

## Reforming abortion law in Ireland

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## **Abortion Law Reform in Ireland:**

### **Arguments in the Public Submissions to the Citizens Assembly**

Anyone with even a passing interest in the politics of reproductive rights will know that abortion is a serious flashpoint in Irish politics. For decades, the questions of whether, how, and when pregnant people<sup>1</sup> living in Ireland can access abortion have been matters of contention, and since 1983 the Constitution has protected the “right to life of the unborn” in Article 40.3.3 (known as the 8<sup>th</sup> Amendment). Now, however, all has changed. On 25 May 2018 the majority of those who voted approved of a proposition to repeal the 8<sup>th</sup> Amendment and replace it with the 36<sup>th</sup> Amendment to the Constitution, a new clause that reads ‘Provision may be made by law for the regulation of termination of pregnancy’. Once this constitutional change has been certified—on the completion of legal challenges to the referendum itself—this constitutional change will clear the way for the Oireachtas [Irish parliament] to pass legislation regulating abortion. That legislation, as currently proposed (Department of Health, 2018a), will allow for abortion without restriction as to reason up to 12 weeks (subject to a 3-day waiting period), allow abortion where there is a risk to life or of serious harm to health after 12 weeks but until foetal viability, and without gestational time limit where the foetus has a condition that means it is likely to die before or within 28 days of birth. All the indications are that these proposals will find general support across the political establishment, and it is hoped that legislation and a system for its administration will be in place by January of 2019 (Coyne, 2018).

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<sup>1</sup> Throughout this paper the phrases pregnant person and pregnant woman are used interchangeably. Following the Gender Recognition Act 2015 preferred gender is recognised without any requirement of medical intervention on the body of the trans\* person in Ireland. Thus, it is possible for a man to be pregnant in Ireland. This potential is recognised through the interchangeable use of these terms in the paper. Similarly, the words women, men, female, and male are used to include those who identify as men or women, respectively. Trans\* is used to refer to those submitters who identified as trans\* in their submissions.

Getting to this point has involved decades of advocacy (Quilty et. al., 2015), adverse decisions from international human rights bodies, deaths, injuries and revelations of the hardship caused by Ireland's restrictive abortion laws (Abortion Rights Campaign, 2016). It also, of course, required a significant shift in political positioning on the question about the desirability of holding a referendum on Ireland's constitutional abortion law. While the enormous popular demand for repeal undoubtedly pushed official politics into proposing a referendum (de Londras, 2018), so too did the outcome of a "Citizens' Assembly" established pursuant to a commitment in the Programme for Partnership Government (Government of Ireland, 2016; 153) in the aftermath of the indecisive 2016 general election following which a minority government coalition of Fine Gael and a number Independents was formed with the support of the opposition party, Fianna Fáil.

Fine Gael could hardly have been described as a pro-choice or even a pro-referendum party in advance of the Citizens' Assembly. In its General Election manifesto it had committed to no more than a deliberative forum such as a Citizens' Assembly to discuss the possibility of a referendum. In contrast, non-aligned independent Katherine Zappone TD—on whom Fine Gael ultimately depended to form a government and who became Minister for Children and Youth Affairs in that government—had campaigned on a social justice manifesto that included repeal. She insisted on the inclusion of the Citizens' Assembly in the Programme for Government, but for many this commitment was insufficient. The suspicion was that the Citizens' Assembly was nothing more than a delaying tactic that would put abortion law reform on the long finger of a government that it was broadly anticipated would be unstable due to its minority status and

unorthodox composition. However, the Citizens' Assembly was not a wholly unprecedented innovation in Ireland. A few years earlier, a similar mechanism—the Constitutional Convention—had been established to consider possible constitutional change including whether to put a proposition for marriage equality to the People by means of a referendum. That process has produced progressive recommendations (to have a referendum) (The Convention on the Constitution, 2013), and the referendum that followed resulted in an overwhelming vote for marriage equality. For many in politics, the Constitutional Convention was considered to be core to setting the (political) conditions for that constitutional change, notwithstanding the many years of LGBTQI+ activism that had preceded it. As a Senator, Zappone herself had been a member of the Constitutional Convention, as well as having earlier (unsuccessfully) sued the state to recognize her (Canadian, same-sex) marriage in Irish law (*Zappone & Gilligan v Revenue Commissioners & Ors*, 2006). Based on this experience, she argued that a process such as the Citizens' Assembly would offer an important opportunity to develop a knowledge base around abortion and help to secure fundamental legal change beyond the so-called 'hard cases' of rape, incest and fatal foetal anomaly on which there was already a fair degree of political consensus (Zappone, 2016).

The Citizens' Assembly was, then, to be an 'exercise in deliberative democracy'. It was comprised of 99 'citizens' selected by a polling company using the electoral register, and chaired by a judge of the Irish Supreme Court, Ms Justice Mary Laffoy. The Assembly began its work in the autumn of 2016, and over the following months received oral and written evidence from a number of experts and advocates. This covered legal regulation of abortion in Ireland and abroad, the intricacies of constitutional law, the relationship between domestic law and

international human rights law, the experience of medical practitioners in the UK treating women from Ireland who access abortion in England, ethicists, pro-choice and anti-abortion advocates, and (anonymized and recorded) testimony from women who have accessed abortion and from women who have not (Citizens Assembly, 2017, Appendix E). As well as having monthly meetings at which solicited views were received and discussed, the Citizens Assembly put out a call for submissions from the general public. Approximately 13,000 such submissions were received (Citizens Assembly, 2017, 76-78) and, broadly speaking, these submissions concerned whether the 8<sup>th</sup> Amendment should be repealed ('pro-repeal submissions') or whether the status quo should be maintained ('pro-retain submissions'). These submissions made remarkably little impact on the Assembly, at least in the formal proceedings. While the secretariat to the Assembly prepared a sample of some of the submissions and distributed them to the members, and while they expressly identified the submissions that were made from advocacy groups and from people who declared first hand experience of abortion care (or the lack thereof) (Citizens Assembly, 2017, 78), there was no systematic engagement in the formal and public sessions with these submissions, although it seems they were discussed in private session (Citizens Assembly, 2017, 78). The purpose of the submissions was never really entirely clear, and—apart from the first person narratives—there is very little to suggest they actually played any real role at all in the Assembly and its deliberations (although individual members may well, of course, have engaged with them in their private time between meetings). In spite of that, they are a valuable and interesting resource through which to explore at least some of the structures and topics of argument about abortion that were then circulating among the populace in Ireland.

