

# **Survivors of Symphysiotomy**

## **Submission to the United Nations Human Rights Committee**

Response to information received from Ireland by the Committee (25 July 2017) on follow-up to its concluding observations on Ireland's fourth periodic report under the ICCPR, with reference to the practice of forced symphysiotomy

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# Survivors of Symphysiotomy

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1. Having cited Articles 2 and 7 of the International Covenant on Civil and Political Rights, the Committee, in its concluding observations on 19 August 2014, recommended that the State party

*should initiate a prompt, independent and thorough investigation into cases of symphysiotomy, prosecute and punish the perpetrators, including medical personnel, and provide an effective remedy to the survivors of symphysiotomy for the damage sustained, including fair and adequate compensation and rehabilitation, on an individualized basis. It should facilitate access to judicial remedies by victims opting for the ex-gratia scheme, including allowing a challenge to the sums offered to them under the scheme.*

Similar recommendations have been made this year by several treaty bodies.

2. Symphysiotomy is a birth operation which involves cutting the *symphysis pubis*, the joint at the junction of the two pubic bones that binds the two sides of the pelvis. These were scheduled operations performed in preference to Caesarean section to enforce vaginal birth, and inflicted on women and girls in a manner which deprived them of all legal rights, including the right to refuse medical treatment and experimentation, and which led to lifelong physical and mental suffering.

3. Ireland continues to reject the Committee's observations and to flout its recommendations. In its latest report, the State party denies that doctors who performed symphysiotomy without patient consent were perpetrators on the basis that these operations were justified and, it is suggested, non-injurious. The State party claims that several independent investigations into the practice have been carried out, and that fair and adequate compensation, including rehabilitation, has been provided to survivors.<sup>1</sup>

4. Following Ireland's examination under the ICCPR in 2014, the Committee concluded that 1,500 women and girls had been subjected to symphysiotomy from 1944-1987 without their free and informed consent.<sup>2</sup> Doctors who performed forced symphysiotomy were perpetrators: consent to medical intervention was legally required in Ireland at that time; the operation, performed as it was in preference to Caesarean section, was unjustified; the surgery inflicted serious bodily harm; and constituted torture, cruel, inhuman and degrading treatment; and involuntary medical experimentation.

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<sup>1</sup> UN Human Rights Committee 2017 Concluding observations on the fourth periodic report of Ireland Addendum Information received from Ireland on follow-up to the concluding observations, 4-6. CCPR/C/IRL/CO/4/Add.1 (15 Aug 2017).

<sup>2</sup> UN Human Rights Committee 2014 Concluding observations on the Fourth Periodic Report of Ireland. CCPR//C/IRL/CO/4, para 11 (19 Aug 2014).

## A The practice of forced symphysiotomy

### **The absence of patient consent**

5. An estimated 1,500 women and girls were subjected to forced symphysiotomy: this practice constitutes a gross violation of human rights that Ireland continues to deny. In refusing to accept that doctors who performed symphysiotomy were ‘perpetrators who should now be punished’ (para 11: 23), the State party ignores the fact that these operations were coercive, and that doctors violated both international and domestic law. Patient consent was a legal requirement under Ireland’s 1937 Constitution and under Irish Supreme Court law.<sup>3</sup>

### **An unjustified practice**

6. Symphysiotomy was used in Western medicine only as a procedure of last resort: its dangers were well known within the medical profession. These operations were performed in Ireland as a first resort, in the absence of medical necessity. In referencing literature on emergency obstetric surgery (Para 11: 21-22), the State party has obscured a key distinction: the use of symphysiotomy as an emergency operation and its employment as a preferred procedure. Ireland was the only resource rich country in the world to practise symphysiotomy in preference to Caesarean section – the safe and standard treatment for difficult births readily available at that time in Ireland – in the mid to late 20<sup>th</sup> century.

