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29 September 2014

RE: Shadow Report to the Third Periodic Report of Ireland under the International Covenant on Economic, Social and Cultural Rights

Dear Committee Members,

We refer to the above and would like to raise a number of issues that affect women in pregnancy and their families in Ireland. We refer specifically to Article 3 and Article 12 of the International Covenant on Economic, Social and Cultural Rights.

We hope that the following comments will further assist the Committee in its examination.

Executive Summary

This Shadow Report, submitted by the Abortion Rights Campaign (ARC), outlines how women's rights in Ireland, particularly sexual and reproductive health rights, are threatened and denied in contravention of the International Covenant on Economic, Social and Cultural Rights ("the Covenant"). The Report focuses specifically on Article 3 and Article 12 of the Covenant, making reference to the jurisprudence of the United Nations (UN) Committee on Economic, Social and Cultural rights ("the Committee"), as well as relevant statements from other UN Human Rights mechanisms.

Ireland continues to criminalise abortion in almost all circumstances, with a possible sentence of up to fourteen years' imprisonment. The only, very narrow, exception to criminalisation is where there exists a "real and substantial risk" to the woman's life (as

opposed to her health) and where that risk can only be averted by termination of pregnancy. The State commenced the Protection of Life During Pregnancy Act 2013 (PLDPA) in January 2014 ostensibly (a) to respond to the European Court of Human Rights (“ECtHR”) judgment in *A, B and C v. Ireland* (2010); and (b) to finally give legislative effect to a 1992 Irish Supreme Court ruling that established a constitutional right to an abortion if a woman’s life is at risk. ARC contends that the PLDPA fails to fulfil the requirements of either judgment as the onerous barriers written into the new Act inordinately obstruct the clinical care pathway for abortion and have the effect of rendering the procedure difficult or impossible to access in practice.

Furthermore, Ireland’s constitutional ban on abortion, considered in conjunction with an amendment that permits abortion overseas, has the effect of discriminating against those who may be unable to travel. While abortion remains, except in the rarest circumstances, illegal in Ireland, the extent to which women living in Ireland can access abortion currently depends on their financial means, whether they are able-bodied, whether they can travel freely in and out of the State, etc. Marginalised women (those of lower socio-economic status, asylum-seeking women, women with certain disabilities, etc.) therefore bear the full burden of the State’s abortion ban, whereas privileged women can circumvent it, albeit often at a significant financial and emotional cost.

We recommend that the State broaden abortion access to rectify the anomalous hypocrisy of a medical procedure being available only to those who are able to travel outside Ireland, and to bring Ireland’s laws on abortion into line with internationally recognised human rights norms.

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Introduction

The Abortion Rights Campaign (ARC) is an all-Ireland grassroots alliance of groups and individuals advocating full reproductive rights, including the right to choose abortion.

Briefly, our aims are to build broad national support for a referendum to repeal the Eighth Amendment (the constitutional ban on abortion); to push for the introduction of extensive abortion legislation by the Northern Ireland Assembly; to highlight and reduce the effects of stigma and shame on people exercising reproductive choice; and to ensure that the health and rights of women in pregnancy are protected in line with international human rights standards and best medical practice.

Article 3

In its 2010 Report to the Committee, the Irish State indicated that Ireland was, at the time of writing, in the process of implementing the European Court of Human Rights judgment in *A, B and C v. Ireland* (2010), which held that the Irish State was in violation of Article 8 of the European Convention on Human Rights (“ECHR”).¹ The clear implication from this statement is that, once the Irish State had enacted appropriate legislation and fulfilled its obligations under the ECHR, this would also bring Irish law into line with its Covenant obligations.

Following the submission of its report to the Committee, the Irish State did not actually take any further measures (statutory or administrative) to satisfy its Covenant obligations for a further three years. When finally implemented, the Protection of Life During Pregnancy Act 2013 (PLDPA) was intended to be a legislative response to both the *A, B and C* case and an earlier Irish Supreme Court decision, *Attorney General v. X*, which established a Constitutional right to access abortion where there is a threat to the life of a woman, including by way of suicidal ideation.²

The reality, however, is that the PLDPA does not adequately fulfil Ireland’s obligations under the ECHR, nor does it legislate for the full constitutional right established by the Irish Supreme Court in the *X* case. In addition, the PLDPA clearly does not satisfy Ireland’s obligations under Article 3 and Article 12 of the Covenant.

