

## “The Enemy of the Good”: Reflections on Ireland’s New Abortion Legislation.

Máiréad Enright\*

A while ago, I was in a room in Belfast with Emma Campbell making jokes about FitBit. Emma’s FitBit reported that her resting heartrate had gone through the roof when the decriminalisation of abortion in Northern Ireland was discussed in the House of Commons. Weeks into the Irish debates on the new Health (Regulation of Termination of Pregnancy) Bill, I told her I knew the feeling – heartsore, heartsick with law. We joked about making an art installation of reproductive justice campaigners’ FitBit biodata – long medical charts maybe – measuring and marking our quickened heartbeats and sleepless nights, our heightened blood alcohol levels and bad cholesterol, and calibrating them carefully against stages in these endless processes of abortion law reform. Let me recite some of those Irish moments for you:

- 29 June 2017: the Citizens Assembly publishes its report.<sup>1</sup> It recommends that the 8<sup>th</sup> Amendment should be repealed and replaced with new text confirming that the Oireachtas<sup>2</sup> can liberalise Irish abortion law. It recommends that abortion should be made available in the first 12 weeks of pregnancy without requiring women to disclose their reasons for terminating the pregnancy. After 12 weeks, abortion should be available on limited grounds.
- 20 December 2017: after weeks of difficult hearings, the Joint Oireachtas Committee on the Eighth Amendment publishes its own report,<sup>3</sup> which concludes that a referendum should be held to repeal the near-total constitutional ban on abortion, and recommends that abortion should be legalised in Ireland on narrower grounds than those suggested by the Assembly; risk to life, risk of serious harm to health and fatal foetal anomaly.
- 30 January 2018: the Taoiseach<sup>4</sup> announces that the referendum will be held in May or early June.<sup>5</sup>

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\* Senior Lecturer in Law, University of Birmingham, UK. Email [m.enright@bham.ac.uk](mailto:m.enright@bham.ac.uk). This piece was written in a personal capacity and submitted on 14 December 2018. The quotation in the title is taken from the observation of the Irish obstetrician, Chris Fitzpatrick, that critics of the new abortion care legislation have been warned, in the words of Voltaire, to “let not the perfect be the enemy of the good”: Chris Fitzpatrick, “January deadline for abortion services dangerously unrealistic” *Irish Times*, 7 December 2018 <https://www.irishtimes.com/opinion/january-deadline-for-abortion-service-dangerously-unrealistic-1.3722598>

<sup>1</sup> Citizens’ Assembly, *Final Report on the Eighth Amendment of the Constitution* (Dublin: Citizens’ Assembly, 2017) <https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution.html> For discussion of the Assembly’s proceedings see IADC Debate on the Citizens’ Assembly in Ireland: <https://blog-iacl-aidc.org/debate-the-citizens-assembly-in-ireland/>

<sup>2</sup> The Oireachtas is the Irish parliament.

<sup>3</sup> *Report of the Joint Oireachtas Committee on the Eighth Amendment* (Oireachtas, 2018) <https://webarchive.oireachtas.ie/parliament/media/committees/eighthamendmentoftheconstitution/Report-of-the-Joint-Committee-on-the-Eighth-Amendment-web-version.pdf>

<sup>4</sup> The Taoiseach is the head of the Irish government

<sup>5</sup> Marie O’Halloran, “Abortion now in hands of the electorate, says Taoiseach” *Irish Times*, 30 January 2018 <https://www.irishtimes.com/news/politics/oireachtas/abortion-now-in-the-hands-of-irish-electorate-says-taoiseach-1.3373887>

- 9 March 2018: the Minister for Health, Simon Harris, introduces the 36<sup>th</sup> Amendment to the Constitution Bill in Dáil Éireann.<sup>6</sup> The people will be asked to vote to remove the 8<sup>th</sup> Amendment from the Constitution, and replace it with the 36<sup>th</sup> Amendment, which empowers the Oireachtas to legislate, in future, for the “termination of pregnancy”.
- 22 March 2018: Together for Yes, the civil society campaign for a Yes vote in the referendum, is launched.<sup>7</sup> It is led by Gráinne Griffin (Abortion Rights Campaign), Orla O’Connor (National Women’s Council of Ireland) and Ailbhe Smyth (Coalition to Repeal the 8<sup>th</sup> Amendment).
- 27 March 2018: the 36<sup>th</sup> Amendment Bill finally passes all stages in the Oireachtas, and we know for sure that a referendum will take place in May.
- 28 March 2018: the Fine Gael-led government publishes the General Scheme of a Bill to Regulate Termination of Pregnancy;<sup>8</sup> a draft of the legislation it says it will endeavour to pass, if the 8<sup>th</sup> Amendment is removed from the Constitution. The legislation essentially mirrors the Joint Oireachtas Committee’s recommendations, but to placate the conservative Tánaiste<sup>9</sup> it inserts a new requirement that women accessing a termination in the first 12 weeks of pregnancy will be subjected to a 3-day mandatory waiting period.
- 25 May 2018: the people overwhelmingly vote to remove the 8<sup>th</sup> Amendment.
- 26 May 2018: the votes are counted and the win is confirmed – 66.4% of a 64.1% turnout. Simon Harris announces that a new abortion service will be up and running in Ireland by January 2019.<sup>10</sup>
- 4 June 2018: three anti-abortion activists, Joanna Jordan, Charles Byrne and Ciaran Treacy,<sup>11</sup> begin actions in the High Court challenging the result of the Referendum. Although the challengers’ cases are plainly unfounded,<sup>12</sup> it is not until 7 September that the Supreme Court rejects the last of them.<sup>13</sup>
- 18 September 2018: the President signs the 36<sup>th</sup> Amendment into law.
- 27 September 2018: Simon Harris introduces the Health (Regulation of Termination of Pregnancy) Bill 2018<sup>14</sup> in the Dáil.<sup>15</sup>

