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*Pádraig McCarthy*

## The Oireachtas Committee on the Eighth Amendment

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# The Irish Human Rights and Equality Commission and the Oireachtas Committee on the Eighth Amendment

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The Irish Human Rights and Equality Commission (IHREC), whose work is of immense importance to the people, met the Oireachtas Committee on the Eighth Amendment on 4 October 2017.<sup>1</sup> They presented a prepared document<sup>2</sup> to the Oireachtas Committee. The document is entitled *Human rights and equality considerations in the development of a new legislative and regulatory framework on abortion*. Of the 15 members of IHREC, two dissented from the report.

I find the IHREC document utterly shocking. Its 38 pages with over 17,000 words rightly present a strong case for concern for the welfare and health of the pregnant woman. What is shocking is the absence of expressed concern for the welfare and life of the unborn child. One would never suspect from the document that abortion has any impact on any unborn child. It is like writing about the Iraq war, with concern for the impact on the US and allied personnel, and overlooking the impact on the people of Iraq. It is extraordinary that the IHREC could produce such a document. The IHREC website says: “*Our vision is of an inclusive Ireland where human rights and equality are respected, protected and fulfilled for everyone, everywhere* [their emphasis].” We can then examine whether the IHREC document represents true equality and human rights.

Ms Emily Logan, Chief Commissioner of IHREC, said to the Oireachtas Committee: “*Ireland has ratified six of the nine core UN human rights treaties and is bound by those obligations as a matter of international law.*” One of those treaties is the UN Convention on the Rights of the Child. The document mentions it 13 times. Not once does it refer to the statement in the Preamble to the Convention: “*the child, by reason of his physical and*

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1 [http://beta.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_the\\_eighth\\_amendment\\_of\\_the\\_constitution/2017-10-04/2/](http://beta.oireachtas.ie/en/debates/debate/joint_committee_on_the_eighth_amendment_of_the_constitution/2017-10-04/2/)

2 <https://www.ihrec.ie/app/uploads/2017/10/IHREC-policy-document.pdf>

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*mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”*

Perhaps the most fundamental error in the IHREC document is that it sees the Eighth Amendment only through the lens of its impact on abortion in Ireland. The commitment in the Amendment is far wider: *“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.”* Any treatment by IHREC in promoting and defending human rights must also be far wider.

Consequently, the IHREC document treats abortion as if it were the only remedy imaginable for resolving a crisis pregnancy, and does not consider other approaches which, if implemented and promoted by the State, would be a true application of the Eighth Amendment. Failure to do this is a major failing of successive governments since 1983.

Ms Christina Zampas of the faculty of law at the University of Toronto addressed the Oireachtas Committee. She referred to the above words from the Preamble to the Convention on the Rights of the Child at the Oireachtas Committee in response to Rónán Mullen, saying *“the convention does a very good job of protecting prenatal interests.”* She did not however address the question of safeguards and legal protection before birth. She referred before the Committee to *“the inherent dignity and rights of every human being”*, and yet she does not acknowledge that for the child before birth.

Ms Zampas even said, *“No international or European human rights treaty or treaty monitoring body or court has provided that right-to-life treaty provisions apply before birth.”* The Convention on the Rights of the Child shows she is clearly incorrect. It makes no sense to say that the child before as well as after birth *“needs special safeguards and care, including appropriate legal protection”* if there is no *“right-to-life.”*

Emily Logan referred before the Committee to the 1969 UN Vienna Convention on the Law of Treaties in relation to the “good faith principle”, saying: *“If a government ratifies a treaty, it creates a legitimate expectation that it is going to comply with the terms of that treaty.”*

She did not refer to the fuller text of Vienna Article 31: *“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes ...”* The *“ordinary meaning”* of *“needs special safeguards and care, including appropriate*

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*legal protection, before as well as after birth*” is abundantly clear. She sees no “*legitimate expectation*” that Ireland or any other UN member state will comply with this part of the treaty.

