵⁵ Although the ECHR respected Ireland’s interest in promoting morals, the court concluded that

46. *Open Door Counselling v. Ireland*, 15 E.H.R.R. 244 (1992).

47. *Id.*

48. *Id.*

49. European Convention on Human Rights, *supra* note 13, art. 8. Article 8 provides for the right to respect for private and family life:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country.

Id.

50. European Convention on Human Rights, *supra* note 13, art. 10. Article 10 deals with the right of freedom of expression. *Id.* It includes the freedom to receive and impart information and ideas without interference from public officials. *Id.*

51. European Convention on Human Rights, *supra* note 13, art. 14. Article 14 provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Id.

52. *Open Door Counselling v. Ireland*, 15 E.H.R.R. 244 (1992).

53. *Id.* at 264.

54. *Id.*

55. *Id.* at 266-67.

“it would be an abdication to accept the government’s largely ineffective, over-broad and disproportionate perpetual injunction.”⁵⁶

E. Response to the Courts: 1992 Constitutional Amendments

In light of the ECHR’s decision in *Open Door Counselling v. Ireland*, and the Irish Supreme Court’s decision in *Attorney General v. X*, the legislature began the process of enacting new amendments to the Irish Constitution.⁵⁷ In 1992, the Irish people held a referendum for constitutional amendments. Three proposals were held simultaneously on November 25, 1992, and each was a proposed amendment in regards to abortion.⁵⁸ Drafted in reaction to the *X* case, the twelfth amendment proposed that the risk of suicide was not a type of threat to the life of the mother that would justify abortion.⁵⁹ This amendment was rejected by a wide margin—1,079,297 (65.35%) to 572,177 (34.65%).⁶⁰

Voters also considered the thirteenth amendment, which stated that the prohibition of abortion in Ireland would not prevent the government from allowing women to travel to other jurisdictions where abortion was legal.⁶¹ The Irish people already had the right to travel under European Communities law as part of the “four freedoms.”⁶² Therefore, this amendment was simply bringing Irish law in conformity with existing European Union law. This amendment passed by a vote of 1,035,308 (62.39%) to 624,059 (37.61%).⁶³

The final amendment to go before the Irish people was the fourteenth amendment. This amendment allowed Irish citizens to receive information about obtaining abortions in other jurisdictions.⁶⁴ This amendment also passed with 992,833 (59.88%) voting “yes” and 665,106 (40.13%) voting “no.”⁶⁵

56. See Calt, *supra* note 1, at 1198.

57. SPRENG, *supra* note 21, at 129-30.

58. See DEP’T OF ENV’T, CMTY. & LOCAL GOV’T, REFERENDUM RESULTS 1937–2012, at 42, available at <http://bit.ly/sMs9iG> [hereinafter REFERENDUM RESULTS].

59. SPRENG, *supra* note 21, at 129-30.

60. See REFERENDUM RESULTS, *supra* note 58.

61. See Thirteenth Amendment to the Constitution Act, 1992 (Amendment No. 13/1992) (Ir.), available at <http://bit.ly/10KMW4R>.

62. See *Living and Working in the Single Market*, EUROPA WEB PORTAL, <http://bit.ly/V0pbhe> (last updated Nov. 30, 2012).

63. See REFERENDUM RESULTS, *supra* note 58.

64. See Fourteenth Amendment to the Constitution Act, 1992 (Amendment No. 14/1992) (Ir.), available at <http://bit.ly/YhOIZH>.

65. See REFERENDUM RESULTS, *supra* note 58.

F. *Abortion a Contentious Issue in the Treaty on European Union*⁶⁶

The Irish government not only added new amendments to the Irish Constitution in 1992, but also debated whether to ratify the Treaty on European Union.⁶⁷ The Treaty led to the creation of the euro and the three pillars—European Communities, Common Foreign and Security Policy, and the Police and Judicial Co-operation in Criminal Matters—comprising the European Union.⁶⁸ Ireland was not one of the original signatories to the Treaty; rather, voters approved the treaty only after the insertion of protocol 7 that explicitly protected Ireland's prohibition on abortion.⁶⁹

Protocol 7 states that “nothing in this Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.”⁷⁰ Protocol 7 makes clear that ratification of the treaty will not affect Ireland's abortion laws.⁷¹ Without this protocol, it is unlikely that voters would have ratified the treaty for fear of having to relax their abortion laws.