Following a detailed, hand-coded analysis of over 1,000 of the submissions received we found that they attend primarily to ‘broad’ or ‘first principles’ arguments about abortion *per se*, and are only minimally concerned with technical (and technocratic) arguments about the future shape and nature of the legal regulation of abortion. Within the submissions themselves there is limited evidence that key arguments about harm, the impact of criminalization, and the requirements of international human rights law that were advanced by pro-repeal advocates having achieved significant purchase, while the pro-retain submissions revealed a significant dependence on emerging arguments about disability and disability rights in anti-abortion activism. In contrast, arguments of constitutional design, of international human rights law, of legal certainty, of medical practice etc dominated the official narrative that followed the Assembly, in particular the Joint Oireachtas Committee that was established especially to receive and consider the report of the Assembly and make recommendations to the parliament as a whole (Houses of the Oireachtas, 2017). In this paper we focus on the primary arguments made the submissions from the general public to the Citizens’ Assembly. We go on to consider the extent to which these arguments subsequently arose in the referendum campaign of 2018. Relying on a detailed exit poll from the referendum vote (RTE & Behaviour and Attitudes, 2018), we argue that the arguments made in these submissions continued to motivate voters on the day of the referendum itself, even where the elite and official discourses of the referendum campaign itself diverged somewhat from these. This analysis raises questions about the purpose of the Citizens’ Assembly *per se* and particularly about whether its primary impact was on official political narratives of abortion law reform in Ireland rather than on the everyday voter as she engaged with the issues.

## **Abortion Law in Ireland: The *Status Quo Ante*<sup>2</sup>**

Under the 8<sup>th</sup> Amendment, Ireland had a hyper-restrictive abortion law regime. Abortion had been criminalized since the foundation of the state. The initial criminalization took the form of s. 58 of the Offences Against the Person Act 1861—a piece of law inherited upon independence—which remained in place until it was replaced by a new criminalization in s. 22 of the Protection of Life During Pregnancy Act 2013. That Act reduced the criminal sanction for abortion from ‘up to life imprisonment’ to ‘up to 14 years imprisonment’, but retained the basic legal structure that had been in place for over 150 years: that abortion was generally criminalized (for both providers and pregnant persons who self-administer abortion), although some limited exceptions to that criminalization were provided for.

Under the 2013 Act those exceptions were very limited indeed: abortion was legally permitted in Ireland where between one and three medical professionals certified in good faith that there was a real and significant risk to the life of the pregnant woman that could only be averted by the termination of the pregnancy, and that the fetus was not viable so that abortion (rather than, for example, an early delivery by means of a C-section) was the appropriate means of termination (s.s. 7-8, Protection of Life During Pregnancy Act 2013). Where there was an emergency only one medic’s certification was required; where the risk to life emanated from a non-physical illness (most frequently a risk of suicide) at least three medics’ certification was needed.

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<sup>2</sup> Although the 2013 Act remains in force at the time of writing, the law here is described as if the 36<sup>th</sup> Amendment has been certified and in anticipation of the proposed new legislation being introduced, which in turn will repeal the 2013 Act in full.

In all other cases, pregnant people who did not want to continue with their pregnancies had limited choices indeed: many traveled to another jurisdiction (most commonly England) to access abortion care, others (illegally) imported the abortion pill and administered abortions themselves, some self-harmed in the attempt to bring their pregnancies to an end, and countless others proceeded with their pregnancies.

The Irish law on abortion could be traced back, in legal terms at least, to 1983 when a referendum resulted in the 8<sup>th</sup> Amendment being inserted into the Constitution. This provision, which became the first clause of Article 40.3.3, recognized the “right to life of the unborn” and pledged the state, “as far as practicable”, to protect it with equal regard to “the right to life of the mother”. Through a series of superior court cases, Article 40.3.3 came to mean that pregnant people in Ireland could not access information about abortion, could lawfully be prevented from travelling abroad to access abortion care, and were provided with medical treatment in accordance with a ‘two patient’ model in which the rights, interests and wellbeing of both patients (the woman and the fetus) were largely regarded as equivalent (de Londras, 2016). The implications for basic principles of medical law were clear. While the 8<sup>th</sup> Amendment had its most obvious impact on the availability of abortion care, its effects were felt throughout maternal medical care including the principle of informed consent to medical interventions (which did not apply fully to pregnant persons (HSE, 2013)) and women’s experiences of consent, intrusion and obstetric violence during childbirth (Midwives for Choice, 2016).

Some of Article 40.3.3’s effects were mitigated by further referenda in 1992 through which the Constitution was amended to make clear that the 8<sup>th</sup> Amendment did not mean a pregnant person



could not travel or receive information (de Londras, 2016, 262-270). After this referendum it became possible to access non-directive information about abortion, and pregnant women were constitutionally protected from being prevented from traveling to access abortion care outside of Ireland. However, while these rights were legally protected, ‘real world’ access to abortion care was heavily dependent on financial means, visa status, ability to travel, ability to take time off of work, the availability of childcare for the pregnant person’s children and so on (Irish Family Planning Association, 2016). The right to access information was very heavily constrained: medical practitioners faced criminal prosecution if they referred a patient for abortion care in another jurisdiction and only non-directive information could be provided about abortion (Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1996). Rogue pregnancy agencies (offering misinformation to women in order to dissuade them from accessing abortion) were both prevalent and unregulated (Coyne & Suarez, 2016).

Having seemingly exhausted the possibilities for meaningful reform through litigation at home, campaigns for reproductive autonomy in Ireland began to focus with determination on the international sphere, resulting in numerous decisions and opinions from international human rights bodies urging Ireland to reform its laws on abortion to bring them in line with international human rights law. This includes the UN Human Rights Committee’s finding in *Mellett v Ireland* that criminalizing abortion in cases of ‘fatal fetal abnormality’ violates pregnant women’s right to be free from torture, inhuman and degrading treatment or punishment.<sup>3</sup> This was followed just over a year later by an almost identical finding in *Whelan v Ireland*.<sup>4</sup> The Irish government’s response, however, was consistent: it claimed that the constitutional position reflected in Article

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<sup>3</sup> UNHRC Decision CCPR/C/116/D/2324, 9 June 2016.

<sup>4</sup> UNHRC Decision CCPR/C/119/D/2425/2014, 12 June 2017.

40.3.3 represented ‘the will of the People’. While states are required to comply with their international law obligations regardless of domestic law (and thus, by *implication*, to change their domestic law where that is required to ensure compliance), Ireland consistently attempted to argue that abortion was a matter of such profound moral, and particular *national*, sensitivity that states should be able to reach their own decision on the ‘balance’ to be struck between fetal rights and the rights of pregnant people without interference from international law. This argument was sometimes successful: the European Court of Human Rights notably accepted it in *A, B & C v Ireland*,<sup>5</sup> for example (de Londras & Dzehtsiarou, 2014). But it failed to find traction in the UN human rights bodies (McMahon & ní Ghráinne, 2017). It also failed, largely, to convince the NGO and advocacy communities, as well as scholars, who noted that the Irish people had never been asked whether they wanted to liberalise abortion laws (all proposals on the substantive matter since 1983 had been to further restrict access to abortion so that the risk of suicide would not be a sufficient risk to life to allow for abortion where chosen by the pregnant person), that the vast majority of women of reproductive age in Ireland had never had the chance to make their position on what the law should be clear, and that there were strong arguments of legitimacy, autonomy, and democracy in favour of holding a new referendum (de Londras, 2016; de Londras & Enright, 2018).