Complaints are often voiced about Ireland’s restrictive abortion laws. Law restricts. “*Appropriate legal protection*” implies restrictions on how the child, before and after birth, is treated. An individual does not have an unrestricted “right to choose” how to treat the child. I do not have a right to choose to steal your mobile phone, nor to drive just how I wish, nor how to treat a child before or after birth. Law, of course, can be needlessly over-restrictive, but we need law for the good of society. There are normally good reasons for such legislation. I have freedom to choose, but I must reconsider my choices when they impact on another human being. The Convention on the Rights of the Child clearly acknowledges that an unborn child is a human being.

Ireland, along with all member states of the UN (except USA), ratified the Convention in good faith. Abortion clearly cannot be described as “special safeguards and care, including appropriate legal protection” for the child before birth. The UN must be challenged to live up to its own commitments, and must challenge member States to do likewise.

Ireland, along with many other States, has failed, and does fail, in respect of care for women in crisis pregnancy. We fail to ensure that society, and the economy, are friendly and supportive environments for parents and families, where they can find all the support they need in their difficult situation for themselves and their unborn child, just as we would want them to be assured of such support with a child after birth. This is where we fail. We could “solve” the housing crisis tomorrow by simply eliminating all the homeless, but that would be totally unacceptable. Why then should we look to “solve” the problem of crisis pregnancy by eliminating the unborn child, whatever its situation?

US<sup>3</sup> and UK<sup>4</sup> statistics indicate that a large majority of those seeking abortion have non-medical reasons for doing so. The Human Rights and Equality Commission document says (page 18): “*It is the view of the Commission that there is a clear socio-economic and gender equality case for a revised and expanded framework for access to abortion services in Ireland.*” Where the genesis of the difficulty is social or economic, the appropriate solution is in social or economic remedies, not in medical remedies, and especially not in destructive medical remedies. There are many “social determinants” of health and health decisions which cannot

3 <https://www.guttmacher.org/sites/default/files/pdfs/journals/3711005.pdf>

4 <https://www.gov.uk/government/statistics/report-on-abortion-statistics-in-england-and-wales-for-2016>. “In 2016, 97% of abortions (180,794) were undertaken under ground C.” Ground C covers non-medical reasons.

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be remedied by medical procedures: poverty, housing conditions, employment conditions, social support, etc. These are evident in the inequalities we see in society. They indicate where society fails.

Jan O’Sullivan TD said to the Oireachtas Committee: “... the statement that abortion will be used as a method of contraception needs to be counteracted. I do not believe that is true.” However, a study by Open University for Marie Stopes International UK in October 2015 says: “*The majority of all abortions follow contraceptive failure. More than half of the women (57%) who had an abortion reported using contraception at the time they became pregnant.*”<sup>5</sup> Abortion is most certainly used as a backup for failed contraception.

Frederica Mathewes-Green wrote: “*Do women want abortion? Not like she wants a Porsche or an ice cream cone. Like an animal caught in a trap, trying to gnaw off its own leg, a woman who seeks an abortion is trying to escape a desperate situation... Abortion is not a sign that women are free, but a sign that they are desperate... Women’s rights are not in conflict with their own children’s rights; the appearance of such a conflict is a sign that something is wrong in society.*”<sup>6</sup> When a woman is faced with a crisis pregnancy, our society *must* provide the support and resources so that she does not act out of desperation.

Who is responsible for resolving such desperate situations? If tomorrow your only way to have food for yourself and your family is to steal bread, are you to be punished? The fault here lies not with the individual in difficulty, but with society which fails to assure each person of the essentials for dignified human living. To expect a pregnant woman in a desperate situation to choose without providing the support is not freedom; it is social injustice.