G. *Adopting the Treaty of Lisbon (2008-2009)*⁷²

In 2008, the European Union underwent a major reorganization with the Treaty of Lisbon.⁷³ All 27 members of the European Union had to ratify the treaty for it to pass, and, initially, the Irish voters rejected it.⁷⁴ Although Irish voters had many concerns about the treaty, abortion was among the major factors.⁷⁵ However, after more than 1.5 years of negotiation, Irish voters passed the treaty by a decisive margin of 64.4 percent to 35.6 percent.⁷⁶ One of the products of the negotiations was the

66. Treaty on European Union (Treaty on Maastricht), Feb. 7, 1992, 1992 O.J. (C 191) [hereinafter Treaty on European Union].

67. See Calt, *supra* note 1, at 1201.

68. Treaty on European Union, *supra* note 66.

69. See McBrien, *supra* note 5, at 198-99.

70. Treaty on European Union, *supra* note 66.

71. *Id.*

72. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306), available at <http://bit.ly/WQr3IV>.

73. See Calt, *supra* note 1, at 1202.

74. See *Irish EU Vote Lost, Officials Say*, BBC NEWS (June 13, 2008, 16:57 UK), <http://bbc.in/P6nBs>.

75. See Dave Schuler, *Ireland Rejects Treaty of Lisbon*, OUTSIDE THE BELTWAY (June 13, 2008), <http://bit.ly/13Z7eFp>.

76. See Carsten Volkery, *Ireland Overturns its 'No' to EU Reform*, SPIEGEL ONLINE INT'L (Oct. 3, 2009, 4:24 PM), <http://bit.ly/13WZMM4>.

guarantee that “nothing in the Treaty of Lisbon . . . affects in any way the scope and applicability of the protection of the right to life in Article . . . 40.3.3.”⁷⁷ This was an important addition; in its absence, it is likely that the Irish voters would not have agreed to sign on to the treaty.

H. Irish Abortion Comes Under International Scrutiny: A., B. & C. v. Ireland

A., B. & C. v. Ireland is a landmark case in European law and Irish law. The European Court of Human Rights decided the case on December 16, 2010.⁷⁸ The case was brought by three anonymous women, identified only as A, B, and C.⁷⁹ Each of these women became pregnant unintentionally and travelled abroad to obtain legal abortions that were impossible to obtain in Ireland.⁸⁰ A and B had nearly identical claims that concentrated on the inability to procure legal abortions in Ireland.⁸¹ C’s situation, however, was distinguishable from the cases of A and B because C was undergoing chemotherapy for cancer treatments.⁸² She was unsure of the risks a pregnancy would have on her health and life; yet, she had no information on obtaining assistance in Ireland and sought an abortion in the United Kingdom.⁸³

The European Court of Human Rights dismissed A’s and B’s claims entirely and dismissed C’s claims in part.⁸⁴ The Court did not believe that Article 8 of the Convention⁸⁵ provided a right to abortion.⁸⁶ However, the Court found that Ireland violated Article 8 because no clear procedure guaranteed C access to an abortion in Ireland if her life were in danger.⁸⁷ In other words, C could not obtain an authoritative legal answer as to whether she qualified for an abortion under Irish law.⁸⁸

III. AFTERMATH OF *A., B. & C. v. IRELAND*

The ECHR emphasized in *A., B. & C. v. Ireland* that there is no unqualified right to an abortion under the Convention for the Protection

77. DEP’T OF FOREIGN AFFAIRS, WHITE PAPER ON THE LISBON TREATY 17 (2009), available at <http://bit.ly/TaWv9U>.

78. See *A., B. & C. v. Ireland*, [2010] Eur. Ct. H.R. 2032.

79. *Id.* ¶ 1.