The assessment procedures set out in the PLDPA are onerous, impractical and unworkable. Section 9 of the Act, which deals specifically with cases where a pregnancy may constitute a risk to the woman’s life by way of suicide, requires that three medical professionals—two psychiatrists and an obstetrician—certify that the woman’s life is at risk in order for her to be able to access an abortion. If she is not deemed to satisfy the criteria, but still believes she is entitled to an abortion under the Act, she must appeal to a review panel whereby a further three medical professionals will adjudicate on her case. Additionally, given that the first point of care for many pregnant women is their general practitioner, a pregnant woman at risk of suicide could potentially have to make her case to seven medical professionals before she is granted her request for a termination. These extremely onerous barriers to abortion access in cases of suicide risk do not constitute an “effective and accessible” procedure for assessing whether a woman qualifies for a legal abortion, as required by the ECtHR ruling in the *A, B and C* case.³ Furthermore, they discriminate against women with mental health issues and place women who are already vulnerable at further risk. The UN Special Rapporteur on the Right to Health has criticised legislation that requires access to legal

¹ Irish State Party Report to the UN Committee on Economic, Social and Cultural Rights, E/C.12/IRL/3, para 78.

² *Attorney General v. X* [1992] IESC 1. Miss X was a fourteen-year-old rape survivor against whom a High Court injunction was served preventing her from leaving Ireland to procure an abortion in the UK. The Supreme Court overturned the injunction and ruled that there was a constitutional right to abortion if there was a risk to the pregnant woman’s life, including by suicide.

³ *A, B and C v. Ireland*, decision of the European Court of Human Rights, 16 December 2010, Application no. 25579/05.

abortion to be approved by more than one health-care provider on the grounds that this restricts access.⁴

Within a year of the commencement of the PLDPA, the *Irish Independent* newspaper reported the case of a young asylum-seeking woman (known only as “Ms Y”) who was pregnant as a result of rape and who did not wish to continue with the pregnancy. She sought advice on obtaining an abortion abroad but, as she was an asylum seeker, was unable to leave the State freely. Unable to access a termination, she became suicidal. After many weeks of engagement with the State health system, she was eventually assessed under the PLDPA. Although certified as suicidal, she was apparently refused an abortion at 24 weeks’ gestation on the premise that the fetus was, by that stage, potentially viable. She then effectively went on hunger strike, and a High Court injunction was sought to forcibly hydrate her. Her pregnancy was eventually terminated by caesarean section at just under 26 weeks’ gestation. It is not yet clear what information was provided to the young woman about her right to access a termination under the legislation.⁵

It is deeply concerning that the first known application of the PLDPA should result in a case that would appear to demonstrate that abortion, even under the strict circumstances permitted by the new Act, is not accessible in practice. These shortcomings in the law will be further discussed under **Issue 3 – Accessibility**, concerning Ireland’s implementation of Article 12 of the Covenant.

Article 12

Issue 1 – Criminalisation

Section 59 of the 1861 Offences Against the Person Act, now obsolete, criminalised abortion with a sentence of life imprisonment.⁶ The PLDPA restates the criminalisation of abortion in all cases except where there is a “real and substantial risk” to the woman’s life which can only be averted by terminating the pregnancy. Abortion in all other cases, including where there is a serious risk to the woman’s health, carries a potential fourteen-year prison sentence. This places women and doctors in precarious situations, unable to access or provide abortions to prevent serious damage to women’s health and potentially preventing women from accessing post-abortion care and medical support. This restatement of the criminal prohibition of abortion is dangerous and unnecessary and contravenes human rights norms.

⁴ Interim report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, A/66/254, para 24, available at <http://www.un.org/en/ga/third/66/documentslist.shtml>.