The Guttmacher Institute, a pro-abortion body, quoting The Lancet, reports that in 2010–2014 there were 56.3 million procured abortions every year.<sup>7</sup> That is 107 every minute. This does not indicate a need for abortion. Rather, it indicates a catastrophic failure on the part of human society, just as we are failing in the case of the millions facing famine in East Africa. How can we shame our world into facing reality? Is there nobody to shout STOP? The grandchildren of this generation may ask us in the future: “What did you do to protect the earth from climate change?” Will they

5 [http://oro.open.ac.uk/45138/1/MSI\\_key-findings\\_10-15\\_email.pdf](http://oro.open.ac.uk/45138/1/MSI_key-findings_10-15_email.pdf)

6 <http://frederica.com/writings/abortion-womens-rights-and-wrongs.html>

7 [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(16\)30380-4/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)30380-4/abstract). It is likely that this is an underestimate. A US Department of State report for China for 2015 says: “An official news media outlet also reported at least an additional 10 million chemically induced abortions were performed in nongovernment facilities.” <https://www.state.gov/documents/organization/252967.pdf>, page 55.

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also ask us: “*What did you do when 56.3 million unborn children were destroyed every year?*”

Simone Veil, who died in June 2017, was France’s Minister for Health. Introducing legislation for abortion in France on 26 November 1974, she was conflicted as she spoke to the *Assemblée Nationale*:<sup>8</sup>

*“It is to this disorder we must put an end... But how? I say with all my conviction: abortion must remain the exception, the last resort for insoluble situations. But how can we tolerate it without it losing its character as an exception?... No woman has recourse to abortion light-heartedly (aucune femme ne recourt de gaieté de couer a l’avortement). Just listen to women. It is always a tragedy and it will always remain a tragedy. This is why, if the proposal presented to you takes into account the existing factual situation, if it admits the possibility of a termination of pregnancy, it is to control it and, as far as possible, to dissuade the woman from it... Among those who oppose today a change in the repressive law, how many show concern to help those women in their distress? How many ... have been able to offer to young single mothers the understanding and the moral support of which they have had great need?... [the law] is for application to individual and often distressing situations. Although it no longer forbids it, it does not create any right to abortion.”* She concludes: “*Nobody ever contested, and [I] the minister for health less than anyone, that abortion is a failure when it is not a tragedy.*”

Abortions in France climbed from 48,000 in the first year of legalisation to 200,000 in 1999. Mme Veil’s call for greater support for women in distress by legalising abortion failed “*to dissuade the woman from it.*” The initial limitations on the practice of abortion have been systematically dismantled. A law of 4 July 2001 makes it an offence to try to persuade a woman not to have an abortion; this was extended by a law of 4 August 2014. Conscientious objection has become increasingly more difficult. In 2016 a television advertisement showing happy people with Down syndrome<sup>9</sup> to reassure parents expecting a child with the syndrome was banned as a commercial by the French Council of State. The grounds given were that the happiness of the children shown in the video was “*likely to disturb the conscience of women who had lawfully made different personal life choices.*”

Will we make the same mistakes? Will we adjust our society and follow the rest of the world into abject failure to meet our commitments and obligations to our most vulnerable? Or will

8 <http://www.assemblee-nationale.fr/histoire/interruption/1974-11-26-1.pdf>

9 [https://www.youtube.com/watch?time\\_continue=9&v=Ju-q4OnBtNU](https://www.youtube.com/watch?time_continue=9&v=Ju-q4OnBtNU)

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we put our minds and hearts, and the resources, into finding a better way to address the challenge that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”?

Psychiatrist Ivor Browne quotes the Indian philosopher Jiddu Krishnamurti: “*It is no measure of health to be well-adjusted to a profoundly sick society.*” A world which terminates 56.3 million human lives every year, and does not see it as a cause for concern but rather something to expand, is a profoundly sick society. Is that how we want Ireland to be known? Even a person who does not see procured abortion as morally problematic must surely be concerned.

We do not need to succumb to this sickness that plagues this world. It is not beyond our capacity to find a better way to support those in crisis pregnancy, a way which will provide a model for the rest of the world. If the success of a leader is defined as being well adjusted to 56.3 million abortions a year, then we don't want successful leaders. We want great leaders - who love the people enough and respect the people enough to be free and unafraid and unintimidated to tell the truth, to acknowledge our failings, and to take all necessary steps.