80. *Id.* ¶¶ 13, 18, 22.

81. *Id.*

82. *Id.* ¶¶ 23-25.

83. *Id.* ¶ 24.

84. See *A., B. & C. v. Ireland*, [2010] Eur. Ct. H.R. 2032, ¶¶ 4-8.

85. See European Convention on Human Rights, *supra* note 13, art. 10.

86. See *A., B. & C. v. Ireland*, [2010] Eur. Ct. H.R. 2032, ¶ 214.

87. *Id.* ¶¶ 267-87.

88. *Id.*

of Human Rights.⁸⁹ Nevertheless, in finding that Ireland violated Article 8 of the Convention, the EHCR has placed pressure on the Irish government to take steps to comply with Article 8.⁹⁰

The ECHR's primary issue with the Irish government's position was that Article 40.3.3 envisioned the establishment of lawful abortions in Ireland,⁹¹ yet no relevant legislation had been enacted to ensure that the Article's purpose was carried out.⁹² The ruling caused the Irish government to begin the process of establishing a Human Rights and Equality Commission under the Department of Justice and Equality.⁹³ The Department of Justice and Equality intended the Commission to be in place and fully functional by February 2012.⁹⁴ However, as of January 2013, the working group tasked with establishing the Commission was still searching for individuals to fill positions on the Commission that has yet to come into existence.⁹⁵

Despite the fact that the Commission is not functional, the Irish government has taken steps to prepare for the UPR by the United Nations Human Rights Council.⁹⁶ The UPR is a process that involves a review by the Human Rights Council of all the United Nations member states' human rights records.⁹⁷

A. *Ireland's Universal Periodic Review*

The United National Human Rights Council reviewed all of Ireland's human rights obligations, including the country's policies on abortion.⁹⁸ Ireland's review was held in Geneva, Switzerland, on October 6, 2011.⁹⁹ The review started with a presentation by the Irish government on the human rights situation, continued with a dialogue between the Irish government and members of the UPR Working Group, and concluded with recommendations by other countries to improve the human rights situation.¹⁰⁰

89. *Id.* ¶ 94.

90. *See New Human Rights Commission, supra* note 16.

91. *See* IR. CONST., 1983, art. 40.3.3.

92. *See* A., B. & C. v. Ireland, [2010] Eur. Ct. H.R. 2032.

93. *See New Human Rights Commission, supra* note 16.

94. *Id.*

95. *See* IHREC SELECTION PANEL, <http://bit.ly/Wmvehj> (last visited Jan. 21, 2013).

96. *Id.*

97. *Universal Periodic Review*, U.N. HUM. RTS., <http://bit.ly/91FIyY> (last visited Jan. 21, 2013).

98. *See* Hum. Rts. Council Draft Rep., *supra* note 17.

99. *Ireland's Universal Periodic Review*, UNIVERSAL PERIODIC REVIEW (REVIEWING HUM. RTS. IN IR.), <http://bit.ly/11M4kW7> (last visited Jan. 21, 2013).

100. *Id.*

During Ireland's presentation to the member states in the UPR, Minister for Justice Alan Shatter discussed many important human rights issues; however, the only reference to abortion and reproductive rights was the ECHR's ruling in *A., B. & C. v. Ireland*.¹⁰¹ The Irish delegation claimed that Ireland was "[c]ommitted to expeditious implementation of the European Court of Human Rights judgment in the *A, B and C v Ireland* case and an expert group will be appointed . . . [to make] recommendations to Government on how this matter should be best addressed."¹⁰² This statement was the only one that Minister Shatter made in regards to abortion or *A., B. & C.*