⁵ Dearbhail McDonald and Fionnan Sheahan, ‘Baby delivered as woman refused abortion under law’, *Irish Independent*, 19 August 2014, available at <<http://www.independent.ie/irish-news/health/baby-delivered-as-woman-refused-abortion-under-law-30512513.html>> [accessed 29 September 2014]; Kitty Holland, ‘Terms of inquiry set into care of woman in abortion case’, *Irish Times*, 22 August 2014, available at <<http://www.irishtimes.com/news/social-affairs/terms-of-inquiry-set-into-care-of-woman-in-abortion-case-1.1905586>> [accessed 29 September 2014]

⁶ Offences Against the Person Act, 1861, available at <<http://www.irishstatutebook.ie/1861/en/act/pub/0100/print.html>> [accessed 29 September 2014]

The Committee has previously stated on numerous occasions that the criminalisation of abortion is incompatible with Article 12 of the Covenant and has recommended that State parties take measures to remove such laws.⁷ This jurisprudence has found support among numerous other UN Human Rights Treaty Bodies. Earlier in 2014 the UN Human Rights Committee expressed grave concern over the criminalisation element in the PLDPA,⁸ suggesting that it was not compatible with Ireland's obligations under the International Covenant on Civil and Political Rights (ICCPR). Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recommends the removal of any barriers to women's access to reproductive health services. CEDAW criticises in particular "laws that criminalise medical procedures only needed by women and that punish women who undergo those procedures".⁹ The UN Committee Against Torture (UNCAT) has also expressed specific concern for the criminal penalties in Ireland's abortion laws and has cautioned that it may give rise to a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰ Finally, the UN Special Rapporteur on the Right to Health has recommended the immediate removal of criminalisation of and legal restriction on sexual and reproductive health-care services, including abortion, in all states.¹¹

Issue 2 – Greater Access

In its General Comment No. 14 (on the Right to the Highest Attainable Standard of Health), the Committee has affirmed that "reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning". In addition to calling upon States to remove criminal sanctions for abortion, the Committee has, in its recent Concluding Observations, recommended that States provide increased access to

⁷ UN Committee on Economic, Social and Cultural Rights, Concluding Observations for the Dominican Republic, E/C.12/DOM/CO/329, 2010, para 29, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=449&Lang=en> [accessed 29 September 2014];

UN Committee on Economic, Social and Cultural Rights, Concluding Observations for El Salvador, E/C.12/SLV/CO/3-5, 2006, para 22, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=820&Lang=en> [accessed 29 September 2014]; UN Committee on Economic, Social and Cultural Rights, Concluding Observations for Rwanda, E/C.12/RWA/CO/2-4, para 26, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=620&Lang=en> [accessed 29 September 2014]

⁸ UN Human Rights Committee, Concluding Observations for the Irish State, Advanced Unedited Copy, CCPR/C/IRL/CO/4, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=432&Lang=en> [accessed 29 September 2014]

⁹ Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation 24: Article 12 of the Convention (Women and Health), A/54/38/rev. 1, ch. 1, 1999.

¹⁰ Committee Against Torture, Concluding Observations for the Irish State, CAT/C/IRL/CO/1, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=331&Lang=en> [accessed 29 September 2014]

¹¹ Interim report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, A/66/254, para 24, available at <<http://www.un.org/en/ga/third/66/documentslist.shtml>> [accessed 29 September 2014]

safe and legal abortions in specific circumstances.¹² These circumstances include situations where pregnancy results from rape or where there is a serious risk to the health of a woman.¹³ As the law currently stands in Ireland, abortion is only permitted in cases where there is a “real and substantial risk” to the woman’s life. Abortion remains illegal in cases of rape, incest, inevitable miscarriage, fatal fetal abnormality and risks to the woman’s health. It is clear, therefore, that Ireland’s current laws are not compatible with the Committee’s interpretation of Article 12.

The law in Ireland does allow women to travel abroad to access abortion facilities. However, this limited right cannot be considered as fulfilling Ireland’s obligations under Article 12. Forcing women to travel to access necessary health-care services is hypocritical and disproportionately affects women at various sites and intersections of disadvantage. The State’s Constitution effectively permits abortion through the Thirteenth Amendment, which recognises that the constitutional right to life afforded to “the unborn” does not limit the freedom to travel in and out of the State. However, the combination of these provisions places the full emotional, psychological and financial costs of such an arrangement (travel, accommodation and childcare costs; lost income arising from leave from work; isolation; stigma, etc.) on the woman.¹⁴ Women are discriminated against in having to travel and pay for a service, a limitation not placed on men’s access to the highest attainable standard of health. The reality is that, for many women living on the margins of Irish society, they simply will not have the resources and support structures to effectively exercise their right to travel for reproductive health care abroad. Traveling to access abortion facilities also disrupts the continuum of clinical care, as a woman’s own doctor will not necessarily be able to communicate with the medical practitioners she engages with abroad. This creates a lack of medical continuity, which may negatively impact on women’s health and welfare. Coupled with fear of societal shame and criminal prosecution, this means that women will often not seek proper post-abortion medical care or check-ups.