Abortion is not an end in itself. Nobody chooses abortion just for the joy of having an abortion. It is a means to an end: a perceived solution to a crisis pregnancy. Society must ensure realistic alternatives are available. Where only one way is found, choice is not on the table.

Why do we as a society put a woman in crisis pregnancy in a desperate situation where the only realistic option is to terminate the life of her child, however conceived, and in whatever state of health? Her child is not her enemy. Her rights are not in conflict with her child's rights. Why have we not even begun to imagine a different situation, where, no matter how great the difficulty and uncertainty, she knows she is not alone? Where she will have total assurance of all the support she needs, however impossible it may seem, to bring her child to birth, and to make any subsequent decisions? Where she and her child will have full and unconditional welcome in society? Why have we not even begun to ask women what are the reasons why they seek abortion? Why have we not even begun to imagine a different world?

George Bernard Shaw, in *Back to Methusaleh* in 1921, wrote: “You see things; and you say, ‘Why?’ But I dream things that never were; and I say, ‘Why not?’”

President John F Kennedy spoke to the Dáil and Seanad on 28 June 1963: “*This is an extraordinary country. George Bernard*

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*Shaw, speaking as an Irishman, summed up an approach to life: "Other peoples," he said, "see things and say: "Why?" ... But I dream things that never were - and I say: "Why not?"*<sup>10</sup> We need to hear it again.

Some may think: "That's all very well, but we must live with political reality, and with what we can actually accomplish." Otto von Bismarck in 1867 wrote: "*Politics is the art of the possible.*" In other words, we may have our ideals, but if we're not prepared to compromise on them we may achieve nothing. But what if the only "compromise" offered is the deliberate procured death of unborn children?

Vaclav Havel (1936-2011), first president of the Czech Republic, turns that on its head. His collected speeches are called *The Art of the Impossible: Politics as Morality in Practice: Speeches and Writings, 1990-1996*. To speak of "Politics as Morality in Practice" may seem entirely out of touch with reality. It may seem that we have no way to resist the forces of the open market, and that we must conform to the "international standards" on globalised abortion, even though they run directly counter to the world commitment in the Convention on the Rights of the Child. But this is what we need to envisage: to tackle what seems impossible, and to say "Why not?"

Of course it will seem impossible. We are being swept along in the globalisation of abortion. Have we learned nothing from the truly disastrous violations of human rights in World War II where categories of people were redefined as non-people? Post-war reaction led to the great advances of the Universal Declaration of Human Rights in 1948 and the subsequent Conventions, including that of the Rights of the Child. Have we forgotten that? If any human life is declared unworthy, whether it be the smallest or the oldest, the most abled or the most disabled, the most helpless or the most powerful, then my life and your life is also being declared unworthy.

It is an enormous challenge, but a start has been made. Perinatal hospice care is or should be made readily accessible. In December 2009, the Department of Health and Children published Palliative care for children with lifelimiting conditions in Ireland - A National Policy.<sup>11</sup> A follow-up report was issued in 2016.<sup>12</sup> The Irish Medical Organisation at their 2015 meeting called on the Minister for Health to make provision for dedicated perinatal palliative care nationally. An International Conference on Children's Palliative Care took place in Dublin in April 2016.<sup>13</sup> (This needs to be addressed

10 <https://www.oireachtas.ie/viewdoc.asp?DocID=21>

11 [http://health.gov.ie/wp-content/uploads/2014/03/palliative\\_care\\_en.pdf](http://health.gov.ie/wp-content/uploads/2014/03/palliative_care_en.pdf)

12 <http://www.lenus.ie/hse/handle/10147/613304>

13 <http://cpcconf.ie/>



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also in Northern Ireland.)<sup>14</sup> Perinatal-neonatal palliative care and bereavement care “*must be considered as standard care and treated as an expectation, not as optional additional services.*”<sup>15</sup> In its concern for “*women’s right to the highest attainable standard of physical and mental health*”, why does IHREC not insist that these services are provided, and urgently?