<sup>6</sup> Thirty-Sixth Amendment of the Constitution Act, 2018

<https://www.oireachtas.ie/en/bills/bill/2018/29/>

<sup>7</sup> Launch of Together for Yes: <https://www.youtube.com/watch?v=eKJ72rgJD1o&feature=youtu.be>

<sup>8</sup> General Scheme of a Bill to Regulate Termination of Pregnancy, 2018 <https://health.gov.ie/wp-content/uploads/2018/03/General-Scheme-for-Publication.pdf>

<sup>9</sup> Deputy Prime Minister.

<sup>10</sup> Jennifer Ryan, “Simon Harris: ‘I threw everything at this says Minister for Health’” *Irish Times*, 28 May 2018 <https://www.irishtimes.com/life-and-style/people/simon-harris-i-threw-everything-at-this-says-minister-for-health-1.3511575?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Flife-and-style%2Fpeople%2Fsimon-harris-i-threw-everything-at-this-says-minister-for-health-1.3511575>

<sup>11</sup> Mary Carolan, “Three court challenges initiated to Irish referendum result” *Irish Times*, 5 June 2018 <https://www.irishtimes.com/news/crime-and-law/courts/high-court/three-court-challenges-initiated-to-abortion-referendum-result-1.3520188?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fcrime-and-law%2Fcourts%2Fhigh-court%2Fthree-court-challenges-initiated-to-abortion-referendum-result-1.3520188>

<sup>12</sup> See e.g. *Jordan v. Ireland* [2018] IEHC 438; *Jordan v. Ireland* [2018] IECA 291.

<sup>13</sup> *Jordan v. Ireland* [2018] IESCDT 124.

<sup>14</sup> Health (Regulation of Termination of Pregnancy) Bill, 2018

[https://data.oireachtas.ie/ie/oireachtas/bill/2018/105/eng/ver\\_c/b105b18d.pdf](https://data.oireachtas.ie/ie/oireachtas/bill/2018/105/eng/ver_c/b105b18d.pdf)

<sup>15</sup> The Dáil is the Irish House of Representatives.

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On 13 December the Bill completed its passage through the Dáil and Seanad,<sup>16</sup> and the President will soon sign it into law. Guidelines instructing doctors on how the new legislation is to be interpreted in practice should be published any day. The Health Services Executive has made contracts available to general practitioners who are willing to provide abortion services in early pregnancy.<sup>17</sup> Activist medical groups such as the Southern Taskgroup on Abortion and Reproductive Topics (START) and Doctors for Choice are running training and information sessions for their colleagues who want to provide care.

### **Progress or Flawed Legislation?**

According to this linear account, we are making progress. A new law appears to pass seamlessly through its formal stages under its own momentum, with a rhythmic grace – almost as regular as a heartbeat. When the Bill finally cleared the Seanad, I wept as quickly and as easily as on the night of 25 May, when we first got news that we had won the referendum. But when I trace the list of legislative moments which brought us here, I also recover the tightness of anger, spreading across my shoulders, down my breastbone, settling heavy at the top of my stomach. It has soaked into the muscle memory of my typing hands. It has worn away at the crook of my neck, where my phone often hums with queries from Ireland, and it lodges in my throat when we talk through the legislation, flitting between legalism, laughter and expletive. Especially since September, each stage of these institutional processes has had its own sickening undertow; with each stage, the law has seemed to pull further and further out of the grasp of the movement that gave life to the demand for abortion law reform. The heartache, the soreness of it, has taken me by surprise. The Repeal campaign – the catch-all term for the grassroots Irish pro-choice movement which emerged in 2012 in the aftermath of the death of Savita Halappanavar,<sup>18</sup> and pressed for the referendum – was led, in large part by young feminists who never departed from the demand for “free, safe, legal” abortion. There is not space here to list all of the ways in which the government’s legislation falls far short of that demand. Let me talk about two.

First, the legislation actively undermines the promise of access to abortion “on request”. Although s. 12 promises that abortion will be accessible up to 12 weeks,<sup>19</sup> the Department of Health has determined that a woman will not be able to get an abortion from her general practitioner after 9 weeks.<sup>20</sup> In part this is because it is assumed that general practitioners will only provide early medical abortions, and that procedural abortions will be performed in hospitals. Recently START tweeted to encourage women to present to their doctors by 7 weeks if possible, if they want to avoid having to travel to a hospital.<sup>21</sup> These time pressures will present significant challenges to many women. Some of the cities will be well-served by specialist women’s health

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<sup>16</sup> The Seanad is the Irish Senate.