Following Minister Shatter's presentation to the Human Rights Council, there was a dialogue between the Irish delegation and the other member countries.¹⁰³ During the dialogue, member countries made a number of recommendations to the Irish delegation to help improve human rights issues in Ireland.¹⁰⁴ Among the recommendations made to the Irish government were numerous suggestions regarding abortion and reproductive rights.¹⁰⁵

Several countries expressed an interest in Ireland's progress in dealing with reproductive issues. France inquired about Ireland's intentions to comply with the ECHR's decision in *A., B. & C. v. Ireland* and made suggestions to ensure compliance.¹⁰⁶ The Netherlands also made recommendations to Ireland on ways to satisfy the issues raised in both *A., B. & C.* and *Attorney General v. X*.¹⁰⁷ Germany inquired about the Irish government's adoption of policies to come into compliance with the ECHR's ruling but also asked if Ireland intended to abolish the Offences against the Person Act, which makes abortion a criminal offence.¹⁰⁸

The member states looked for more than vague promises to deal with abortion issues and called for new legislation.¹⁰⁹ In addition, some of the member countries requested a more definitive timeline in regards

101. See generally Hum. Rts. Council Draft Rep., *supra* note 17.

102. *Id.* at 7.

103. See *id.*

104. See *id.* at 7-13.

105. See *id.*

106. *Id.* at 7.

107. See Hum. Rts. Council Draft Rep., *supra* note 17, at 12. The Netherlands suggested that Ireland ensure that the establishment of an expert group on abortion would lead to a framework that would provide adequate services for women seeking abortions. See *id.* at 21.

108. *Id.* at 13.

109. Press Release, Int'l Planned Parenthood Fed'n, U.N. Human Rights Council Review Puts Ireland Under Obligation to Improve Human Rights in Terms of Access to Abortion (Oct. 7, 2011), available at <http://bit.ly/Tb2Xhh>.

to implementing measures that would satisfy the ECHR's ruling in *A., B. & C. v. Ireland*.¹¹⁰

B. Rejection of Abortion Recommendations

The UPR report highlighted the issues that the Irish government was supposedly committed to addressing.¹¹¹ These claims were met with both optimism and skepticism. The Irish Family Planning Association Chief Executive Niall Behan called the release of the UPR report “a momentous day for women in Ireland”¹¹² and also stated that “[i]t is heartening to see so many of our UN partners taking a stand for women’s reproductive rights at such an important human rights forum.”¹¹³ Despite Behan’s optimism, the Irish government was not in complete solidarity with other member countries in supporting reproductive rights.¹¹⁴ The Irish government did not support many of the recommended changes involving abortion or reproductive rights that other countries suggested.¹¹⁵

Norway requested that Ireland bring its abortion laws in line with the International Covenant on Civil and Political Rights (ICCPR).¹¹⁶ Although the ICCPR does not mention abortion in its text, the committee that oversees its enforcement sometimes pressures nations to liberalize their laws.¹¹⁷ This was one of the suggestions that “did not enjoy the support of country Ireland,” according to the UPR Report.¹¹⁸ Another recommendation that Ireland rejected was Spain’s suggestion to decriminalize abortion.¹¹⁹ To decriminalize abortion, the Irish government would need to repeal or reform the Offences against the Person Act.¹²⁰ The country rejected other recommendations that would have allowed abortions when the mother’s health is at risk.¹²¹ Perhaps the most perplexing rejection, however, was that of the recommendation made by the United Kingdom regarding the ECHR’s ruling. Ireland explicitly refused to introduce legislation that would implement the ECHR’s recommendations in *A., B. & C. v. Ireland*.¹²² This rejection

110. *Id.*

111. *See generally* Hum. Rts. Council Draft Rep., *supra* note 17.

112. *See* Press Release, *supra* note 109.

113. *Id.*

114. *See generally* Hum. Rts. Council Draft Rep., *supra* note 17.

115. *Id.*

116. *See id.* at 20.

117. Susan Yoshihara, *Norway to Ireland: “Bring Abortion Laws in Line with ICCPR,”* TURTLE BAY & BEYOND (Oct. 14, 2011), <http://bit.ly/Tb2Xhh>.