### **Lifelong disability**

7. These unjustified operations generally had devastating and sometimes catastrophic effects on women and their families. Symphysiotomy led to fetal brain damage<sup>4</sup> and fetal deaths, and carried a 10 per cent fetal mortality rate<sup>5</sup>. Women suffered locomotor difficulties, chronic pain, bladder and/or bowel injuries, incontinence and organ prolapse, and these effects in very many cases were, and are, lifelong. The surgery generally had a lasting effect on the psychological integrity of the women subjected to it: depression, post-traumatic stress disorder, claustrophobia and/or panic attacks have been widely reported. Bonding difficulties following symphysiotomy were common, and this led in some cases to emotional distancing and/or unresolved grief. The performance of this genital surgery adversely affected women’s sexual lives, and occasionally led to marital break-up. Some found the experience of forced symphysiotomy so frightening that, post symphysiotomy, they had no further children.

### **Torture, cruel, inhuman and degrading treatment**

8. In addressing the question as to whether symphysiotomy was ‘a deliberate act of torture’, the State party quotes the Harding Clark Report,<sup>6</sup> which found ‘no evidence of any kind to suggest intention to inflict pain’ (para11: 19). The practice of symphysiotomy constituted torture, cruel, inhuman and degrading treatment: severe physical and mental suffering was inflicted by public officials for a prohibited purpose.<sup>7</sup> These birth operations were carried out

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<sup>3</sup> Daniels v. Heskin [1954] IR 73.

<sup>4</sup> Royal Academy of Medicine in Ireland 1950 ‘Transactions.’ *Irish Journal of Medical Science* 1950: 860.

<sup>5</sup> Feeney J K 1956 *Coombe Lying In Hospital Report 1956*. In Morrissey J K 2004 op cit, 175.

<sup>6</sup> Harding Clark M 2016 *The Surgical Symphysiotomy Ex Gratia Payment Scheme* Department of Health , Dublin. The main report is available at <http://health.gov.ie/wp-content/uploads/2016/11/The-Surgical-Symphysiotomy-Ex-Gratia- Payment-Scheme-Report.pdf>

<sup>7</sup> Hathaway O, Nowlan A, Spiegel J 2012 ‘Tortured Reasoning: The Intent to Torture Under International and Domestic Law’ *Faculty Scholarship Series* 4723, 802. Available at [http://digitalcommons.law.yale.edu/fss\\_papers/4723](http://digitalcommons.law.yale.edu/fss_papers/4723).

for reasons of discrimination based on sex in private facilities which delivered maternity services on behalf of the State, and in public institutions owned and managed by the State.

**9.** Women selected for surgery were required to labour for as long as it took for dilatation to advance to the degree required by medical protocol. The operation was carried out under local anaesthetic as a matter of policy, and was frequently performed before large groups of generally male students. Women often faced further hours of labour following surgery, and the expulsion of the baby, vaginally, unhinged the severed pelvis still further. Women were usually obliged to walk on their sundered pelvises within a day or two of surgery, a practice that inflicted further severe pain. Babies born following symphysiotomy required intensive care, and this led to enforced separation from their mothers, which gave rise to more anguish and distress.<sup>8</sup> The practice of the surgery was covert: women were routinely denied post-operative nursing care in hospital, and were discharged not knowing they had been subjected to symphysiotomy.

**10.** The State party contends that the practice of forced symphysiotomy was ‘an attempt to improve maternal and fetal outcomes’ (Para 11: 18) and that its primary purpose was to avoid Caesarean section on the basis that ‘married women were expected to have several children ... Having 5 or more children was normal’ (Para 11: 19). This ignores the evidence that the practice of symphysiotomy was religiously motivated. The prevailing philosophy in Catholic hospitals was repugnant not only to sterilisation (Para 11: 19) but to birth control in general. The chief proponent of symphysiotomy, Dr Arthur Barry, urged his colleagues to ‘abandon’ unnecessary Caesarean section, seeing it as leading to practices that were ‘contrary to the moral law’: contraception, sterilisation and ‘therapeutic abortion’.<sup>9</sup> The State party’s suggestion that women were trapped in an endless cycle of reproduction is misleading. In 1954, just 23 per cent of Irish couples had five children or more.<sup>10</sup> Despite the advent of the contraceptive pill in the 1960s, the practice of forced symphysiotomy persisted into the 1980s.