As the 2016 General Election campaign began, abortion was firmly on the political agenda, put there largely by advocacy groups but also by the concerted attention that had been paid to—and the advocacy and activism that followed (Kennedy, 2015)—the publicisation of stories of pregnant women who died or suffered in situations where it was felt that access to abortion

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<sup>5</sup> [2010] ECHR 2032.

would significantly have changed the outcome in their cases. As a result, most political parties took some kind of a position on the future of the 8<sup>th</sup> Amendment in their manifestos. Fine Gael committed to establishing a Citizens Assembly to consider the matter of the 8<sup>th</sup> Amendment, while the Social Democrats proposed repealing the 8<sup>th</sup> Amendment and then having a “people’s convention” to consider the legislation that would follow. Sinn Fein, Labour, the Green Party, the Anti-Austerity Alliance, and People Before Profit all proposed repeal of the 8<sup>th</sup> Amendment followed by legislation to make abortion available, although there was little consistency across the parties regarding different levels of availability. Fianna Fáil, rather surprisingly, made no mention of abortion in its manifesto, although its leader subsequently proposed a judge-led commission to consider the future of the 8<sup>th</sup> Amendment. All parties seemed, at the very least, to recognize that the matter of abortion needed to be discussed and likely the Constitution amended, although they could hardly be said to have been *ad idem* on the matter beyond that fairly low-level consensus.

It is perhaps unsurprising then that, following an indecisive election and the formation of a government reliant on both independent Cabinet members and a support agreement with the opposition Fianna Fáil party, the Programme for Government featured nothing more than a commitment to the establishment of Citizens’ Assembly to discuss the 8<sup>th</sup> Amendment.

### **The Submissions to the Citizens Assembly**

The Citizens Assembly welcomed submissions from the public on the matter of the 8<sup>th</sup> Amendment between October and December of 2016. During that time, 13,075 electronic and

postal submissions were made, 12,200 of which were published on the Assembly's website (Citizens Assembly, 2017, 76). The Citizens Assembly website, which invited the submissions and through which the vast majority were actually made, offered no guidance whatsoever about the substantive form of submissions to be made. No questions were asked for people to answer, and no limitations as to form, word length or similar were laid down. In contrast, there were some clear rules that precluded anonymous or repetitious submissions (Citizens Assembly, 2017, 77).

The lack of guidance on the format of the submissions is, at once, a limitation and an advantage in using the submissions as sources for analysis. On the one hand, the submission authors decided for themselves how to form their submissions, what to include, how to make their argument, and what format would be most effective in communicating their message. This led to a very wide variation in submission forms: some were simply one word ("Repeal"), some were many thousands of words long taking the form almost of academic articles, some were mass cards, some were art works, some were collections of personal stories, some were photographs or photocopies from magazines. A great many of the submissions were 'template' submissions: key text used across thousands of submissions which either mirrored one another exactly or used the same core text and then embellished it according to the personal preferences of the author. Some submissions were sent by organizations, NGOs and lobby groups; some by professionals with particular expertise on abortion from medical or legal perspectives. The variety is striking. The disadvantage of this variety in form, however, is that it limits the kinds of conclusions that one can draw from anything other than a comprehensive and complete hand coding of all of the submissions, or a clearly designed corpus linguistics approach to text mining the submissions,

treating them collectively as a unique corpus. Even within that corpus, however, at least two categories of text would need to be considered: the 'directly entered text' that submitters entered into the text box on the website (which in the majority of cases forms the totality of the submission) and the attachments that some submitters appended. In some cases the attachments match exactly the text in the direct text entry box; in others they are vastly different. This paper, then, focuses on a sample of the submissions, selected using a randomized approach outlined below, for the purposes of identifying key arguments and themes across the submissions.

As already noted, 13,075 electronic and postal submissions on the 8<sup>th</sup> Amendment were made to the Citizens Assembly. Of these, only 12,200 were officially published and accessible as of March 2017 on the website of the Assembly, others having been excluded because of breaches of the rule on anonymity, duplication, or a request for removal made to the Secretariat of the Assembly (Citizens Assembly, 2017, 77). Our starting corpus was the 12,200 submissions publicly available on the Citizens Assembly website on 8 March 2017. From the published responses a randomized sample of 1202 submissions was selected and utilized to extrapolate gender, key motifs and the submitter's preference between two options of repealing or retaining the 8<sup>th</sup> Amendment.

Upon collecting the submissions, data checking was performed to ensure usability of returned data given the intended focus of the data analysis (i.e., retain/repeal decision as linked to gender and key motifs as identified and discussed below). When checking for a retain/repeal decision, 9 subjects indicated a different or undetectable preference and 68 subjects returned no usable data. This reduced the sample size by 77 to 1125. Because we wanted to assess the existence of any

gender variations across the submissions, gender was then checked for usable data. The gender of the submitter was determined to the extent possible by reliance on both the name of the submitter (or of multiple submitters where a submission was made on behalf of a number of named individuals) and the content of the submission, which sometimes aided in this process (e.g. it contained the terms ‘as a father’, ‘as a young woman’ etc). It is possible that some submitters’ gender was misidentified through this process. Of the remaining subjects, 1 identified as trans\*, 26 were unknown, and 22 had identified themselves as both male and female without identifying themselves as non-binary. As the number trans\* submitters in the sample was so small (1) and the other submissions could not be assigned to a gender for the purposes of analysis, these 49 submissions were excluded. That left us with a final sample of 1076 submissions.

From the final sample (N = 1076) retain/repeal was combined into a binary variable (either retain or repeal), male/female was also coded into one binary variable (either male or female). A final coded variable was entered to reflect a categorical variable capturing the following distinctions: (Female, Retain; Female, Repeal; Male, Retain; Male, Repeal). This categorical information was imported into SPSS where a non-parametric chi-squared test for independence was produced.

Of the sample of 1076 submissions, 418 came from submitters identified as male (i.e. 38.8%) and 658 were identified as female (i.e. 61.2%). Of these submissions, 767 were in favor of retaining the 8<sup>th</sup> Amendment (or 71.3%) and 309 were in favor of repealing the 8<sup>th</sup> Amendment (or 28.7%). No inferences as to popular opinion in general could be drawn from this: the analysis here does not account for repetitive or template submissions; the submitters are entirely self-

selecting; and the sampling was randomized. Furthermore, as we know from the referendum result itself, the electorate more broadly was in fact overwhelming pro-repeal, with over 66% of voters casting a yes/tá vote (Referendum Commission, 2018).