118. *See* Hum. Rts. Council Draft Rep., *supra* note 17, at 20.

119. *Id.*

120. *Id.*

121. *Id.* at 20-21.

122. *Id.* at 20.

came after Minister Shatter expressed Ireland's commitment to support the *A., B. & C. v. Ireland* decision.¹²³ The Irish Family Planning Association subsequently criticized the government for sending what it called "mixed messages" on how the government planned to implement the ECHR ruling.¹²⁴

C. Government's "Commitment" to Legislation

Although the Irish government claims that it is committed to implementing measures that would uphold the ECHR's ruling, Ireland's mixed messages at the UPR suggests otherwise. Thus far, the government has established an expert group on abortion rights.¹²⁵ On November 29, 2011, Minister for Health James Reilly received approval from Irish Cabinet members to establish a 14-member group that has the primary purpose of addressing the outcome of the ECHR's 2010 ruling on abortion rights in Ireland.¹²⁶ On January 31, 2012, Reilly announced that health, law, and psychiatry professionals would be included in this group.¹²⁷ However, the Department of Justice and Equality has yet to complete the process of creating the Irish Human Rights and Equality Commission.¹²⁸ Although the establishment of the Commission has been significantly delayed, the 14-member working group has made progress in examining Ireland's current laws.

The working group has provided recommendations for the government to resolve three central issues of the ECHR ruling.¹²⁹ These three issues include: (1) the absence of legislative criteria to assess what constitutes a substantial risk to the mother's life,¹³⁰ (2) the lack of a framework to resolve differences of opinion between a woman and her doctor,¹³¹ and (3) the effect that criminal penalties have on the doctor-patient relationship.¹³² Overall, the ECHR was most concerned with "the striking discordance between the theoretical right to a lawful abortion in

123. *See id.* at 7.

124. *See* Rudhán Mac Cormaic, *State Rejects UN Findings on Abortion Legislation*, IRISH TIMES (Oct. 10, 2011), <http://bit.ly/qDbsdM>.

125. *See* Deaglán de Bréadún, *Minister Sets Up Expert Group on Abortion Rights*, IRISH TIMES (Nov. 11, 2011), <http://bit.ly/v0v6ix>.

126. *Id.*

127. *Expert Group Established to Report on ECHR Abortion Ruling*, THEJOURNAL.IE (Jan. 13, 2012), <http://bit.ly/xtjA1e>.

128. *See* IHREC SELECTION PANEL, <http://bit.ly/Wmvehj> (last visited Jan. 21, 2013).

129. *Abortion Expert Group Receives Cabinet Approval*, IRISH FAMILY PLANNING ASS'N (Dec. 2011), <http://bit.ly/Tb6lc3>.

130. *Id.*

131. *Id.*

132. *Id.*

Ireland and the reality of its practical implementation[.]”¹³³ The working group is thus seeking primarily to remedy this problem.

While the establishment of a group to address the ECHR ruling shows a step toward resolving problematic abortion issues, it is uncertain how the group will influence government policy. After the group was established in January 2012, it was given six months to return a report to the government.¹³⁴ Four months past the deadline, in November 2012, the working group finally delivered the report to Minister Reilly and Taoiseach Enda Kenny.¹³⁵ Some commentators believe that the report’s completion was prompted by the controversial death of Savita Halappanavar in October 2012.¹³⁶ Halappanavar died of a blood infection in a Galway hospital after being denied an abortion, though she was in the process of miscarriage.¹³⁷ The hospital staff told her that she could not receive an abortion because Ireland is a Catholic country.¹³⁸ Her death received international attention and, within two weeks, the working group finalized its report on Ireland’s abortion policies. The Irish government accepted the report in November 2012 and, on December 19, 2012, Taoiseach Kenny announced the government’s intention to bring Irish laws in line with the ECHR decision.¹³⁹ Despite the finalization of the report, the death of Halappanavar, and the Taoiseach’s announcement, the current ruling party in Ireland—the Fine Gael—remains deeply divided on the issue.¹⁴⁰ To provide the government with the information it needs to move forward in the process, the Oireachtas Committee on Health and Children held three days of hearings in January 2013.¹⁴¹