The IHREC document for the Oireachtas Committee, at the end of the Introduction, states: “*In the context of these developments, the Commission is publishing this policy paper in order to outline some of the principles that may best inform a reformed legal and regulatory framework governing access to abortion in Ireland in order to ensure it meets the State’s international human rights obligations, including the obligation to guarantee women’s right to the highest attainable standard of physical and mental health.*”

Why then does the IHREC document fail to insist on the urgency of advancing those provisions in perinatal care, which are clearly relevant to both the Eighth Amendment and to “*women’s right to the highest attainable standard of physical and mental health*”? Why does the document promote abortion as if it were the only remedy in accordance with human rights? Why does the document slavishly follow the example of the Citizens’ Assembly in seeing only the implications of the Eighth Amendment for abortion, and not the full gamut of human rights covered by the Amendment? When the IHREC, in calling attention to what it perceives as difficulties arising from the Eighth Amendment, neglects to call attention to the Human Rights failings inherent in the conclusions of the Citizens’ Assembly, it fails the people of Ireland, and it fails in its own mandate.

In April 2017, Emily Logan said: “... in the context of a constitutional referendum we’re not allowed to influence the electorate but we are legitimately allowed to comment on any piece of legislation that has implications for human rights and equality.”<sup>16</sup> The IHREC presentation to the Oireachtas Committee clearly attempts to influence the referendum at an early stage by influencing the proposal which is put to the people.

What if even a fraction of the energy spent promoting abortion was given to establishing proper perinatal care? A variety of groups already offer helpful resources for a variety of situations. Information is on their websites: Every Life Counts; Cura; Feileacáin; One Day More; A Little Lifetime; Hospice Foundation Maternity & Neonatal Network, etc. It is essential that this kind of work be considered as standard care and treated as an expectation,

14 <http://www.bbc.com/news/uk-northern-ireland-36264186>

15 <http://www.nature.com/jp/journal/v35/n1/s/pdf/jp2015145a.pdf>

16 <https://www.irishtimes.com/life-and-style/people/emily-logan-don-t-judge-irish-women-s-rights-by-lesser-standards-1.3035176>

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not as optional additional services, whether or not a change is made in the Eighth Amendment. Only if this is made an essential part of the debate will the process of preparing for the referendum make any sense. We must ensure that this happens. IHREC must make its voice heard in this aspect of the question.

If a woman in crisis pregnancy is told: “You have two options: take the boat, or suffer it out” – then she is not being told the truth. If the only option is the nuclear option of abortion, the world is in trouble.

Of course it will cost us, in human resources and in emotional commitment, and in financial resources. Of course there will be enormous resistance. Of course we will be accused of being cruel, of being unjust, of being unrealistic. Of course people will say we haven’t the slightest chance of changing the world. Of course it will not come about overnight. And, of course, if nobody makes a start, it will never happen.

What seems impossible may in fact be possible. Vaclav Havel (*“The Art of the Impossible”*) was sentenced to four-and-a-half years in prison for his involvement in the Czech civil rights movement in 1979. Ten years later, he was elected president.

One hundred years ago Ireland was struggling for independence against the greatest empire in the world. Ten years later, at Ardnacrusha, we were building the largest hydro-electric generating plant in the world.

We need a vision for our society, our country, our world. We need a society which takes practical steps to treasure all who carry within themselves our coming generation, and to treasure all who are born, even and especially those whose lives will be brief or disabled. Without vision there is no hope. Without vision the people perish.

We put enormous effort into trying to prevent avoidable deaths at all stages of life. All the safety regulations, precisely in being restrictive, have a purpose. Every procured abortion is an avoidable death. Are we to say that we cannot treasure all human life, simply and without exception? What is your life worth if we cannot do this? Are we going to give up?

We have to decide whether we are prepared to make the commitment for all those who will bear new human lives, and who will know the anguish of crisis. We have to decide whether it is worth doing all that is needed. We have to make the decision now.