<sup>17</sup> Health Services Executive, Termination of Pregnancy Draft Contract:

<https://www.hse.ie/eng/about/who/gmscontracts/termination-of-pregnancy-draft-contract/>

<sup>18</sup> Megan Specia, “How Savita Halappanavar’s death spurred Ireland’s abortion rights campaign” *New York Times*, 27 May 2018 <https://www.nytimes.com/2018/05/27/world/europe/savita-halappanavar-ireland-abortion.html>

<sup>19</sup> “Weeks” for the purposes of the legislation means weeks since the woman’s last menstrual period, not weeks’ gestation.

<sup>20</sup> See Health Services Executive, Termination of Pregnancy Draft Contract, above n 19.

<sup>21</sup> @startdoctors 1 December 2018 <https://twitter.com/Startdoctors/status/1068815402833248256>

clinics. However, in rural Ireland especially, same-day GP appointments are rare and a woman may have to travel some distance to find a GP who is not a conscientious objector and who has volunteered to provide abortion services. The contract for general practitioners providing abortion services requires the woman to attend two consultation appointments. Many women will struggle to keep two medical appointments; for instance, if their mobility is restricted<sup>22</sup> or if they live under the control of a parent or intimate partner,<sup>23</sup> or in an institution such as a religious home, or in a rural direct provision centre on an allowance of twenty euro a week.<sup>24</sup> These difficulties are exacerbated by the government's insistence on a mandatory three-day waiting period. The waiting period runs from when the doctor first examines the woman, and certifies that her pregnancy is under 12 weeks.<sup>25</sup> Harris rejected amendments that would have mitigated the effects of the waiting period by allowing it to be waived in certain circumstances, or by allowing it to run from when the woman first contacts her doctor to seek an appointment.<sup>26</sup> The immovable 12 week deadline is likely to be one reason for continued abortion travel from Ireland, even if the numbers travelling drop.<sup>27</sup> We are hearing reports that illegal abortion pills – long the safety-net for Irish women needing to end pregnancies – are already being seized more frequently.

Second, it is not clear that the legislation will protect women who need to terminate a pregnancy to preserve their health. After 12 weeks, s. 9 permits women to access a termination where their health is at risk of “serious harm”. However, the legislation does not define “serious harm”. It also requires doctors to refuse a termination where that termination would not “avert” (as opposed to reduce) the risk, where the foetus can be delivered alive without the need for “extraordinary life-saving measures” (again, not defined), or where the doctors agree that a termination would not be an “appropriate” course of action (the legislation does not tell us how this should be assessed) in order to avert the risk. The threshold for intervention under s. 9, although ill-defined, is nevertheless high, and it will be interpreted against a backdrop of continued criminalisation. Although the new legislation provides that a woman who obtains an illegal abortion will never commit a crime, a doctor who strays outside the bounds of the Act may do so.<sup>28</sup> It is true that the referendum campaign empowered and

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<sup>22</sup> Inclusion Ireland, *Submission to the Department of Health on the Health (Regulation of Termination of Pregnancy) Bill, 2018* <http://www.inclusionireland.ie/sites/default/files/attach/basic-page/1651/submission-doh-health-regulation-termination-pregnancy-bill-2018.pdf>

<sup>23</sup> See letter to Simon Harris from Mara Clarke, the director of the Abortion Support Network <https://twitter.com/maraclarke/status/1071038187588460544>

<sup>24</sup> Direct provision is the Irish reception system for people seeking asylum.

<sup>25</sup> Health (Regulation of Termination of Pregnancy) Bill, 2018, s.12(3).

<sup>26</sup> See e.g. Report Amendments 32-34:

<https://data.oireachtas.ie/ie/oireachtas/bill/2018/105/dail/4/amendment/numberedList/eng/b105a18d-drnl.pdf>

<sup>27</sup> The Director of the National Women's Council, Orla O'Connor, has argued that a 12 week time limit will be satisfactory for the majority of women: “Letter to the Editor” *Irish Times*, 8 February 2018 <https://www.irishtimes.com/opinion/letters/referendum-on-the-eighth-amendment-1.3383653>

<sup>28</sup> The Minister's refusal to decriminalise is rooted (1) in the assumption that the foetus maintains certain rights in Irish law, which must be vindicated by continued criminalisation and (2) by an equation of criminalisation with protection of women and decriminalisation with chaos. See further Simon Harris, Health (Regulation of Termination of Pregnancy) Bill, 2018 Committee Stage (on the rights of the foetus) <https://www.kildarestreet.com/committees/?gid=2018-11-06a.482> and Simon Harris, Health (Regulation of Termination of Pregnancy) Bill, 2018 Report Stage (on criminal law as

emboldened pro-choice doctors. It is equally true that the shadow of criminalisation will deter more cautious doctors from providing care, and we do not yet know what sort of interpretative culture the implementation guidelines on s. 9 will foster. As we know in Ireland from our long experience with treating abortion as a crime, the mere possibility of prosecution will often have disproportionate chilling effects on legal abortion access.<sup>29</sup> The risk is that s. 9 will rarely be invoked, leading to delays in access to treatment that would preserve physical and mental health, or to refusals of care which will condemn women to continue dangerous pregnancy and labour.<sup>30</sup> Simon Harris rejected amendments that would mitigate the worst of the harms likely to be caused by this ground.<sup>31</sup>