### **An involuntary medical experiment**

**11.** The official narrative ignores the fact that the practice of symphysiotomy originated in a mass medical experiment aimed at replacing Caesarean section with symphysiotomy in selected cases. Proponents saw Caesarean section as a barrier to childbearing without limitation: the so-called rule of three limited the number of C-sections that could safely be performed on the same woman, restricting family size. Young, healthy women expecting their first child, who were suspected of being slightly too narrow for vaginal birth, were selected<sup>11</sup> for this long defunct and dangerous operation, to enable them to bear an unlimited number of children. The experiment, begun in 1944 at the National Maternity Hospital, lasted for 20 years. These were involuntary surgeries: patient consent had no role in clinical practice, as Dr Barry made clear.<sup>12</sup>

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<sup>8</sup> O’Connor M 2011 *Bodily Harm: symphysiotomy and pubiotomy in Ireland 1944-92*. Evertime, Westport, 27.

<sup>9</sup> Barry A 1954 ‘Conservatism in Obstetrics.’ *Transactions of the Sixth International Congress of Catholic Doctors* Fleetwood J Ed Guild of St Luke SS Cosmas and Damian, Dublin, 122-6.

<sup>10</sup> Ferriter D 2009 *Occasions of Sin: sex and society in modern Ireland*. Profile: London, 301.

<sup>11</sup> Morrissey J K 2004 Morrissey J K 2004 *An examination of the relationship between the Catholic Church and the medical profession in Ireland in the period 1922-1992, with particular emphasis on the impact of this relationship in the field of reproductive medicine*. Unpublished PhD thesis University College Dublin: 154.

<sup>12</sup> Royal Academy of Medicine ‘Transactions’ 1955 *Irish Journal of Medical Science* 1955: 537. In Morrissey J 2004 op cit, 167-8.

## B Failure of the State to provide an effective remedy

12. Several treaty bodies have affirmed that Ireland's failure to provide an effective remedy to survivors is in violation of its human rights obligations. The UN Committee Against Torture has called for 'an impartial, thorough investigation', the initiation of criminal proceedings against any perpetrators, and 'redress, including compensation and rehabilitation, determined on an individual basis'.<sup>13</sup> Similar recommendations were made by CEDAW.<sup>14</sup>

### Failure to carry out an independent and thorough inquiry

13. The State party's claim that three 'independent investigations (Para 11: 1-2) have been carried out has effectively been rejected by successive treaty bodies. Referring to the reports in question, the Council of Europe Human Rights Commissioner found that 'the first report could not be considered as independent, an important shortcoming given that the two ensuing reports relied heavily on its findings',<sup>15</sup> while CEDAW observed that 'no effort has been made to establish an independent investigation'.<sup>16</sup>

14. The first report<sup>17</sup> was a partial and inadequate review. The Walsh Report:

(a) lacked independence: the terms of reference and the choice of report writer were settled between the Department of Health and the Institute of Obstetricians and Gynaecologists, some of whose members performed these operations;<sup>18</sup>

(b) lacked comprehensiveness: the terms<sup>19</sup> excluded oral evidence and unpublished data, putting 99 per cent of hospital records and written victim testimonies outside the scope of the review;

(c) justified the practice, including the fact that it was coercive, by claiming, wrongly, that patient consent to medical intervention was, and 'is still not a legal requirement [in Ireland] except in relation to mental health'.<sup>20</sup>

15. The second report described as an 'independent investigation' was a narrow review, assisted by Department of Health officials, which, *inter alia*, justified the surgery.<sup>21</sup>

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<sup>13</sup> Committee Against Torture 2017 Concluding observations on the second periodic report of Ireland CAT/C/IRL/CO/2, p 10, para 30 (31 August, 2017). Available at [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT\\_CAT\\_COC\\_IRL\\_28491\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_COC_IRL_28491_E.pdf)

<sup>14</sup> CEDAW Committee 2017 Concluding observations on the combined sixth and seventh periodic reports of Ireland CEDAW/C/IRL/CO/6-7, p 4, para 14 (b) (3 March, 2017).

