



Submission to the Committee on  
the 8<sup>th</sup> Amendment of the Constitution (Joint)

29 November 2017

### **Introduction**

Following a briefing for members of the Oireachtas on Thursday 23<sup>rd</sup> November 2017 on the effect of the 8<sup>th</sup> Amendment on the rights of women during pregnancy, labour and birth, it was proposed that Midwives for Choice should consider making a brief submission to the Committee on the 8<sup>th</sup> Amendment as they had brought a new perspective to the debate. The briefing was given by Philomena Canning, Chairperson of Midwives for Choice, which represents midwives who care for women during pregnancy, labour and after birth; Dr Krysia Lynch, Chairperson of the Association for the Improvement of the Maternity Services in Ireland, which represents the users of these services; and Ruadhán Mac Aodháin, solicitor with MacGeehin Toale Solrs, who has acted in a number of childbirth cases in Ireland.

### **Joint submission from Midwives for Choice and the Association for the Improvement of the Maternity Services:**

Pregnant women are virtually the only group of adults in Ireland whose rights to autonomy and self-determination are routinely undermined in healthcare settings. In March 2017, a report from the Council of Europe noted the use of the 8<sup>th</sup> Amendment ‘to force women to comply with medical decision-making about their care and treatment [in childbirth] with which they do not agree’. Also in March, the UN Women’s Committee (CEDAW) called for Ireland’s system of maternity care to be abandoned because of its failure to meet international human rights standards. The UN Committee Against Torture expressed similar concerns last July.

The system of care these human rights bodies were referring to is known as ‘active management’. Under this system, women’s labour is managed to ensure they give birth within eight hours. The medical protocols laid down for accelerating labour are invasive: (i) rupturing the waters surrounding the baby in the womb; and (ii) putting a woman on an intravenous drip containing a synthetic hormone that intensifies and accelerates labour. Not every woman wants these procedures, but the system assumes consent.

Around 100,000 women are affected by the 8th Amendment every year. Research carried out by the Association for the Improvement of the Maternity Services in Ireland shows that women's fundamental rights are being routinely denied. In its latest survey, as many as 38 per cent of respondents stated that their consent was *not* sought for tests and procedures carried out during pregnancy. One woman in every three reported that they had been subjected to tests and procedures during labour and birth *without* consent. Half of those who responded reported that they were given *no* opportunity to refuse such diagnostics or interventions during pregnancy, labour or birth. Almost 3,000 women took part in this 2016 survey.

Underpinning an obstetric culture that is slow to respect women's human rights is the 8th Amendment. The HSE's National Consent Policy contributes to a climate of fear and a culture of coercion. For example, hospital staff seeking to ensure pregnant women comply with medical induction policies routinely inform them that if they do not present for induction as scheduled, the Gardaí will be called to bring them to hospital. Threats such as these give rise to anxiety and fear at a time when women are at their most vulnerable. In the longer term, the experience of involuntary medical intervention may damage women's mental health, undermining their self-esteem, and putting them at risk of anxiety, depression, birth trauma, and post-traumatic stress disorder.

The influence of the 8<sup>th</sup> Amendment can be seen in the National Consent Policy, which states: 'there is significant legal uncertainty regarding the extent of a pregnant woman's right to refuse treatment in circumstances in which the refusal would put the life of a viable foetus at serious risk. In such circumstances, legal advice should be sought'. This effectively gives health care professionals *carte blanche* to apply to the High Court. So, if a woman chooses to decline a drug, such as Syntocinon – the drug used to accelerate labour which has been implicated in cases of fetal death and brain damage – she may be threatened with legal action in the height of labour. The National Maternity Strategy reinforces the HSE's coercive message by underlining the need to seek legal advice in cases 'where there are *implications* for the health or life of the baby, *as defined by her team of health care professionals* (emphasis added)'.

With more and more women giving birth in fewer and fewer hospitals, labour ward beds are already at a premium, and, with further closures of maternity units planned, centralisation is set to increase. The greater the pressure to ensure a high turnover of beds, the more remote the possibility that women's fundamental rights will be respected. Repealing the 8<sup>th</sup> Amendment in full is essential if Ireland is to develop a system of maternity care that meets international human rights standards.

### **Submission from Ruadhán Mac Aodháin, solicitor, MacGeehin Toale Solrs:**

Uniquely, the Irish Constitution affirms equal rights for the mother and her unborn child. There has been little analysis of the impact of the 8<sup>th</sup> Amendment on women's constitutional rights, however.

In September 2016, the HSE was refused the orders it sought to compel a woman to undergo a Caesarean section against her wishes. The High Court rejected that argument that the mother lacked capacity and affirmed that, while the Court believed the mother was taking an unnecessary risk, she had the right to make such a decision. The Court also found that this was not a case of such an exceptional nature as to warrant the type of intervention sought by the HSE, and that the rights of the unborn child should not be seen as greater than those of its mother.

A significant proportion of medical negligence claims in Ireland include allegations of failures to obtain valid consent. However, the circumstances in which the rights of the fetus warrant intervention against the wishes of the mother continue to be unclear, and this uncertainty is problematic. Jurisprudence from other countries has had little influence in Ireland in birth related cases on account of the 8<sup>th</sup> Amendment.

Before its introduction, there was some recognition of the right to be born. If the 8<sup>th</sup> Amendment is repealed, the courts are likely to look to jurisprudence from other jurisdictions and to recognise the rights of the unborn child to some degree. Fetal rights are recognised in countries where the fetus does not have constitutional rights, such as England. However, national guidelines on consent there differ significantly from those in force here, in that they recognise the right of an adult with capacity to refuse medical intervention.

There are no adequate procedures in place to deal with attempts to override women's consent in maternity care. Measures which would strengthen women's human rights in this area are: improving the HSE guidelines on consent, establishing grievance procedures to deal with failures to obtain informed consent, education to inform and empower women about their rights, procedures to deal with emergencies, and specific legislation recognising women's fundamental rights in childbirth.

Philomena Canning  
Chairperson