Issue 3 – Accessibility

The Right to Health as provided by Article 12.1 of the Covenant requires that services be “accessible”.¹⁵ Accessibility, according to General Comment No. 14, consists of four elements: non-discrimination, physical accessibility, economic accessibility and information accessibility.¹⁶ Health services must therefore be physically and economically accessible to

¹² UN Committee on Economic, Social and Cultural Rights, Concluding Observations for Argentina, E/C.12/ARG/CO/3, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=445&Lang=en> [accessed 29 September 2014]

¹³ UN Committee on Economic, Social and Cultural Rights, Concluding Observations for the Dominican Republic, E/C.12/DOM/CO/329, 2010, para 29, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=449&Lang=en> [accessed 29 September 2014]

¹⁴ Thirteenth Amendment to the Constitution of Ireland, approved by public vote on 25 November 1992, and signed into law on 23 December 1992, available at <<http://www.irishstatutebook.ie/1992/en/act/cam/0013/print.html>> [accessed 29 September 2014]

¹⁵ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, para 12, on the International Covenant on Economic, Social and Cultural Rights, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11> [accessed 29 September 2014]

¹⁶ Ibid.

all, especially the most vulnerable and marginalised in society.¹⁷ The Irish State's current laws on abortion do not adequately fulfil the four requirements set out in General Comment No. 14.

The simple fact is that, except in very limited circumstances, there is no right to access abortion in Ireland. The notion of “physical accessibility” is in no way achieved through Ireland's abortion laws. In 2013 at least 3,679 women and girls travelled from the Republic of Ireland to Britain to access abortion services.¹⁸ These procedures performed outside Ireland cannot, and should not, be understood as providing “physical accessibility” to abortion. As noted above, the Thirteenth Amendment to the Irish Constitution provides for a right to travel for abortion services.¹⁹ However, not all women in Ireland can avail of this right: women with an inability to travel due to terms of residency, health, poverty or legal status are currently discriminated against. A discriminatory two-tier system has been created within Ireland's abortion regime, where women with financial resources and support can travel abroad to access appropriate health care. Women on the margins of Irish society, however—very often the women whose agency has also been limited in other important and varied ways—have no effective means to vindicate their Thirteenth Amendment rights. They simply cannot access abortion services. The Irish State allows women to travel abroad but it provides no financial or administrative support. Thus, in Ireland, it cannot be said that the State authorities have fulfilled the requirement to provide “economically accessible” health care in line with the principle of non-discrimination. On the contrary, Ireland's current abortion laws result in flagrant inequity. This inequality was specifically referred to by the UN Human Rights Committee in its recent Concluding Observations on Ireland's compliance with the ICCPR. The Human Rights Committee spoke of the “the discriminatory impact of the Protection of Life During Pregnancy Act on women who are unable to travel abroad to seek abortions”.²⁰

Issue 4 – The Eighth Amendment

The Eighth Amendment to the Constitution of Ireland, signed into law in 1983, equates the right to life of a pregnant woman with that of an embryo or fetus (“the unborn”), effectively from the point of implantation. It reads:

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 respect, and, as far as practicable, by its laws to defend and vindicate that right.²¹

¹⁷ Ibid.

¹⁸ See Irish Family Planning Association website for an annual breakdown of the number of women who travelled to Britain for terminations from 1980 to 2013: <<http://bit.ly/IFPAstatistics>> [accessed 29 September 2014]

¹⁹ Thirteenth Amendment to the Constitution of Ireland, approved by public vote on 25 November 1992, and signed into law on 23 December 1992, available at <<http://www.irishstatutebook.ie/1992/en/act/cam/0013/print.html>> [accessed 29 September 2014]

²⁰ UN Human Rights Committee, Concluding Observations for the Irish State, Advanced Unedited Copy, CCPR/C/IRL/CO/4, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=432&Lang=en> [accessed 29 September 2014]