### Silencing Feminist Voices in Irish Abortion Law.

Ruth Fletcher, Fiona de Londras, Sheelagh McGuinness, Vicky Conway and I worked as a sub-group of Lawyers for Choice<sup>32</sup> to produce position papers in August,<sup>33</sup> October<sup>34</sup> and again in November<sup>35</sup> outlining the difficulties with the Health (Regulation of Termination of Pregnancy) Bill 2018 and suggesting corrective amendments. Along with other pro-choice groups such as the Abortion Rights Campaign and the Irish Family Planning Association, we helped to draft amendments that pro-choice TDs<sup>36</sup> including Clare Daly and Brid Smith, and senators such as Lynn Ruane, Alice Mary Higgins and Colette Kelleher, put to Simon Harris as the legislation went through the Dáil and the Seanad. Feminist legislative drafting is one of our set pieces.<sup>37</sup> We worked hard and fast – all phone calls and WhatsApp groups and endless comments and replies on tighter and tighter iterations of the same idea. We worried at clauses, and snagged them on our politics, and imagined how they might be read by people we have never met, and people we wanted to empower; how they might be patched together with the demands of a difficult case in an imagined future time. We traded half-jokes about how we were living through every feminist article ever written about law reform. We felt the small satisfactions of crafting legal devices that seemed to fit the moment. We tried to improve the government’s legislation to secure

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the only means of deterring behaviour harmful to women)

<https://www.kildarestreet.com/sendebates/?gid=2018-12-13a.724>

<sup>29</sup> This was part of the basis of the judgment in *A, B and C v. Ireland* [2010] ECHR 2032.

<sup>30</sup> This happened in the case of Ms. Y. See Ruth Fletcher, “Contesting the Cruel Treatment of Abortion-Seeking Women” (2014) 22(4) *Reproductive Health Matters* 10-21.

<sup>31</sup> See e.g. Report Amendments 2-12:

<https://data.oireachtas.ie/ie/oireachtas/bill/2018/105/seanad/4/amendment/numberedList/eng/nl-b105b18d.pdf>

<sup>32</sup> [www.lawyers4choice.ie](http://www.lawyers4choice.ie)

<sup>33</sup> Máiréad Enright et al., *Position Paper on the Updated General Scheme of the Health (Regulation of Termination of Pregnancy) Bill, 2018* <https://lawyers4choice.files.wordpress.com/2018/08/position-paper-1.pdf>

<sup>34</sup> Ruth Fletcher et al., *Briefing Paper on the Health (Regulation of Termination of Pregnancy) Bill, 2018: Making the Legislation Work, Delivering on the Referendum* [https://lawyers4choice.files.wordpress.com/2018/10/hrtop\\_briefing\\_final.pdf](https://lawyers4choice.files.wordpress.com/2018/10/hrtop_briefing_final.pdf)

<sup>35</sup> Fiona de Londras et al., “Amending the Health (Regulation of Termination of Pregnancy) Bill: 5 Priority Issues for the Seanad” <https://lawyers4choice.ie/2018/11/29/amending-the-health-regulation-of-termination-of-pregnancy-act-5-priority-issues-for-the-seanad/>

<sup>36</sup> TDs are members of the Dáil.

<sup>37</sup> See e.g. Máiréad Enright et al., “Abortion Law Reform in Ireland: A Model for Change” (2015) 5(1) *feminists@law* <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/173/631>

meaningful abortion access and minimise harm. This felt like useful work. This felt as if we might be making something. But the amendments didn't take: we were making them not for law, but for the archive.

Simon Harris repeatedly insisted that the General Scheme he had published in March was not, as we had assumed, draft legislation, but the final settlement. He said again and again in the Oireachtas that, although the referendum question was about empowering politicians to make new abortion law, the people had also voted indirectly on the legislation and it could not now be changed.<sup>38</sup> He held this line at all costs, sometimes invoking the bare bones of (privileged) "legal advice" from the Attorney General. Where previous Ministers for Health always fell back on the 8<sup>th</sup> Amendment's protection of the right to life of the unborn to block progressive abortion legislation, Harris never touched on the substance of the Constitution. We still do not know how Repeal altered the constitutional structure, only that there is a black box in the law where women's constitutional rights should be. "Law", for Harris, is something separate from policy,<sup>39</sup> beyond the ken of "simple laymen"<sup>40</sup> like him or his parliamentary colleagues; something which generates certainty, clarity and order.<sup>41</sup> "Nobody ... wants to put one word into, take one word out of or change one word in this Bill that could cause any legal confusion."<sup>42</sup> "Legal certainty," on these terms, always trumps women's rights.<sup>43</sup>

Harris' one significant concession to pro-choice lobbying was procedural. He accepted that the operation of the Act should be reviewed within three years of commencement. This is provided for in s. 7. We know nothing yet about what the focus of this review will be, or about the kinds of data which will be gathered to inform it. While s. 7 opens up possibilities of future reform it also, of course, comfortably defers them.