This chi-squared test compared the frequencies of individuals that occurred in each category. The test indicated, given the retain/repeal decision and gender variables recorded, what cell count would be *expected* should there be no association between gender and the decision to retain or repeal the current law on abortion. As shown in Table 1, the *observed* values inevitably varied (above/below) the expected values. In particular, a disproportionate number of women preferred repeal in contrast with those who would prefer to retain the 8<sup>th</sup> Amendment. The opposite was true within the male respondent variables. This chi-squared test for independence suggested that there may have been a significant association between gender and a retain/repeal decision, ( $\chi^2$  (n 1076, df 1) = 47.85, p < .001), within the sample, with women being more likely to support repeal than men. The referendum exit poll affirms this, indicating a statistically significant higher proportion of women voting yes (72.1%) than men (65.9%) (RTE & Behaviour and Attitudes, 2018; 10).

**Table 1:** Results of non-parametric chi-squared test for independence on retain/repeal decisions for gender, ( $\chi^2$  (n 1076, df 1) = 47.85, p < .001)

	<b>Retain</b>	<b>Repeal</b>	<b>Total</b>
<b>Male</b>	Observed: 348 (32.3% of subjects)	Observed: 70 (6.5% of subjects)	418 (38.8%)

	Expected: 298	Expected: 120	
<b>Female</b>	Observed: 419 (38.9% of subjects) Expected: 469	Observed: 239 (22.2% of subjects) Expected: 189	658 (61.2%)
<b>Total</b>	767 (71.3%)	309 *28.7%)	

In addition to the categorical information (male or female and retain or repeal) obtained from the random sample chi-squared test, key motifs based on the submissions could also be analyzed. These motifs were identified through a combination of reading a wide range of submissions, randomly selected prior to the randomization that led to sample examined here, and by reference to key themes in contemporary public debates on abortion in Ireland. These motifs included but were not limited to Fatal Fetal Abnormalities (FFA), religion, international human rights law (IHRL), personal experience, autonomy, rights, fetal rights/personhood, money, mental health, and disability. To compute these motifs, frequency counts for each factor were generated utilizing SPSS, with the output being organized by category. The most commonly referred to motifs in the sample together with their frequency by category are presented in Table 2. Notably, health—i.e. arguments about (positive or negative) impacts of abortion law and the prohibition/legalization of abortion—were not among the most frequent motifs in the same analyzed, even though (as considered below) health in act became a core focus of the referendum campaign proper.

**Table 2:** Key motifs and their corresponding frequencies for gender and retain/repeal decisions.



	<b>Fetal Rights</b>	<b>Autonomy</b>	<b>Religion</b>	<b>Disability</b>	<b>IHRL</b>
<b>Female retain (n = 409)</b>	348 (81.9%)	No data	31 (7.4%)	201 (48%)	3 (0.7%)
<b>Female repeal (n = 239)</b>	No data	149 (62.3%)	7 (2.9%)	No data	40 (16.7%)
<b>Male retain (n = 348)</b>	286 (82.2%)	1 (0.3%)	37 (10.6%)	150 (43.2%)	9 (2.6%)
<b>Male repeal (n = 70)</b>	1 (1.4%)	32 (45.7%)	5 (7.1%)	1 (1.4%)	12 (18.6%)

Inferential statistical analysis was not an appropriate method for analyzing these motifs. As a result, the data is harder to analyze as it is based on subjective self-selection and omitted responses. However, it is important to note that this does not necessarily mean the submission respondents did not give the motifs any consideration in the formation of her submission, but simply that the motif was not clearly present in the submission text. This might mean that either the motif was not considered at all, that the submission respondent considered the motif to be of lesser importance than other arguments presented, they were not motivated to engage with the motif, they were distracted, or they did not allow more of their time to respond completely (or a combination of these reasons). In many cases, no clear arguments were presented in the submissions analyzed, which instead simply made a clear and succinct argument for repeal or retention of the 8<sup>th</sup> Amendment.

## **Discussion**

Notwithstanding the aforementioned data limitations, informative observations from the frequencies observed in the sample analysis can be drawn. FFA, IHRL, rights and autonomy seemed to be important to those individuals who preferred to repeal the 8<sup>th</sup> Amendment, regardless of gender. Interestingly, both men and women who wished to retain the 8<sup>th</sup> Amendment focused heavily on fetal rights while those who wished to repeal the 8<sup>th</sup> Amendment failed to acknowledge fetal rights or did so only marginally. Percentages indicate a larger response rate (which could be inferred to represent greater importance) for autonomy. Conversely, those who indicate retain do not seem to rate these factors as important. For those individuals wishing to retain the 8<sup>th</sup> Amendment, religion and disability seem to have been important influences on their decision, irrespective of gender, although as discussed below religion features somewhat sparingly in the submissions.

The analysis of this sample suggests that, at least among those people who were self-motivated enough to engage with the process of the Citizens Assembly, first principles arguments mattered. For those who were pro-repeal, the question of fetal personhood or the legal and moral status of the fetus was overwhelmingly sufficiently subordinate to the autonomy and rights of the pregnant person for it to be marginalized. Similarly, but in reverse, for those who favored retention of the 8<sup>th</sup> Amendment the status of the fetus was of the utmost importance, and so important indeed that it overrode any arguments about rights, autonomy, and even harm to pregnant people that might emerge from a hyper-restrictive abortion law regime. This is,

perhaps, to be expected. In the first place the sample here is entirely self-selecting: it might reasonably be assumed that only those who (a) were sufficiently invested in a particular outcome, and (b) had some faith in the importance of the Citizens Assembly would have engaged with the process at all. It might also reflect the entirely form-less approach to submissions adopted by the Assembly and noted above: rather than ask specific questions about the form or nature of any potential change, the submissions process left it entirely open to submitting individuals and organizations to decide on the format, substance, and emphases of their submissions. In such a context, it is perhaps to be expected that many of those who engaged reverted to ‘core’ structures and motifs of ‘arguing about abortion’—to the core questions of right or wrong (simply put)—rather than the more technical questions of legal form. However, what is interesting—even bearing this in mind—is how resilient these core concepts of fetal personhood and women’s autonomy continued to be to the arguments about abortion that were made in these submissions.

However, it is important to note that this did not necessarily align with holding views about the appropriate, workable, or desirable form and content of abortion law. Those who submitted to the Assembly can hardly be criticized for a failure to move past these baseline arguments given the lack of guidance to either the submitting public or the Assembly itself about the exact scope of its mandate. In a relatively formless context, the form of argument that seemed to resonate is significant. In these submissions, these were first principles arguments.