The hearings on abortion showed the divisions and lack of consensus on many important issues. For instance, issues surrounding suicide remained contentious, and even psychiatrists disagreed on whether legislation was necessary in this context.¹⁴² Although doctors worried about being prosecuted because of the lack of clarity

133. See *A., B. & C. v. Ireland*, [2010] Eur. Ct. H.R. 2032, ¶ 264.

134. See *Abortion Expert Group Receives Cabinet Approval*, *supra* note 129.

135. *Taoiseach: Expert Group Delivered Abortion Report Last Night*, IRISH EXAM’R (Nov. 14, 2012, 12:00 AM), <http://bit.ly/VgjiSz>.

136. Henry McDonald, *Ireland ‘Should Change Abortion Law’ After Woman’s Death*, THE GUARDIAN (Nov. 14, 2012, 8:05 EST), <http://bit.ly/X7DnuO>.

137. See *id.*

138. See *id.*

139. *Ireland May Clarify Abortion Law*, UNITED PRESS INT’L (Dec. 19, 2012, 1:19 AM), <http://bit.ly/10zuNWD>.

140. Henry McDonald, *Ireland’s Abortion Ban: A History of Obstruction and Denial*, THE GUARDIAN, (Nov. 14, 2012, 6:19 EST), <http://bit.ly/ZI8rz0>.

141. See *13 Things We Learned from the Oireachtas Abortion Hearings This Week*, THE JOURNAL.IE (Jan. 1, 2013), <http://bit.ly/UdWw9P> [hereinafter *13 Things*].

142. See *id.*

surrounding the law and the criminal penalties that could ensue, legal experts and government officials expressed concern that new legislation would allow for widespread access to abortions.¹⁴³ During the hearings, the Oireachtas Committee heard from medical experts, legal experts, church officials, and groups advocating for their positions on both sides of the debate.¹⁴⁴ Although the government has expressed a commitment to enacting new regulations, many testifying experts expressed doubt as to whether legislation would work.¹⁴⁵

Although there were conflicting opinions at the hearings, the more conservative Teachta Dála (TD) (Irish Parliament members) may be changing their views on abortion. TD Regina Doherty is a member of the conservative Fine Gael and has a ‘pro-life’ stance, but she stated that “any doubts or questions she had . . . have now been put to rest following the hearings.”¹⁴⁶ She and other conservative TD are willing to support legislation that offers clarity and conformance with the Constitution; however, these TD expect narrowly construed legislation to prevent “unexplained” increased numbers of abortions.¹⁴⁷

If the Irish government introduces new legislation, there will likely be disagreement as to its scope. This debate has the potential to create a ‘grid-lock’ for passing legislation. Additionally, the Irish government is notorious for sidestepping and redirecting when it comes to dealing with issues surrounding reproductive rights, leading to the phrase “an Irish solution to an Irish problem.”¹⁴⁸ This euphemism essentially means “turning a blind eye” to the problem.¹⁴⁹ Ireland’s history of sidestepping abortion issues could be an indication of how the Irish government will address the ECHR ruling.

The Irish government has the opportunity to show the ECHR and the United Nations what steps it will take to address the relevant problems noted in *A., B. & C.* Despite the Irish government’s current commitment to legislation, at least in theory, political pressure will be an obstacle to enacting new legislation. Nevertheless, regardless of whether the Irish Government achieves its aims through legislation, Ireland must

143. *See id.*

144. *See* Harry McGee, *Coalition Road Map to Advance Abortion Debate Begins with Oireachtas Hearings*, IRISH TIMES (Jan. 8, 2013) <http://bit.ly/10atQoq>.