### Women Can't Wait?

Anti-choice TDs and senators, meanwhile, doggedly pursued their own agenda, delivering speeches which raked over the ground of the referendum once more, pressing amendments on burial of foetal remains, on compulsory ultrasound, on sex-selective abortion, to futile, weary votes.<sup>44</sup> Lawyers for Choice have live-tweeted parliamentary debates for years, as part of our public legal education work, trying to project a wry and steady presence for activists following the debates on social media. My colleagues

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<sup>38</sup> For a counter argument, see Senator Lynn Ruane, Health (Regulation of Termination of Pregnancy) Bill, 2018 Committee Stage <https://www.kildarestreet.com/sendebates/?gid=2018-12-10a.119>

<sup>39</sup> See e.g. Simon Harris, Health (Regulation of Termination of Pregnancy) Bill, 2018 Report Stage <https://www.kildarestreet.com/debate/?id=2018-11-28a.627>

<sup>40</sup> See e.g. Simon Harris, Health (Regulation of Termination of Pregnancy) Bill, 2018 Second Stage <https://www.kildarestreet.com/sendebates/?gid=2018-12-06a.151>; Simon Harris, Health (Regulation of Termination of Pregnancy) Bill, 2018 Committee Stage <https://www.kildarestreet.com/sendebates/?gid=2018-12-10a.84><https://www.kildarestreet.com/committees/?gid=2018-11-08a.2085>

<sup>41</sup> See e.g. Simon Harris, Health (Regulation of Termination of Pregnancy) Bill, 2018 Committee Stage <https://www.kildarestreet.com/sendebates/?gid=2018-12-10a.84>

<sup>42</sup> See e.g. Simon Harris, Health (Regulation of Termination of Pregnancy) Bill, 2018 Committee Stage <https://www.kildarestreet.com/sendebates/?gid=2018-12-10a.84>

<sup>43</sup> Justine McCarthy, "Legal certainty is politically suicidal" *The Times*, 1 October 2018.

<sup>44</sup> See further Paula Dennan, "Misogyny of the Eighth Amendment is still alive in Ireland" *Headstuff*, 21 November 2018, 201 <https://www.headstuff.org/topical/misogyny-eighth-amendment/>

Gearóidín McEvoy and Sandra Duffy chronicled these exchanges with grace and humour on the @LawyersforChoice twitter account, staying with every hurtful word. Anti-choice politicians added days to the legislative process, and mopped up media attention that might otherwise be focused on the limitations of the legislation itself. They wore away the government's patience, and its hospitality to pro-choice discourse. Very soon, securing speedy passage of the legislation began to take priority over its content. It was not only that the Minister has staked his reputation on legalising abortion by January, but that activists began to realise that women pregnant today were trusting him and waiting for him to deliver. We knew that pro-choice doctors, nurses and midwives were ready to provide services, but we were warned that their anti-choice colleagues were mobilising in their representative groups to block provision.<sup>45</sup> Many pro-choice activists I spoke to told me that women were over a barrel – in no position to refuse this law. Women's organisations began to use the slogan "We Can't Wait".<sup>46</sup> By Report stage in the Seanad, some pro-choice senators had dropped their amendments. Others spoke on those amendments to make necessary legal and political points, knowing they could not be pressed to a positive vote. We are asked to accept that the law's defects will be worked out on the backs of women; that it will have to be good enough for now. There will be another Bill next year, providing for safe access zones at premises where abortions are provided. There will be the three-year review of this Act. Perhaps inevitably, women and their doctors will be embroiled in future litigation or prosecution.

As Senator Lynn Ruane noted, the emphasis on getting "good enough" legislation through the Oireachtas in time for the new year felt like another "silencing of women".<sup>47</sup> This was never the Repeal movement's law.<sup>48</sup> Many activists came to terms with the gap between the law demanded and the law delivered many months ago, when the Joint Oireachtas Committee made their recommendations, and the government enshrined them in its draft/final legislation. Then, once Together for Yes was formed, it said as little as possible about the legislation or about the possible shape of future constitutional law – leaving those questions to the government and neither critiquing nor adopting its proposals.<sup>49</sup> I still don't really know why that was – I had no strategic role in that platform. I know the groups held together in plural and temporary coalition would have had vastly different views on whether this was legislation worth fighting for. I know that the No campaign, whose antecedents in the Life Institute and the Pro-life Campaign were always keen to make law for women, focused tightly on the detail

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<sup>45</sup> See e.g. Catherine Sanz, "GPs walk out of meeting after leaders refuse vote on terminations" *The Times*, 3 December 2018.

<sup>46</sup> See the twitter hashtag: <https://twitter.com/hashtag/wecantwait?src=hash>

<sup>47</sup> Lynn Ruane, Health (Regulation of Termination of Pregnancy) Bill, 2018 Committee Stage <https://www.kildarestreet.com/sendebates/?gid=2018-12-10a.119>

<sup>48</sup> I distinguish Repeal from Together for Yes. Together for Yes can be read as a phase of Repeal (which lasted only for the duration of the referendum campaign). However, it is important to bear in mind that some groups conducted campaigns which were separate and different from Together for Yes.