*Fetal Rights*

Fetal Rights were a key animating concern for those submitters who favored retention of the constitutional *status quo*. Of the 767 pro-retain submissions analyzed, fetal rights featured in 629 of them, with a fairly stable occurrence across male and female submitters (81.9% of female pro-retain submitters, and 82.2% of male pro-retain submitters). This is perhaps to be expected, not only because at the level of moral or ethical disagreement the status of the fetus is a key point of disagreement about abortion, but also because the effect of the 8<sup>th</sup> Amendment was to create explicit constitutional rights for the fetus and to confer upon it a form of constitutional personhood that would be removed by repeal of the provision. Indeed, as discussed further below, this claim—that repeal would absolutely remove constitutional rights and make the fetus into a constitutional nullity—became central to the anti-repeal campaign in the referendum proper. Fetal rights were not only important for the submitters, but also make an appearance in the final recommendations of the Citizens Assembly itself. The primary recommendation—which relates to the proposed changes to the Constitution—was that “Article 40.3.3 should be replaced or amended with a constitutional provision that explicitly authorizes the Oireachtas to legislate to address termination of pregnancy, any rights of the unborn and any rights of the pregnant woman” (Citizens Assembly, 2017, 3). This wording at least suggested a persistent view that fetal and women’s rights could and should be balanced, either in the constitutional text or in a legislative provision.

It is difficult to tell with certainty where the concern with fetal rights truly emerged in the Assembly; when the original ballot was presented to the members for consideration ‘the rights of the unborn’ were mentioned within it, but there was no mention of the rights of pregnant women. During the Assembly’s meetings one expert, Brian Murray SC, had raised the possibility that

fetal rights might ‘survive’ repeal of the 8<sup>th</sup> Amendment so that the proposal might be read as copper fastening the ability of parliament to legislate without constraint from fetal rights. However ultimately the motivation for the ballot phrasing in precisely this way is a matter of reasonable disagreement (de Londras, 2017; Kenny, 2017). The expert group that had been appointed to assist in the work of the Assembly devised this original ballot, and this group in turn was made up of academics and practitioners across various disciplines, primarily law (Citizens Assembly, 2017, 50). Some members of the Assembly questioned the use of the term ‘the unborn’, but the expert group opined that it was appropriate given that this was the terminology that currently features in the Constitution (Citizens Assembly, 2017b). Furthermore, it was the members of the Citizens Assembly that insisted the rights of the pregnant woman be explicitly referred to in the ballot and final recommendation (Citizens Assembly, 2017b).

Both this and the prevalence of fetal rights across the submissions were indicative of the resilience of fetal rights within the discourse on abortion in Ireland. This suggested that narratives of fetal rights and fetal personhood would pose a particular challenge in the eventual referendum campaign. First, it suggested that it would be difficult to shift the discussion from *constitutionally entrenched legally protected fetal rights* (which can be used, through force of law, to override a pregnant person’s preferred course of action vis-à-vis continuing with pregnancy) to *politically recognised ethical or moral rights* that can help to shape a future legislative abortion law regime. Second, it placed the fetus in opposition to the pregnant person, constructing abortion as a conflict of legally enforceable rights rather than a matter of ethical decision-making (de Londras & Enright, 2018). The intractability of these discursive and political challenges that flow from discussion of fetal rights makes both seemed to make the

crafting of an alternative or replacement constitutional text difficult, and also that the constitutional referendum and any law- and policy-making that would follow a successful referendum might be dominated by such oppositional frames, potentially making it more difficult to de-exceptionalize abortion and convince the political, legal and medical professions to treat it as all other complex fields of policy-making are treated.

### *Autonomy*

*Autonomy* was a strikingly important argument for submitters who favored repeal of the 8<sup>th</sup> Amendment. Of the 309 pro-repeal submissions in the sample, 181 made arguments of autonomy. There was some differentiation as to gender, with 149 female submitters (or 62.3%) referring to autonomy, and 32 male submitters (or 45.7%). Autonomy is a key plank to the pro-choice position, encompassing within it the claim that, regardless of decisions as to the moral or ethical status of the fetus, the autonomy of the pregnant woman demands that she be able to access abortion care should she wish to do so.

Autonomy is a particular and nuanced argument within the pro-choice movement, because it demands no further specification as to outcome than that abortion care be available. One can argue from autonomy, for example, and either support exceptions-based (or ‘grounds based’) abortion law or a ‘free, safe legal’ approach without limitation. In this, autonomy can be contrasted to arguments of fetal rights. Where one considers that a fetus is equivalent in rights-bearing status to the pregnant woman (or to anyone else, indeed) then any argument in favor of abortion *except* where there is an imminent risk to the life of the pregnant woman is difficult to

make out. This suggests, immediately, that the persuasive effect of an autonomy-based argument in a referendum debate, and indeed in ancillary discussions about law reform and legislative design, might be difficult to maximize as the concept of autonomy leads less obviously to a single ‘right answer’ or, at least, to a clear concept of where autonomy leads in terms of constitutional and legal design. Interestingly, and as discussed further below, in the official referendum campaign discussions of autonomy and sexual and reproductive agency tended to be minimized to some extent, with a significant focus instead on ‘hard cases’ of rape, incest and fatal fetal anomaly, even though in fact the exit polling from the referendum itself suggested that ‘Women’s right to choose’ influenced voters’ decision more than any other factor (RTE & Behaviour and Economics, 2018; 127).

### *Religion*

Religion is often associated with abortion in Irish popular and public discourse, with the constitutional position on abortion being clearly associated with the dominance of Catholic thought and Catholic institutions in the early 1980s, and with religious figures continuing to be prominent protagonists in public debates. This characterization captures both official representatives and ordained members of the clergy and Church, and spokespeople for organizations (such as the Iona Institute, Youth Defence and similar) that are aligned with (or perceived to be aligned with) Catholic thinking and doctrine on the matter of abortion. It might have been expected that many of the pro-retain submitters would have had recourse to religion in underpinning their arguments for retention of the *status quo*, however even taking an expansive approach to identifying religion as a motif (including counting references to God, sin, and

praying for members of the Assembly and their work) only 68 of the 767 ‘retain’ respondents analyzed drew on religion as an argument. An even smaller number of pro-repeal submitters referred to religion (12 in total). It is, of course, not possible to draw any firm conclusions from such a small sample, but the absence of ‘religion talk’ is noticeable here and seemed to align with broader patterns of the ‘secularisation’ of anti-abortion activism observed elsewhere (Brown, 2009) as well as suggesting that pro-retain advocates might be less likely to rely on ‘simple’ arguments of religion, religious doctrine, or fetal sacredness in a referendum, and that ‘official’ intervention by church leaders might be modest. As discussed below, this did indeed turn out to be the case in the 2018 referendum.

### *Disability*

In contrast with religion, disability featured extremely heavily in the submissions analyzed for this paper. In the main, disability and the rights of disabled persons were referred to in pro-retain submissions. As outlined in Table 2 above, 351 of 767 pro-retain submissions referred to disability, as opposed to only 1 of the pro-repeal submissions analyzed as part of this sample. There is a developing international trend of talking about disability and, especially, the sacredness and right to life of disabled children, as a key technique of anti-abortion campaigners, particularly in place of religion-talk, which the analysis of this sample might indicate to some extent in Ireland. Within this strain of argument, abortion access is a gateway to eugenics, and the liberalization of abortion is presented as a sign of disrespect of, disregard for, and indignities directed towards people with disabilities. The salutary tale of states such as Iceland, which are



represented as being ‘Down’s Syndrome free countries’, is proffered to conflate reproductive autonomy with something akin to the quest for designer babies.