<sup>15</sup> Muiznieks N 2017 *Report by Nils Muiznieks, Council of Europe Commissioner for Human Rights, following his visit to Ireland, from 22 to 25 November 2016* CommDH 2017 (8) 29 March 2017. Council of Europe, 32, para 172.

<sup>16</sup> CEDAW Committee 2017 *op cit*, p 4, para 14 (b).

<sup>17</sup> Walsh O 2014 *Report on Symphysiotomy in Ireland 1944-1984* Department of Health, Dublin. Available at <http://health.gov.ie/wp-content/uploads/2014/07/Final-Final-walsh-Report-on-Symphysiotomy1.pdf>

<sup>18</sup> Martin J Deputy Chief Medical Officer Department of Health 2011. Correspondence with Dr Michael O'Dowd Chairman of the Institute of Obstetricians and Gynaecologists by email (a series of four). 27 January.

<sup>19</sup> Walsh O 2014 *op cit*, 9.

<sup>20</sup> Walsh O 2014 *op cit*, 70.

<sup>21</sup> Murphy Y 2014 *Independent Review of Issues relating to Symphysiotomy* Department of Health, Dublin, 21-22.

16. The third report now claimed to have been an ‘independent investigation’ is the Harding Clark Report.<sup>22</sup> Not confining itself to the working of the symphysiotomy payment scheme, the report presented a lengthy justification of Ireland’s forced symphysiotomies, and was the subject of much negative commentary both in Ireland and internationally,<sup>23</sup> within the human rights community.

(i) The 600-page Harding Clark report (including appendices) lacked independence: it was produced from within an office staffed by Department of Health officials, and appeared to be physically located in the Department’s headquarters;

(ii) The core report, much of which was subjective and anecdotal, justified the practice, including the fact that it was coercive, by claiming, wrongly, that the legal principles of patient consent were ‘not formulated’ in Ireland until 1992.<sup>24</sup> As in Walsh, evidence that the practice was an experiment impelled by medical hostility to birth control was ignored.

(iii) The report’s disproportionate and denigratory focus on unsuccessful applicants to the scheme was widely criticised for questioning the credibility of claims and suggesting that applicants had been manipulated into seeking compensation. (The latter suggestion is one that the State party has repeated (para 11: 28).

(iv) The report published the results of a large-scale imaging study<sup>25</sup> that purported to show that symphysiotomy was safe. In referencing this appendix (para 11, 16), the State party omitted to mention that this research breached data protection legislation.

### **Failure to provide appropriate restitution**

17. The State’s ex gratia payment scheme was not an effective remedy, because it was introduced without an admission of or apology for wrongdoing (see O’Keeffe v. Ireland).<sup>26</sup> The scheme failed to provide fair and adequate restitution, and was widely criticised.<sup>27</sup>

(a) The scheme’s terms of reference excluded oral evidence,<sup>28</sup> and written survivor testimony was generally disregarded. The experience of women who underwent symphysiotomy were negated, even in ‘difficult applications’, while reports submitted by doctors on behalf of women were generally dismissed.

(b) A total of 185 applicants, almost one third of the total number (590), were denied entry to the scheme:<sup>29</sup> it required contemporaneous medical records, which in many cases were unobtainable after half a century;

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<sup>22</sup> Harding Clark M 2016 op cit.

<sup>23</sup> Muiznieks N 2017 op cit, 32, para 178; 38, para 186.

<sup>24</sup> Harding Clark M 2016 op cit, 99.