<sup>49</sup> By the end of the campaign this had changed somewhat – see e.g. this statement from two of the campaign's leaders which engages in broad terms with the draft legislation: Ailbhe Smyth and Orla O'Connor, "Vote Yes to remove the harmful Eighth Amendment" *Irish Times*, 24 May 2018 <https://www.irishtimes.com/news/politics/vote-yes-to-remove-the-harmful-eighth-amendment-1.3505961>

of the draft legislation.<sup>50</sup> Once they had colonised the space of legal discourse, deeper engagement with law clashed with Together for Yes's determination to spread its own message rather than become caught up in endless responses to the opposition. Together for Yes also preferred, for good reason, to avoid abstract discussion about legal futures, and focus on the effects of the 8<sup>th</sup> Amendment in practice.<sup>51</sup> Although this strategy was undoubtedly effective in mobilising a landslide pro-choice vote, it had necessary side-effects for public understanding of the potential of this constitutional referendum to change the law on women's bodies. When the draft legislation came up during the referendum campaign, it was often on anti-choice terms; the question was whether it would be an effective limit on women's presumed desire for 'abortion on demand', whether it would open the floodgates to becoming 'like England'.<sup>52</sup> Where Together for Yes offered rebuttals to anti-choice legal analysis, they tended to be based on the text of the government's draft legislation, rather than on explicit legal arguments for what our reproductive rights might or should be in the future.<sup>53</sup> The legislation was the government's covenant with nervous or conservative voters, and in community meetings for local Together for Yes groups, in public legal education work for Lawyers for Choice, in my work with Fiona de Londras on Aboutthe8th.com,<sup>54</sup> I, like others, repeatedly defended it in those terms.

At the same time, I felt uncomfortable and deflated. My feminist colleagues and I had argued for years that with the 8<sup>th</sup> Amendment gone, women's rights in pregnancy could finally be recognised within the constitutional framework.<sup>55</sup> I worried that Together for Yes's core campaign messages were out of sync with that argument. Its emphasis on women less as political agents than as vulnerable recipients of love, compassion and decent medical care of course marked a departure from the cruelties of the abortion ban. But I desperately missed the more assertive message of the earlier Repeal movement, with its unashamed emphasis on bodily autonomy; its inclusion of trans\*, migrant, queer and disabled perspectives; its distrust of medicalisation; its emphasis on women's capacity to get around almost any law which would seek to tie them down. I regret now that we are so far from articulating and embedding a full and shared pro-choice legal culture, against which the successes and failings of the new legislation could be assessed.

At the same time, last Spring the draft legislation felt like a remarkable and unexpected victory. A political class which had not, by and large, accepted that there was any

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<sup>50</sup> See discussion of anti-choice lawfare in Ireland in Máiréad Enright and Fiona de Londras, "The Only Lawyer on the Panel" in Kath Browne and Sydney Calkin (eds), *Post Repeal: Reflections and Futures* (Zed Books, forthcoming 2019).

<sup>51</sup> Sorcha Pollack, "Eighth Amendment has created legal paralysis, Lawyers for Yes says" *Irish Times*, 30 April 2018 <https://www.irishtimes.com/news/social-affairs/eighth-amendment-has-created-legal-paralysis-lawyers-for-yes-says-1.3478987>

<sup>52</sup> "Plans would end in more liberal abortion regime than England" *Irish Examiner*, 9 March 2018.

<sup>53</sup> See e.g. Fiach Kelly, "Amendment limiting abortion to rape cases 'unworkable', say former AGs" *Irish Times*, 15 May 2018 <https://www.irishtimes.com/news/politics/amendment-limiting-abortion-to-rape-cases-unworkable-say-former-ags-1.3495785>

<sup>54</sup> [www.aboutthe8th.com](http://www.aboutthe8th.com)

<sup>55</sup> For an extended argument to this effect see Fiona de Londras and Máiréad Enright, *Repealing the 8<sup>th</sup>* (Policy Press, 2018)

argument for abortion ‘on request’,<sup>56</sup> had dramatically shifted its position. Today, with the new legislation passed, something of that sense of achievement persists. Ireland is about to move from a law which prohibited abortion in almost all cases, to one which might allow a woman to go to her local GP in early pregnancy, and obtain a safe, state-funded abortion with pills. A woman who finds herself in crisis pregnancy in Ireland today may be able to end that pregnancy legally after Christmas, and will be spared the worry of scrambling to access illegal abortion pills, or the trauma of that journey to England which has shaped our sense of Irish womanhood for generations. Women have spent their whole adult lives campaigning for that. This is a darkly miraculous time. Sinéad Redmond captures an atmosphere, less of gratitude than of unsettled pride:

Up till a year ago, if you'd told me I'd be of reproductive age when we could safely & legally access abortion for our own private reasons in Ireland I'd have laughed in your face.<sup>57</sup>

Years ago I gave a paper at a Dublin summer school about the possibilities for abortion legislation after repeal of the 8<sup>th</sup>.<sup>58</sup> I gave it on another day when we excised some brutality from the Irish constitution; when people like me obtained the legal right to marry. In it, I wondered whether abortion legislation “this good” would ever materialise. But somewhere in the years that followed, my ambitions for Irish law deepened. And like many others, I hoped that the unexpectedly strong Yes vote might produce a mandate for amendments to the government’s Bill; not to add new ‘grounds’ for abortion access, but to justify a shift away from restrictive, criminal abortion law to something more positive, flexible and empowering. So, we are no longer satisfied with half-measures, even though we got something we never believed possible. Mercifully, we are not all grieving. Many of us are relieved, and proud, and deeply hopeful for the first women who will be able to access legal abortion at home. But many of us are also angry.