The matter of disability is a difficult one in Irish abortion discourses. On the one hand, there is clear and understandable discomfort with any suggestion that a ‘disability ground’ would be proposed and approved, even though the Citizens Assembly did recommend access for abortion in cases of fetal anomaly not likely to result in death before or shortly after birth (Citizens’ Assembly, 2017). This was perceived as a ‘disability ground’ and presented by some anti-choice campaigners as indicative of the potential outcomes of repealing the 8<sup>th</sup> Amendment (Binchy, 2017). On the other hand, the desire on the part of women with disabilities for reproductive autonomy was almost completely ignored (Byrne, 2017), with disabled people being presented as potential victims of liberalized abortion law and never as potential beneficiaries thereof. Both the prevalence of disability as a motif in the submissions, and its frequent appearance as a flashpoint in contemporary political discussions about giving effect to the Citizens’ Assembly recommendations, suggested that it would be an incendiary topic within the referendum campaign, as indeed it proved to be, as discussed further below.

### *International Human Rights Law*

As already mentioned, recourse to international human rights law has emerged as an important part of the Irish pro-choice movement’s attempt to nudge the political establishment in Ireland towards repeal of the 8<sup>th</sup> Amendment. As well as securing numerous declarations from UN bodies that the law in Ireland is inconsistent with international human rights law, and

recommendations that the law be changed, challenges to Irish abortion law have been the sources of important developments in international human rights law's approach to abortion. In particular, the UN Human Rights Committee has now found that criminalizing abortion in situations of fatal fetal abnormality is a violation of the right to be free from torture, inhuman and degrading treatment or punishment (UNHRC, 2016), and at least some members of the UN Human Rights Committee are developing a rich line of argument that criminalizing abortion is gender-based discrimination *per se* (see especially Cleveland, 2016). However, while these developments in international human rights associations and fora have bolstered the legal arguments put to the Irish government that maintenance of the *status quo* is an unsustainable approach, they seem from this sample to have had remarkably little traction among those who submitted to the Assembly. Of the analyzed sample, only 52 of the 309 pro-repeal submitters referred to international human rights law, and only 12 of the 767 pro-retain submitters. The numbers are small, so that gender-based differentiations might not be especially relevant, but in any case they were relatively minor: 16.7% of pro-repeal female submitters and 18.6% of pro-repeal male submitters referred to international human rights law, as opposed to 0.7% of female and 2.6% of male pro-retain submitters.

This finding seemed to suggest that the argument that international human rights law *requires* constitutional change may not be especially effective in a referendum, as indeed proved to be the case (discussed further below). However, interestingly international human rights law *was* significant for the Joint Oireachtas Committee in reaching its conclusions in consideration of the Assembly's Report. This is perhaps unsurprising. To many, compliance with international human rights law is a technocratic argument that has little to do with the heart of the matter, which

seems to revolve around core questions of fetal rights and autonomy. Furthermore, there is a long-observed tendency to present Ireland as a place with a particular moral connection with fetal life, and an especial status as the protector thereof; the construction of an island nation uniquely ethical in its approach to ‘the unborn’ (Fletcher, 1998; Mullally, 2005). If that is the case, then technical arguments about international legal obligations perhaps understandably struggled to gain traction in a first principles argument about how we conceptualize, protect, and pursue social policy related to fetal rights and women’s autonomy.

### **After the Assembly: The Joint Oireachtas Committee on the 8<sup>th</sup> Amendment**

The Citizens’ Assembly provided its recommendations on the 8<sup>th</sup> Amendment to the Oireachtas in June 2017 (Citizens’ Assembly, 2017). The recommendations were far more extensive and far more liberal than many (or perhaps any) had anticipated. Having first recommended the necessary constitutional change to allow for the introduction of abortion legislation, it went on to make extensive recommendations for a grounds-based abortion law. In summary, the majority of the Assembly members recommended that abortion be available without restriction as to reason up to 12 weeks (48%, with 44% thinking it should be available without restriction up to 22 weeks), up to 22 weeks where there was a risk to a woman’s health (including to mental health), on socio-economic grounds up to 22 weeks, where the fetus was diagnosed with a non-fatal anomaly (up to 22 weeks), in cases of rape (up to 22 weeks), where there was a serious risk to the pregnant person’s health (without time limit), or where the fetus was diagnosed with a fatal anomaly (without time limit). Clearly, these recommendations went far beyond what the political ‘establishment’ had anticipated and certainly beyond what was considered to be the popular and

political consensus around introducing limited and conservative law reform for so-called ‘hard cases’. The Assembly’s discourses and recommendations were largely centered on an understanding and appreciation of the inadequacy of the current law, the reality of Irish reproductive life (including abortion travel and illegal abortion), and a sense of the unsustainable and objectionable nature of the law and the burdens it imposed on pregnant people in Ireland.

The immediate political reaction in many quarters seemed to be one of shock, with some politicians reportedly considering that their role now was to ‘water down’ these recommendations through the parliamentary process (Davin Power, 2017). The Joint Oireachtas Committee approached its consideration of the Assembly’s report with a keen eye to technical expertise, bringing in experts in constitutional law and comparative constitutional law, devoting a day to international human rights law, and engaging in very extensive ways with medical professionals from Ireland and abroad in order to acquire a sense of best international legal and medical practice in abortion law and the provision of abortion care. Unlike the Assembly, the Committee did not engage to any great extent with moral or ethical debates on the ‘rightness’ of abortion, but rather seemed to adopt a disposition that its role was to consider *how* to give effect to the Assembly’s primary recommendation (i.e. constitutional change) rather than *whether* to concur with that recommendation. This resulted in accusations of bias and unfair dealing from some anti-abortion committee members, but the outcome of the Committee’s deliberations reflected that general disposition, with a recommendation for constitutional change being made. Although there was some discussion in the Committee about the nature of that change—in particular, about whether a limited right to access abortion (e.g. on grounds of rape, or risk to life) could replace Article 40.3.3—in the end the Committee voted for ‘repeal *simpliciter*’ on the

basis that comparative experience showed these limited clauses tended to be unworkable. In reaching that conclusion, and in particular in then going on to make recommendations about the kind of legislation that should follow a successful referendum, the Committee leaned especially heavily on three bodies of argument: constitutional design, international human rights law, and the need to be pragmatic in dealing with reality and, particular, in recognizing that thousands of women were self-administering abortion in Ireland every year with potentially devastating impacts for their health *and* that medical professionals considered the 8<sup>th</sup> Amendment to pose barriers to them in providing the highest standards of healthcare to their patients. Thus, unlike in the submissions to the Assembly, the Committee (with notable individual exceptions with different positions *vis-à-vis* the acceptability of abortion) was not manifestly animated by autonomy, fetal rights, or disability, but was deeply engaged with arguments of health, legal design, and international human rights law. The Committee also made more conservative recommendations as to any subsequent abortion law than the Assembly did: its recommendations did not include a socio-economic ground, and abortion on the basis of non-fatal fetal anomaly was expressly excluded (Joint Oireachtas Committee on the 8<sup>th</sup> Amendment, 2017).