²¹ Eighth Amendment to the Constitution of Ireland, approved by public vote on 7 September 1983, and signed into law on 7 October 1983, available at <<http://www.irishstatutebook.ie/1983/en/act/cam/0008/>> [accessed 29 September 2014]

The Eighth Amendment is the root cause of the absence of abortion access in Ireland. Any legislation concerning maternal-fetal conflicts of interest derives from the Amendment, notably including case law where absolutist interpretations of a fetal right to life have prevailed. This has copper-fastened a dangerous dichotomy between the right to life and the right to health in maternity care. Indeed Ireland is the only Council of Europe Contracting State to permit abortion to protect the life, but not the health, of pregnant women. This false distinction requires medical professionals to engage in a form of brinkmanship with thresholds of survival. Irish abortion law effectively subjugates the woman's dignity, bodily autonomy and self-determination to the priority of live birth of "the unborn" at all costs.

The Eighth Amendment is a discriminatory law. In denying women in Ireland access to all necessary medical care, a restriction not placed on men, Irish law evidently places less value on women's lives and well-being than on the lives of men. When considered alongside the Thirteenth Amendment (enacted in 1992), which provides for the right to travel abroad for abortion services, the Eighth Amendment has the further effect of discriminating against those for whom travel is problematic or impossible: young women and girls; women with certain disabilities; women in poverty or of low socio-economic status; asylum seekers; and women in controlling or abusive relationships. All of these women may face increased difficulty in leaving the State.

The ostensible aim of the Eighth Amendment is to prohibit women in Ireland from procuring abortions. However, as the World Health Organization has stated, legislative restrictions on abortion are not associated with lower abortion rates.²² Firstly, well over 150,000 women have travelled overseas for safe, legal abortions since 1980.²³ In 2013 alone 3,679 women gave Irish addresses when accessing abortion services in England and Wales.²⁴ These are merely those we can count. Many more women provide UK addresses at which they are not resident; provide no address at all; or travel further afield to have abortions. All in all, it is estimated that at least twelve women leave Ireland every day to access safe, legal abortion services overseas.

Secondly, an inestimable number of women in Ireland now illegally procure abortions in their homes with abortifacient pills ordered online. In 2012 the Irish Medicines Board (now the Health Products Regulatory Authority) seized 487 such pills.²⁵ Although this represents a decrease on previous years, these figures still probably represent only the tip of the iceberg of the true volume of such pills being imported by people in Ireland: many packages are successfully delivered. In short, abortion has always been a global phenomenon and is an incontrovertible reality for thousands of women in Ireland today.

²² Guttmacher Institute, 'In Brief: Facts on Induced Abortion Worldwide' <http://www.who.int/reproductivehealth/publications/unsafe_abortion/induced_abortion_2012.pdf> [accessed 29 September 2014]

²³ Irish Family Planning Association, 'Abortion Statistics' <<http://www.ifpa.ie/Hot-Topics/Abortion/Statistics>> [accessed 29 September 2014]

²⁴ UK Department of Health, 'Abortion statistics, England and Wales: 2012' <<https://www.gov.uk/government/collections/abortion-statistics-for-england-and-wales>> [accessed 29 September 2014]

²⁵ Fiona Gartland, 'Fall in seizures of drugs that induce abortion', *Irish Times*, 27 May 2013, available at <<http://www.irishtimes.com/news/environment/fall-in-seizures-of-drugs-that-induce-abortion-1.1407015>> [accessed 29 September 2014]

Recommendations

ARC maintains that in order to meet its obligations under the Covenant, the Irish State must:

1. Decriminalise abortion;
2. Ensure that all women in Ireland have *practicable* access to legal abortion services *within* the State, in full compliance with Article 3 and Article 12 of the Covenant and in accordance with previous Committee recommendations.
3. Call a referendum to repeal the Eighth Amendment to the Constitution of Ireland, neither 1. nor 2. being possible without its removal.

Question

Given the current incompatibility of national abortion laws with the State party's obligations under the Convention, what concrete measures will Ireland take to (a) decriminalise abortion and (b) ensure that, irrespective of financial resources, all women can access safe and legal abortion facilities in Ireland, at least in cases where the Committee has clearly recommended removal of barriers to access?