145. *See 13 Things*, *supra* note 141.

146. ‘Pro-Life’ TD ‘95% Ready to Back Worthy’ Abortion Bill, IRISH EXAM’R (Jan. 13, 2013, 12:00 AM), <http://bit.ly/Tbbocj>.

147. John Crown, *I’ll Urge New Law to Be Watertight on Suicide Concerns*, INDEP. (Jan. 13, 2013), <http://bit.ly/11Mavtb>.

148. Lisa Smyth, *Narrative of Irishness and the Problem of Abortion: The X Case 1992*, 60 FEMINIST ETHICS & POLITICS OF LOVE 61, 62 (1998).

149. B.J. Graham, *Heritage Conservation and Revisionist Nationalism in Ireland*, in BUILDING A NEW HERITAGE: TOURISM, CULTURE, AND IDENTITY IN THE NEW EUROPE 135, 147 (G.J. Ashworth & P.J. Larkham eds., 1994).

take appropriate steps to comply with the ECHR ruling. For example, the government is not required to make abortions available to all women seeking to end a pregnancy, but it must (1) establish criteria that allows doctors to assess what constitutes a substantial risk to the mother's life, (2) implement a plan to handle differences of opinion between a woman and her doctor, and (3) change the criminal penalties so they do not have an adverse effect on the doctor-patient relationship.

D. A Feasible Solution for Ireland

The following section presents one potential course of action the Irish government could take to comply with the ECHR ruling.

1. Establishing Objective Criteria

Besides Ireland, 58 other countries around the world allow abortions only when the mother's life is at risk.¹⁵⁰ Most of these countries—including Ireland—follow a rather vague standard in determining whether a mother's life is at risk. The only medical condition that even the strictest pro-life advocates seem to concede would put the mother's life at risk is when there is an ectopic pregnancy.¹⁵¹ Beyond that, there is much debate as to what conditions threaten the lives, or only the health, of pregnant women. However, making ectopic pregnancies the sole circumstance for legal abortions would probably not satisfy the ECHR; yet, it is a starting point in establishing a system that would allow women whose lives are at risk to end their pregnancies.

Establishing an exclusive and exhaustive set of criterion is likely not the best way to implement the type of system that Irish women need. Nevertheless, doctors need more specific guidance than is currently provided under Irish law. For example, the occurrence of an ectopic pregnancy could be at least one reason for an automatic, unquestioned abortion. Another potential condition providing grounds for an abortion could be uterine cancer because it frequently causes life-threatening complications for pregnant women. The bottom line is that Ireland's newly formed committee on abortion should collaborate with medical experts to establish more defined standards for permissible abortions.

150. See *Summary of Abortion Laws around the World*, PREGNANT PAUSE, <http://bit.ly/c1USj5> (last visited Jan. 21, 2013).

151. See *Mother's Life at Risk*, LIFE RES. CHARITABLE TRUST, <http://bit.ly/WAZLrv> (last visited Jan. 21, 2013) [hereinafter *Mother's Risk*] (explaining that an ectopic pregnancy is one in which the embryo implants itself in the fallopian tube rather than traveling to the uterus); STEVE WAGNER, STAND TO REASON, WHAT IF THE MOTHER'S LIFE IS IN DANGER: IS ABORTION ALWAYS WRONG? (2005), available at <http://bit.ly/11Mb867>.

Ideally, the committee should determine common scenarios and situations that are frequently life threatening to pregnant women and should put forth some criteria that would allow doctors to determine when a condition becomes life threatening during pregnancy.