The Committee's report was delivered in December 2017, and at the end of January 2018 the Irish government confirmed that it would hold a referendum to repeal the 8<sup>th</sup> Amendment. Preferring the approach of the Assembly to that of the Committee it indicated that the proposition would be for the repeal of the 8<sup>th</sup> Amendment and its replacement with a clause specifically designed to enable the Oireachtas to legislate for abortion. The language of the Government announcement—made by Taoiseach Leo Varadkar, Minister for Health Simon Harris, and Minister for Children and Youth Affairs Katherine Zappone—was an intriguing mix

of conservative and liberal, with all three referring to the desire to ensure abortion would be “safe, legal and rare” while also indicating a belief that as a polity we should “trust women” and “trust doctors” (Irish Government News Service, 2018). Like the Committee, but unlike the submissions to the Assembly, the Government was also highly motivated by the reality of the widespread use of abortion pills for illegal self-administered abortion in Ireland and particularly animated by the possibility that someone would experience complications and end of extremely ill or even dead as a result of such self-administration.

In March, once the referendum date of 25 May 2018 had been confirmed, the Department of Health published a general scheme of legislation indicating the kind of law that might be introduced in the event of repeal of the 8<sup>th</sup> Amendment (Department of Health, 2018b). It was more conservative than that recommended by either the Citizens’ Assembly or the Committee. While it would allow for abortion without restriction as to reason up to 12 weeks, a 3-day mandatory waiting period would be required, even though such measures are widely criticized for undermining women’s reproductive agency and have no medical purpose. After 12 weeks abortion would be lawful only where there was a risk to life or a risk of serious harm to health, with abortion not being permitted on even those grounds once the fetus has reached viability. No gestational term limit would be imposed in cases of fatal fetal anomalies. It was these proposals, together with the general question of whether to undertake constitutional change at all, that were then debated in the referendum campaign.

### **The Campaign: Key Arguments**

The referendum campaign proper ran from the end of January to the polling day at the end of May, with the pro-repeal campaign largely being led by a civil society coalition called Together or Yes and the anti-repeal campaign by a coalition known as Save the 8<sup>th</sup>. Considering the key motifs identified in the submissions to the Citizens' Assembly and discussed above, the core arguments of the campaign are interesting. In particular, the 'no' campaign seemed to connect well with and amplify the arguments of fetal personhood and disability that could be identified in the submissions and to do so without any significant engagement with religion or religiosity. In contrast, the yes campaign focused heavily on arguments about health, the pragmatic reality of the abortion pill, and the inability to cater for 'hard cases' without constitutional change. Autonomy and reproductive agency were not key and core campaign messages, although of course they arose around the edges and, in reality, in every day discussions and canvassing, but the core arguments from both Together for Yes and the government were generally more tailored and conservative.

### *Fetal rights*

As might have been expected, the 'no' campaign focused heavily on fetal rights. In early 2018 the Supreme Court had confirmed that the right to life under the 8<sup>th</sup> Amendment was the only constitutional right enjoyed by the fetus, although of course even without such a right the state was entitled to legislate in pursuit of the 'common good' of protecting fetal life (*M v Minister for Justice*, 2018). This became a touchstone in the campaign. The 'no' campaign repeatedly claimed that this referendum was uniquely offensive, being the first and only time that the People were asked expressly to remove constitutional rights from a group of people (Save the 8<sup>th</sup>,

2018a). In fact, the 27<sup>th</sup> Amendment to the Constitution had removed citizenship rights from people born in Ireland without an Irish parent, but this seemed to escape their attention. This argument very much chimed with the ‘all or nothing’ effect of constructing the fetus as a rights-bearer described above. Without these rights, the ‘no’ campaign claimed, fetal protection would be the mercy of legislators to whom the electorate was being asked to give a ‘blank check’. In response the official ‘yes’ campaign and, in particular, the Government argued that the Constitution was not the only place in which to balance interests, and instead that the proposed legislation had been designed in order to give appropriate respect to fetal rights *and* the rights of pregnant women not only to life, but also to health. While not entirely abandoning the language and argumentative frameworks imposed by fetal rights, then, the referendum campaign attempted to reframe these through largely technical arguments about the appropriate balance to be struck between these sometimes-competing interests and the right mechanism through which to achieve that balance. Almost no Government figures explicitly rejected the claim that the fetus should be considered to be a rights-bearer per se, although one—Katherine Zappone—did make express her view that the fetus was not of equivalent ethical and legal standing to a pregnant person (Zappone, 2017; Irish Government News Service, 2018). Thus—and perhaps unsurprisingly—in a referendum that was ultimately about stripping constitutional rights from the fetus, fetal rights played a central role, with those advocating a yes vote engaging more extensively with the issue than in the submissions analyzed in this sample. That is perhaps to be expected—campaigns are conversations in which core arguments and claims need to be responded to, while submissions are largely prepared as single documents. The success of the no campaign in centering fetal rights should not be underestimated, then, but interestingly this question of fetal rights seemed to have far less impact on voting behaviors than its centrality



within the campaign might have suggested. Only 36% of voters who participated in the exit poll said that ‘the right to life of the unborn; was an influencing factor in their vote (RTE & Behaviour and Attitudes, 2018; 127).

### *Autonomy*

As already mentioned women’s autonomy—or the right to choose—was perhaps surprisingly not as central to the official referendum campaign as might have been expected, or as its importance in the submissions analyzed in these submissions might have suggested. This may well be connected with the lack of specificity of an autonomy based demand in a pro-choice context, but it was especially interesting that even the proposal for abortion without restriction as to reason was not generally discussed as an autonomy-maximizing proposal. Instead, the official campaign tended to characterize it primarily as the only workable way to make lawful abortion available in cases of rape. This argument focused on the near impossibility of putting in place any system by which a ‘rape ground’ for access to abortion could be put in place without either compromising subsequent criminal proceedings or re-traumatizing victim survivors. While this was true—rape grounds without ‘wide’ or ‘on demand’ grounds for access to abortion simply do not work—it was notable that this ‘hard case’ rationale was prioritized almost to the complete exclusion of arguments about women’s right simply to choose not to be pregnant. In this way, ‘everyday’ abortions became re-stigmatized in the referendum debate as ‘bad abortions’, and this was reinforced by the ‘no’ campaign which argued that the proposal was “too extreme” and did not, in fact, limit abortion to these hard cases but instead allowed for abortion “for no reason” (Save the 8<sup>th</sup>, 2018b). It may well be that the perception that the Irish electorate was sharply divided on

abortion motivated this approach to the campaign, resulting in the right to choose being sidelined in favor of more pragmatic arguments perceived as likely to appeal to the so-called ‘middle ground’. However, once the referendum had been completed it became clear that the Irish electorate was not overly concerned with ‘floodgates’ or opposed to recognizing a right to choose. Instead, 62% of those who participated in the exit poll affirmed that a woman’s right to choose was a key influencing factor (RTE & Behaviour and Attitudes, 2018; 127). Furthermore, 75% of those polled indicated that they “always knew” how they would vote (RTE & Behaviour and Attitudes, 2018; 107) once the referendum was announced, while 76% of those polled had not changed their mind of abortion in the five years preceding the referendum (RTE & Behaviour and Attitudes, 2018; 69).