<sup>25</sup> Harding Clark M 2016 op cit, Appendix 1 *Symphysiotomy and Pubiotomy Review – an Imaging Perspective*. Available at <http://health.gov.ie/wp-content/uploads/2016/11/Appendix-I-Review-by-Prof-Leo-Lawler.pdf>

<sup>26</sup> O’Keeffe v. Ireland [2014] 35810/09.

<sup>27</sup> Muiznieks N 2017 op cit, 34, para 185.

<sup>28</sup> Harding Clark M 2016 op cit. Appendix 4 *Terms of the Scheme* p 16, para 34. Available at <http://health.gov.ie/wp-content/uploads/2016/11/Appendix-IV-Terms-of-The-Surgical-Symphysiotomy-Ex-Gratia-Payment-Scheme.pdf>

<sup>29</sup> Harding Clark M 2016 op cit, 10, 35.

(c) A similar policy was adopted in relation to proof of disability. The majority of the 399 successful applicants did not receive the additional disability payment of €50,000 (and were given the minimum payment of €50,000).

(d) The terms ruled out individualised assessment (pp 2-4), and excluded all right of appeal, in contravention of the Committee's recommendations.<sup>30</sup> Exercising the 'option' of judicial review (11: 30), was unrealistic, given the risk of legal costs.

(e) The terms gave a sole assessor unbridled discretion to run a scheme that was not subject to any external controls by way of independent monitoring or oversight;

(f) As a condition of payment, applicants were forced to sign a waiver abrogating their legal rights, 'holding harmless' those responsible for these abusive operations, and indemnifying private entities and actors as well as public bodies and officials;<sup>31</sup>

(g) Applicants were given just 20 days in which to apply (p 10, para 19).

(h) The payments offered were not commensurate with court awards for injuries inflicted by symphysiotomy (which ranged from €250,000 - €600,000).

(i) The scheme breached applicants' human rights by using their x-rays without their knowledge or consent in a secret study<sup>32</sup> involving up to a dozen radiologists.

### **Failure to provide rehabilitative services**

**18.** The State has failed to provide survivors with health services free of charge: these services are discretionary and have atrophied, leaving women to pay privately or forego care.

### **Lack of access to judicial remedies**

**19.** Victims' access to judicial remedies has been systematically obstructed. In 2013, the government refused an offer from Survivors of Symphysiotomy to settle members' legal actions (collectively) and reversed its previous non-opposition to a Private Members' Bill, temporarily setting aside Ireland's stringent law on limitations (which affords no judicial discretion) for survivors. Women face very significant evidential barriers: following a decision of the Irish Supreme Court,<sup>33</sup> plaintiffs must show that their symphysiotomy was not only unjustified, but unjustifiable under any circumstances. Recent legal cases have demonstrated that the State is prepared to use its vast resources to defend the practice of forced symphysiotomy to the end, no matter how aberrant the circumstances.<sup>34</sup>

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<sup>30</sup> UN Human Rights Committee 2014 op cit, para 11.

<sup>31</sup> The waiver covers 'all doctors, consultants, obstetricians, surgeons, medical staff, midwives, nursing staff, administrative staff, boards of management, associated with all hospitals or nursing homes, former hospitals or former nursing homes in the State whether public, private or otherwise and/or their insurers' and the medical Missionaries of Mary and/or any Religious Order involved in the running of any hospital and/or their insurers'. Deed of Waiver available at <http://www.payment-scheme.gov.ie/Symphysiotomy/Symphysiotomy.nsf/O/OAFC8447AC15B2D580257D89003FA7AE/SfileSCH EDU LE1-Deedof WaiverandIndemnity.doc>

<sup>32</sup> Harding Clark M 2016 op cit, Appendix 1 *Symphysiotomy and Pubiotomy Review – an Imaging Perspective*. Available at <http://health.gov.ie/wp-content/uploads/2016/11/Appendix-I-Review-by-Prof-Leo-Lawler.pdf>

<sup>33</sup> Kearney v. McQuillan [2010] IESC 20.

<sup>34</sup> Farrell v. Ryan [2015] IEHC 275; Farrell v. Ryan [2016] IECA 281

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