2. Plan to Handle Differences in Opinion

In addition to establishing objective medical criteria for legal abortions, the Irish government should create a system that allows women to have a meaningful dialogue with doctors who can interpret and understand the criteria set forth. The process should inform women of both their health risks during pregnancy and whether those risks threaten their lives. Because the Irish government seeks to limit abortions, the government could also establish a structure that provides consultations for women seeking to end a pregnancy due to a life threatening condition. A feasible configuration for this system would start by a woman consulting with her doctor if she thinks her life is at risk due to the pregnancy. The doctor would then issue an opinion as to whether he believes the condition qualifies for a legal abortion under the established criteria and standards. Thereafter, the Irish government could provide a program or clinic that allows a neutral, objective doctor to examine the woman and issue a second medical opinion as to whether the woman's life is at risk. Two comparable findings would be conclusive, but two differing determinations would lead to a third opinion, which would be determinative.

While certainly not a perfect system, and one that would likely be a substantial cost to the Irish government, it would be significant step toward complying with the ECHR's ruling. As explained in Part III.H, *supra*, the ECHR is most concerned with women having a way to determine whether they qualify for legal abortions under Irish law. If the government established a system that provided doctors with a set of medical criteria and women with an incentive to consult with their doctors, these measures would be a strong statement to the ECHR that the Irish government is serious about complying with *A., B. & C.*

3. Changing Criminal Penalties that Address Abortion

Based on the EHCR's decision in *A., B. & C.*, the final issue that the Irish government must address are the criminal penalties imposed on women who obtain illegal abortions and the doctors who provide them. This issue would be less of a concern if the Irish government established more defined medical criteria for legal abortions, as discussed above. At present, doctors are likely hesitant to provide services for theoretically legal abortions because, under current Irish policies, there is no way to

determine when an abortion is legal. Combined with the threat of criminal penalties, the ambiguity in the law leaves few options and little guidance for women.

The Irish government seems reluctant to change the laws regarding criminal penalties for abortions. Changing these laws is likely unnecessary if the Irish government provides guidance on what circumstances make an abortion legal and a system that allows women and doctors to consult each other without fear of violating the law. Thus, establishing such medical guidelines and consulting services should be the Irish government's priority.

IV. CONCLUSION

The history of abortion in Ireland is one that has strongly favored a pro-life standpoint.¹⁵² Based on the initial Offences Against the Persons Act of 1861¹⁵³ that currently criminalizes illegal abortions, and on the decisions in Irish cases in the 1980s and 1990s that restrict access to abortion,¹⁵⁴ the government and the court system seem committed to severely limiting access to legal abortions in Ireland. Prior attempts by the European Union to compel Ireland to liberalize its abortion policy through international treaties have failed.¹⁵⁵ Indeed, the government has been hesitant to enter into any treaties or agreements without assurance that its pro-life history will not be compromised.¹⁵⁶

The ECHR ruling in *A., B., & C. v. Ireland*,¹⁵⁷ followed by the subsequent UPR at the United Nations' Human Rights Council,¹⁵⁸ has placed pressure on Ireland to make meaningful and significant changes to the country's abortion policies. With the establishment of an expert group,¹⁵⁹ Ireland appears to be committed to making some changes to its abortion policies. Nevertheless, Ireland's historic reluctance to take legislative action in regards to abortion law continues to send a mixed message to both the ECHR and other outside observers.¹⁶⁰

Ireland's history of sidestepping abortion issues¹⁶¹ will likely continue into the future. For instance, at the UPR, Ireland rejected every recommendation that dealt with abortion,¹⁶² suggesting that the

152. See *supra* Part II.

153. Offences Against the Person Act, 1861, 24 & 25 Vict. 100, c. 100 (Eng.).

154. See *supra* Parts II.B, II.C.

155. See *supra* Parts II.G, II.F.

156. See *supra* Parts II.G, II.F.

157. See *supra* Part II.H.

158. See *supra* Part III.A.

159. See de Bréadún, *supra* note 125.

160. See Mac Cormaic *supra* note 124.

161. See Smyth *supra* note 148.

162. See Hum. Rts. Council Draft Rep., *supra* note 17.

government is not as committed to implementing the ECHR ruling as it had initially announced. Despite its alleged commitment, Ireland will likely move forward with the expert group's report and implement the ECHR decision in a way that legalizes abortions only in theory but not in practice.