### **Repeal: Lessons on Law in Social Movements.**

I never felt more like a lawyer than when I was involved in Repeal, but no legislation can be the measure of the Repeal movement. Repeal was a floating signifier which could be appropriated, not only by campaigners for reproductive justice in the present, but by queers demanding bodily autonomy, disabled women insisting on being seen as adults with sexual and reproductive lives, older women asking for recognition of past historical abuses, and secularists who wanted a real separation of church and state. Repeal exceeded the demand for abortion access, articulating a refusal of the prevailing gendered order, and an insistent claim to an Ireland where women would be governed otherwise. I do not think that it is meaningful to speak of this movement as captured or co-opted by a legislative process.

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<sup>56</sup> Pat Leahy, “Public unlikely to endorse Assembly call for abortion on request” *Irish Times*, 27 May 2017 <https://www.irishtimes.com/news/politics/public-unlikely-to-endorse-assembly-call-for-abortion-on-request-1.3097912>

<sup>57</sup> Twitter @sineadredmond 6 December 2018  
<https://twitter.com/sineadredmond/status/1070633298332934145>

<sup>58</sup> Máiréad Enright, “After the 8<sup>th</sup>: What sort of abortion law will the Constitution require, once Article 40.3.3 is repealed?”, 23 May 2015: <https://vimeo.com/130971135>

Nevertheless, moments of intense disappointment and frustration with the legislation are important for our understanding of the stakes of feminist law reform, and they should not be easily dismissed as perfectionism. As Ruth Fletcher has written,<sup>59</sup> for feminist lawyers, one of the most important dimensions of Repeal was precisely that it manifested distinct modes of engagement with law; in the arts, in popular and protest cultures and in peer-to-peer education. Women walked down the street in jumpers and t-shirts and necklaces that spelled out a one-word demand for constitutional reform. They stood on door-steps as canvassers, or stayed up late online and traded analyses of abortion law. Repeal simultaneously de-centred the technocratic language of constitutional law and allowed an idea of an emancipatory constitution to breathe. While some of these legacies have been apparent in the legislative process, they have been fragmented, and readily suppressed. The ground moved so suddenly under our feet. I have no complete analysis of why this happened. Certainly, we did not see anything like the public mobilisation around the legislation that we saw around the referendum. Some might attribute this to the mystification of legislative work. But it also reflects campaigners' exhaustion. It is deadening to work, as hundreds of volunteers did, canvassing for every vote in every scrap of spare time,<sup>60</sup> laying intimate dimensions of their lives bare to strangers in often hostile contexts. Later they subjected themselves to a discipline many found hard to bear – leaving aside many of Repeal's most radically inclusive messages to focus on those that Together for Yes had calculated would best reach undecided voters in the elusive 'middle ground'.<sup>61</sup> Increasingly, many of those who participated in the referendum campaign point to related losses inherent in always keeping an eye on the 'middle ground'. These humiliations, particularly the public erasure of minority women chronicled by Shubhangi Karmakar,<sup>62</sup> continue in how the history of abortion law reform in Ireland is already being told. Weeks after the vote, Emma Burns wrote:

For the most part, we didn't hear from the messier edges of the campaign, from the places where multiple oppressions occur to squeeze people of their rights. There was no place in this exceptionally respectable campaign for the sex worker, the woman with a psychosocial disability, women of colour, migrant women, Traveller women, trans men. They were sacrificed for the greater good. Some groups rebelled, and we held breakaway events that we did not tell HQ about, but for most, there was a silent agreement that we would hold our tongues until the campaign was done.<sup>63</sup>

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<sup>59</sup> Ruth Fletcher, "Editorial: Repealedthe8th: Translating Travesty, Global Conversation and the Irish Abortion Referendum" *Feminist Legal Studies* (forthcoming).

<sup>60</sup> For a description of the campaign in my home county of Kerry see Paul W.S. Bowler, "My experience of the Referendum", 22 June 2018 <http://datbeardyman.com/>

<sup>61</sup> See e.g. Emma Campbell, "My experience of the Together for Yes campaign" *Reproductive Health Matters*, 10 October 2018.

<sup>62</sup> See @Repealist, 17 November 2018 <https://twitter.com/Repealist/status/1063798443204898816>

<sup>63</sup> Emma Burns, "Intersectionality and the Irish abortion rights campaign of 2018" <https://emmaqburns.com/2018/09/19/10thdss-intersectionality-and-the-irish-abortion-rights-campaign-of-2018/> For a specific and detailed discussion of the migrant perspective listen to Episode 121, *Echo Chamber Podcast* <https://www.acast.com/echochamberpod/shubhangi-karmakar-diversity-ep121>. For more on these issues listen to "How we won Repeal", Audio from the Dublin Anarchist Bookfair, 15 September 2018 <https://www.wsm.ie/c/how-we-won-repeal-audio-dabf2018>

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Sinéad Redmond provides a searing description of the campaign's costs, two months after it ended:

I remember thinking victory would bring freedom; that it would bring peace. I never once imagined it would bring grief, exhaustion and anger beyond any I ever think I remember feeling in the depth of the struggle.<sup>64</sup>

Many of us who could do so remained focused on the legislation, but attendance at meetings and marches dropped, and it took a long time for pro-choice voters to galvanise people to lobby their representatives for better legislation. I did not work as hard or give as much of myself to Repeal as others, but I still avoided after-parties and celebrations and disappeared into myself for the months after the referendum vote; putting hours into being at home, hacking away at our wild garden, feeling again suddenly the ache of being away from Ireland, sleeping, wishing desperately for my head to clear. I am not worn out yet but others are. What law-making demands of women, few were in any state to give for very long.