### *Religion*

As perhaps indicated from the submissions, religion strictly speaking was of very limited impact on the referendum campaign. While a number of reports emerged of priests preaching against the referendum in church, so too it became clear that people were resisting this preaching either by walking out of mass or by questioning the appropriateness of such interventions with the priest himself. A number of Bishops prepared letters to be read at church, but generally speaking they were not prominent in the public debates and there appeared to be a general sense that religious intervention in the referendum was inappropriate. That said, a number of the key spokespeople for the no campaign are closely associated with lay Catholicism and the Iona Institute, but religious observance played no manifest role in their arguments. The secularization of abortion debates observed in other contexts, then, was also observable in the 2018 referendum. Indeed,

only 12% of voters who participated in the exit poll indicated that their religious views had influenced how they voted (RTE & Behaviour & Attitudes, 2018; 127).

### *Disability*

In contrast to religion, disability was an extremely significant issue in the referendum debate. In particular, the anti-repeal campaign argued that the proposed changes would allow for abortion where disabilities had been diagnosed *in utero*. As in the submissions, the potential fate of fetuses where a Down Syndrome diagnosis had been made was particularly prominent, and ‘no’ campaign posters up and down the country declared that ‘in England’ 93% of ‘children with Down Syndrome are aborted’, exhorting voters: ‘Don’t bring this to Ireland’. In response, however, the yes campaign and Government stressed that—in contrast to the Citizens’ Assembly—the proposed legislation specifically excluded abortion on the grounds of disability. Aided by a number of prominent obstetricians they argued that Down Syndrome could not be diagnosed within the first 12 weeks (i.e. during the proposed period of abortion without restriction as to reason), although screening tests could indicate likelihood during that time period. Undeterred, prominent anti-repeal campaigners continued to argue that repeal would inevitably result in the “abortion of some disabled babies at all stages of pregnancy” (Binchy, 2018). As in the submissions analyzed as part of this sample, the reproductive rights and agency of women with disabilities did not feature in this discussion even though Inclusion Ireland publicly advocated repeal in order to ensure reproductive autonomy for disabled pregnant persons. Even now, while the new legislation is awaited, anti-abortion politicians continue to

argue that they will attempt absolutely to preclude abortion on the grounds of disability in any new law, including during the 12-week protected period (Leahy, 2018).

### *International human rights law*

Even though, as mentioned above, international human rights law was extremely important in the process of the Joint Oireachtas Committee, it was as marginalized in the official referendum campaign as the submissions to the Assembly suggested it would be. As already noted, compliance with international human rights law might simply not have been considered to be a sufficiently compelling argument for the everyday voter. Instead of discussing the need to repeal the 8<sup>th</sup> Amendment in order to vindicate the human rights of pregnant people, the referendum campaign focused on the health impacts of the current law and on the need to repeal Article 40.3.3 and introduce workable abortion law in order to maximize health outcomes for pregnant people. In some ways this is simply the replacement of one technocratic discourse (of law) with another (of medicine) and reflected the prominence of medics in the official campaign and the decision of the yes campaign not to foreground lawyers (in contrast with the no campaign, three of whose prominent advocates—Maria Steen, Ben O’Floinn and Theresa Lowe—regularly highlighted their qualifications as barristers in their public interventions. However, the poor showing for international human rights law in the referendum proper might also be connected with fact that anti-abortion campaigners would likely attempt to both manipulate and discredit it. This was evident in the proceedings of the Joint Oireachtas Committee. Although the Irish Human Rights and Equality Commission released a major policy paper recommending repeal of the 8<sup>th</sup> Amendment, introduction of a wide-ranging abortion law, and decriminalization of

abortion in all cases (IHREC, 2017), key arguments from which it presented at the Committee's full day of hearings on the requirements of international human rights law, members of the Committee tended to reject the interpretation of the law from these experts. For example, anti-abortion members took to reading out the Preamble to the UN Convention on the Rights of the Child (which refers to prenatal life), frequently posed questions about whether 'the unborn' has rights under international law, and in one session William Binchy (who had an important part in introducing the 8<sup>th</sup> Amendment) characterized the development of international human rights law principles in favour of access to abortion as part of an activist 'values system' that was highly politicized and bore little relation to the text of human rights treaties themselves.

## **Conclusions**

While only tentative conclusions could ever be drawn from the submissions of the general public to the Citizens' Assembly, in the wake of the successful referendum campaign to repeal the 8<sup>th</sup> Amendment and create the constitutional space for abortion law reform in Ireland it has become evident that the core arguments motivating these submissions continued to motivate voters. They also, to at least some extent, were reflected in the official campaign, with a striking continuity in approach being observed between the anti-repeal arguments in these submissions and those that emerged in the referendum campaign. For those in favor of reform, however, the official campaign arguments tended to focus more in the referendum on hard cases and medical care than on first principles arguments of a woman's right to choose, even though the exit polls suggest that this was a key motivator for voters and, indeed, that voting intention had remained constant for five years. However, the key role played by the Citizens' Assembly seemed in retrospect to have been to illustrate to politicians the demand for constitutional change and in that way the

apparent mismatch between pro-repeal and pro-choice submitters to the Assembly and the arguments that emerged in the campaign—and behind which pro-repeal politicians were willing and able to muster—appears explicable. The official campaign for repeal at both civil society and political levels seemed to reflect more the kinds of technical and pragmatic arguments that persuaded the Joint Oireachtas Committee, albeit with some differences (in particular technocratic arguments of medicine overtaking those of law), than the first principles arguments that seemed to motivate submitters to the Assembly. This raises an interesting question about the purpose of the Citizens’ Assembly: was its purpose and impact oriented towards informing and assisting the average voter, or was it more influential on official political narratives of abortion law reform? Even if one were to conclude the latter was the case, this is significant in a country in which constitutional change can only be brought about by referendum, but referenda can only take place when mandated by the Oireachtas.

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