Months ago I wondered whether, as activists recovered, there would be a united public campaign for legislative reform, which would seek to capitalise on the Yes vote and its mandate for change. I was unsettled when it did not appear. Some local pro-choice groups, but not all, were able to hold events to discuss the legislation. We saw only limited media discussion of the content of possible amendments. The process of lobbying for better abortion legislation followed the ordinary Irish pattern – feminist groups with long-standing commitments to abortion law reform proposed amendments, co-ordinating informally with one another. But the mantra I heard again and again was “let the politicians do their jobs”. So, politicians did their jobs, and few changed their working methods. Friends working in Irish human rights organisations tell me that they had never experienced such a determined closure of the legislative process – so that the long lobbying work which persuaded politicians to give us a referendum in the first place was no longer as effective. They talk about how TDs and senators who were visible during the referendum campaign dropped off the face of the Earth, leaving only the same small knot of feminist politicians who were always on our side, always game for an amendment. Helen Stonehouse, an activist with the Abortion Rights Campaign, has written a piece which vividly describes the anger produced by attempting to engage with a political system which has returned to “politics as usual”.<sup>65</sup> The title is “Fuck You, Simon Harris”. Fuck him, she says, for hearing the demands of the Repeal movement, but not what they meant. Like Helen, watching the last weeks of legislative debates, I was struck again and again by TDs’ bending of a discourse shaped on the streets by feminist campaigners; using the words “free, safe, legal”<sup>66</sup> to describe legislation that will leave hundreds behind.

It is hard, for me at least, to imagine now what kind of feminist re-grouping could have displaced the government's blind determination to ignore the legal wisdom women

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<sup>64</sup> Sinéad Redmond, “It’s been two months now” *Feminist Ire*, 27 July 2018

<https://feministire.com/2018/07/27/its-been-two-months-now/>.

<sup>65</sup> Helen Stonehouse, “Fuck You Simon Harris” *Learning the World*, 29 November 2018

<https://learningtheworld.net/2018/11/29/fuck-you-simon-harris/>

<sup>66</sup> See e.g. Simon Harris, Health (Regulation of Termination of Pregnancy) Bill, 2018 Final Stage

<https://www.kildarestreet.com/sendebates/?gid=2018-12-13a.813>

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tried to offer. Reform of Irish abortion law will be an ongoing process – of reviews and amendments and perhaps, though we hope no woman is asked to do it, litigation. What the legislative debates of the last few months tell us, however, is that the work of changing Irish legal cultures around abortion is urgent and incomplete. At the same time, we recognise that women who participated in Repeal, even at the edges, experienced a profound shift in their sense of place in the world. That must mean a shift in their sense of place in the law.<sup>67</sup> In a piece written during the campaign, Miriam Needham describes watching that change happen, in other women and in herself; women raised in a culture that made them small, now acting as if “they filled every inch of their bodies, as if they deserved to be there”.<sup>68</sup> It felt like revolution.<sup>69</sup> The law just passed through the Oireachtas attempts to contain this transformation, and I doubt it will be able to. Activists need their achievements to “feel real”;<sup>70</sup> for some, this legislation brings that reality into being, and for others it leaves too much unresolved.

In my wallet, I carry a token that the artist Taryn de Vere gave me in her guise as the Pro-Choice Princess, one time before the annual March for Choice. It is a kind of legal text, entitling the bearer to one life-time of body autonomy, to be used as he or she pleases. It reminds me of all the small provocations we have used to worry away at mainstream Irish legal discourse, and of the standard to which this new legislation is ultimately held. It is the kernel of the law we may one day get. I don't know quite where Ireland's feminist lawyers go next – how we pick up the threads of the legal argumentation that, on this occasion, could not find purchase in the state's law. I imagine it has something to do with working more closely with pro-choice healthcare practitioners as they develop habits and methods of interpreting the legislation. I think it has something to do with articulating the content of women's constitutional rights in abortion cases; rights never developed under the 8<sup>th</sup> Amendment, and never mentioned now in the Oireachtas. It must have to do with translating those rights to shape women's sense of their own entitlements so that they can push back against unfair applications of the law I know it has to do with teaching and writing to support the feminist movement that assembled for Repeal and that is now getting its strength back. I hope it has to do with my friends and mentors in Lawyers for Choice. I trust we will figure it out together. But I am still so angry that it is always up to women to push every legal claim to its conclusion; that the legislative system, and the politics it recognises, never concede anything on their own.

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<sup>67</sup> Sandra Duffy, “Repealed”, 6 June 2018 <https://pgrnscotland.wordpress.com/2018/06/06/repealed/>

<sup>68</sup> Miriam Needham, “A small thing, a big thing” *Light Your Own Lamp*, 11 May 2018 <https://lightyourownlamp.com/2018/05/11/a-small-thing-a-big-thing/>

<sup>69</sup> Taryn de Vere, “How a feminist movement changed Ireland” *Athena Talks*, 27 May 2018 <https://medium.com/athena-talks/how-a-feminist-movement-changed-ireland-e8f29487776a>

<sup>70</sup> Paula Dennon, “Channelling the things I know but don't yet feel” *Cornflake Girl Musings*, 21 September 2018 <http://cornflakegirlsmusings.com/index.php/channelling-the-things-i-know-but-dont-yet-feel/>